"Mulligan v Coffs Harbour City Council [2005]"

HCA 6321 October 2005

Case Review

This case, heard before the High Court of Australia, addresses specific issues of negligence and the responsibility of care in a public area. The case was heard simultaneously with a similar case, *Vairy v. Wyong Shire Council*, in an effort to establish precedent in a relatively murky area of the law.

In a nation where outdoor recreation is particularly common, this case has wide-range impacts. In this case, an unfortunate accident resulted in a precedent-setting case. The plaintiff has undoubtedly suffered as a result of his accident. The court had to balance his responsibility against that of the park management authorities. Would the plaintiff have taken the same actions if warning signs against it were present? It is impossible to know.

Background

The incident prompting this case occurred at Park Beach in New South Wales. Coffs Creek is a shallow, but popular swimming area that leads toward the ocean. The depth of the water and the materials of the creek bed are variable. Portions of the park are set aside and maintained as safe areas for swimming.

The plaintiff, a tourist from Ireland had been swimming in the channel earlier on the day of his accident. As he swam he made superficial estimations of the waters depth by attempting to touch the bottom. Several times that day he dived forward into what appeared to be deeper water and floated along the creek toward the ocean. On one of his forward dives, Garry Mulligan hit the bottom of the creek bed and suffered severe injury.

Mr. Mulligan and the plaintiff from the connected *Vairy v. Wyong Shire Council* case are now paraplegic. Mr. Mulligan's damages were set at over $9 million by a judge. The lower courts denied his claim, however.

Mr. Mulligan's counsellors argued that because the variable depth of the creek and the prevalence of swimmers there were well known, the park authority had an obligation to provide sufficient warnings to divers.

Case Details

In their arguments, the plaintiffs lawyers attempted to establish a foundation based on two propositions. They argued successfully that the actions of the plaintiff and the resulting injuries were foreseeable by the park managers. Secondly, they attempted to draw associations between the responsibilities of individuals owning buildings with public access and the responsibilities of park management. This proposition was more difficult to establish.

After the accident, several warning signs were erected in the area. These included signs warning of submerged objects, currents and the absence of rescue personnel at certain times. In his appeals, the plaintiff attempted to use the placement of these signs as a *de facto* admission of guilt. If the signs were practicable at that time, why were they not in place prior to the accident?

Before deciding issues of liability, the court had to determine which agency was responsible for the specific area in which the accident occurred. Management of the park area is divided up among several public agencies. For example, shore areas were not under the same management as inland areas. Mr. Mulligan's accident occurred near the confluence of the creek and the sea, an area in which tidal forces are evident.

Complicating matters, each of the agencies either denied care or active control of the accident site. If the plaintiffs case was successful, they argued, the majority of damages should be assessed to one of the others (Australasian Legal Information Institute, 2007).

Decision and Impact

In 2005, the court rejected Mr. Mulligan's arguments. In its ruling, the High Court of Australia found that authorities have no inherent responsibility to warn those who dive forward into creeks or leap from natural platforms. There was no direct causation of the accident by any of the defendant's actions or inactions.

The court accepted the ruling of the trial judge that the managing board of the reserve had a "general duty of care…to avoid foreseeable risks of injury" (Australasian Legal Information Institute, 2007). However, specific warnings about creek depth or shallowness are not contained within the duty of care. The plaintiff was consequently ordered to pay the costs of the defendants.

In the end, the plaintiff was unable to overcome the finding that his action had an obvious and inherent risk. According to the trial judge, "the scope of the duty of care owed by each of the relevant defendants did not require that the plaintiff be warned of the risk "that was plainly inherent in the activity he was undertaking" (Australasian Legal Information Institute, 2007).

In the decision, the court recognized that some actions of the defendants could have increased the risk of an accident. For example, a wall erected near the site of the accident could have altered the tidal flow in such a way that had "a consequent effect on the formation of sand dunes in the bed of the creek" (Australasian Legal Information Institute, 2007). That action did not meet the legal definition of negligence, however. The

plaintiff's attorneys, for their part, were unable to prove what Mr. Mulligan's head had struck. This left open the possibility that the actual injury was caused by something that had been placed in the river unbeknownst to the park management.

While the actions of Mr. Mulligan and the result were relatively foreseeable, the park authorities were not liable for not putting up warnings in that particular area of the creek. The plaintiff had argued that the accident was clearly foreseeable by park management. Ironically, a similar argument was made by the defendants. If the risks were foreseeable by the park authorities, so should they have been to Mr. Mulligan. The defendants argued that Mr. Mulligan knew or should have known that there was a risk associated with his actions irrespective of any warning signs.

The court was able to address issues of relevance beyond. those of the specific case. More clarity was needed in the level of responsibility for municipalities and other managers of publicly accessible recreation areas. Liability exposure for managers of public recreation areas was limited. At the same time, the public became better informed. The individual must understand that his actions within nature carry some inherent risk.

Conclusion

Injuries are common in public outdoor areas where people are active. Some of these injuries, like Mr. Mulligan's, are catastrophic. His case raised several questions about the level of legal responsibility for the managers of such properties when injuries occur. In the process of answering these questions the court must weigh the individual responsibility of the plaintiff against that of the managing entity while also considering the right of the public to continued enjoyment of the property.

The managing authority cannot possibly predict everything that a patron might do, especially in an outdoor recreation area such as this. A responsibility does exist, however, to warn patrons of obvious, known area of danger. Despite the fact that the plaintiff lost this case, the case will likely result in the placement of more precautionary warnings in places like Coffs Creek.

Source

Australasian Legal Information Institute. 2007, 'Mulligan v. Coffs Harbour City Council [2005].' *ALII* (online). Retrieved 8/26/2007 from: http://www.hcourt.gov.au/media/Vairy_and_Mulligan.pdf .

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