ACPNS LEGAL CASE REPORTS SERIES

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John XXIII College v SMA [2022] ACTCA 32

Supreme Court of the Australian Capital Territory – Court of Appeal, Murrell CJ, Loukas-Karlsson J and McWilliam AJ, 29 June 2022

An appeal against a finding of negligence and an award of damages and costs.

Key words: Negligence, Australian Capital Territory, Appeal, Duty of Care, Breach, Causation, Damages, Costs

1. This appeal and cross-appeal involved John XXIII College (the College), a residential college of the Australian National University (ANU), and a student who was a resident of the College in 2015 (SMA).

2. The primary proceedings concerned a claim in negligence made by SMA against the College, concerning a social event that she attended on 6 August 2015 called "Pub Golf". The event involved the consumption of alcohol, with the students moving to several different venues or "holes" around Canberra city. It commenced at the College and concluded at Mooseheads nightclub.

3. SMA claimed that during this event, at some time in the night and while intoxicated, she was sexually assaulted by another resident of the College in the alleyway alongside Mooseheads. SMA had no independent memory of the assault occurring due to her intoxication. She learned of it about ten days later through a friend, who told her that the student at the College (NT), with whom she had apparently had sex that night, was joking about his "achievement".

4. SMA's claim in negligence in the proceedings at first instance was that the College owed her a duty of care and had breached this duty in three ways:

    a) By permitting the Pub Golf event to proceed;
    b) By directing the students to leave the College on the night of 6 August 2015; and
    c) In the inappropriate management of SMA's subsequent complaint.

5. Judgment was delivered on 7 August 2020, with the primary judge finding that the College had breached its duty of care both in directing the students to leave the premises and in the handling of SMA's complaint: see SMA v John XXIII College (No 2) (primary judgment). Judgment was entered in SMA's favour in the sum of $420,201.57 plus

costs. A further costs order was made in favour of SMA: SMA v John XXIII College (No 3) [2020] ACTSC 236 (costs judgment).

6. The College appealed the primary judgment in respect of liability, quantum, and costs. The College sought to set aside the orders made by the primary judge, and instead to have judgment entered in its favour, with costs orders similarly in its favour.

7. SMA brought a cross-appeal challenging the quantum of general damages awarded to SMA (complaining that the amount awarded was grossly inadequate) and further asserted that the costs orders made by the primary judge should have required the College to pay her costs on a solicitor and client basis from the commencement of the proceedings, rather than from 13 July 2020 (which was the first day of the substantive hearing).

8. The College's appeal raised 15 grounds as to findings of fact, findings relating to duty of care, breach and causation, admissibility of evidence, contributory negligence, and the amount of damages awarded.

Did the primary judge err in the factual findings made?

9. There was no challenge to SMA's credit on appeal. The factual findings of the trial judge relating to SMA's intake of alcohol, the College's knowledge of the "Pub Golf" event, and the ordering of the students from the premises were undisturbed.

Did the primary judge err in relation to the findings on duty, breach and causation?

Duty and breach

10. There was no error in the primary judge's findings with regard to duty and breach in respect of both breaches of duty of care (as to the direction to leave the College and the handling of the complaint), and no error in the primary judge's findings on causation in respect of the College's handling of SMA's complaint.

11. However, in respect of the direction to leave the College, in the Court of Appeal's view the evidence did not establish that a different course would have been taken by the students generally, and SMA or NT specifically, had the direction to leave the College not been given.

12. The Court of Appeal held that the Wrongs Act applied.

13. The College accepted that it owed SMA, a resident of the College, a duty of care (primary judgment at [246]). The duty of care owed by the College was that of a reasonable person in the College's position, who was in possession of all the information that the College either had, or ought reasonably to have had, at the time of the incident out of which the harm arose: s 42 of the Wrongs Act.

14. The content of that duty was to take reasonable precautions against risks of harm that were (a) foreseeable, (b) not insignificant, and (c) are precautions that, in the circumstances, a reasonable person in the same position would have taken: s 43(1) of the Wrongs Act.

15. Where the risk of harm is of psychiatric injury, the assessment of whether it was "a foreseeable risk" must be established by reference to the whether a person of normal fortitude in the same position as the plaintiff might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken: s 34(1) of the Wrongs Act.

16. The Court of Appeal was clear that the wrong suffered was foreseeable, particularly as there had been previous incidents at the College. Therefore, the College knew or ought to have been aware that:
    (i) Residents at the College, and in particular female residents, were vulnerable to sexual assault where residents were heavily intoxicated, whether they were on or off the College premises; and
    (ii) If an incident occurred, there were ongoing psychological consequences for the female resident involved.

17. The risk was clear and not insignificant.

18. Acting reasonably, the precautions a residential college holding itself out as providing pastoral care for the welfare of the residents should have taken to guard against the risk of sexual misconduct occurring (on or off site) plainly extended to implementing the policies it had in place for controlling the behaviour of the residents.

19. In accordance with the College's policy as set out in its Handbook, the direction that should have been given was not one sending students out to become further intoxicated off the premises, but one that would have directed the residents to the common room and that whatever event was occurring must cease immediately as it was in clear breach of the College's Alcohol Policy (at [93]):

> It will be readily apparent from what has been set out above that the reasonable precautions to be taken did not involve sending the already intoxicated students away from the College to continue their event off site. We accordingly see no error in the primary judge finding that the College breached its duty in the direction that was given.

Causation

20. The Court of Appeal did not agree with the primary judge's finding on causation in relation to the direction given. The students had intended to leave the College in any event, and to finish the night at Mooseheads. The outcome would not necessarily been different if the order to leave the College had not been made, or had been made earlier.

21. The primary judge agreed that the College could not have prevented the Pub Golf event. As that finding was not challenged on appeal, the available precautions or measures were to be assessed in the context of the Pub Golf event proceeding at the College, rather than the event not proceeding at all.

22. Therefore, on the evidence before the Court of Appeal, it held that it was not established that the precautions contended for by the plaintiff were those that a reasonable person in the same position of the College would have taken. Accordingly, the College established error with respect to the primary judge's finding as to causation in relation to the direction to leave the College.

Whether there was error in the primary judge's findings concerning the College's handling of SMA's complaint

23. As the College accepted, it was under a contractual duty to inquire into and resolve complaints in accordance with the Handbook and to accord procedural fairness to both residents involved. There was no suggestion before the primary judge that the procedures in the Handbook were inadequate. The College was also under a duty of care to act for the welfare of its residents. Acting for the welfare of its residents included handling complaints made to it in accordance with what was set out in the Handbook.

24. However, instead of taking an independent role and ensuring that the appropriate procedures as set out in the Handbook occurred, the Head of College became investigator, adjudicator, and the support person for NT. In addition, the evidence showed that his comments about the incident were very inappropriate. It followed that there was no error in the primary judge's finding as to the nature of the duty of care owed, or that it was breached.

Whether there was error in finding that the breach of duty in handling SMA's complaint caused her to suffer the harm alleged

25. On this point, the Court of Appeal said (at [129]):

> To state the evidence is sufficient to explain why the College's argument must fail. It was not the case that SMA's deteriorating mental health, to the point where she developed a recognised psychiatric injury, was a product of the assault itself and her feeling that she had not been believed. As SMA submitted, the sense of injustice felt by SMA included that Mr Johnston's comments indicated he did not believe her, but that was itself a product of the College's mismanagement of the complaint and in any event, what SMA experienced was broader than simply whether or not she was believed. As seen from the extracts of the pleading set out earlier in these reasons, SMA felt she was not taken seriously. It is in that sense that the pleading describes her concerns being "dismissed", namely, treated as unworthy of serious consideration. She felt blamed. She felt unsupported. Her mental state was a direct product of the College's mismanagement of the complaint and there was no error in the primary judge so finding...

Evidentiary Ruling – did the primary judge err in admitting SMA's telephone recording of her conversation with NT?

26. The Court of Appeal found it 'curious that the College challenged the admission of this evidence on appeal but did not challenge the factual finding that the assault occurred', stating further (at [133]):

> Why there was any contest about evidence proving that the admission was made in that circumstance is unclear. In any event, our finding with regard to a lack of causation or harm arising from the direction of the College means that it is unnecessary to deal with this ground.

Did the primary judge fail to apply the statutory presumption for contributory negligence?

27. The primary judge found that contributory negligence did not arise in this case. The Court of Appeal agreed. The success of the College in relation to the causation aspect of the case concerning the direction to leave the College meant that it was unnecessary to address contributory negligence.

Damages

28. In light of the above findings, consideration of the damages aspect of the appeal was on the basis of the second breach established. The complaints of the College addressed the economic loss sum awarded, and the decision to award aggravated damages, including the quantum of that sum.

Did the primary judge err with respect to the quantum of damages to be awarded for economic loss?

29. The College took issue with the primary judge awarding the respondent $287,701.57 in past and future earnings, submitting that the evidence "unequivocally demonstrated that the only reason for the break in [SMA's] full time employment was that she had decided – for reasons which had nothing to do with anything done by [the College] – to change careers".

30. SMA had arrived at ANU in 2014 to pursue a combined degree in Commerce and Law. She graduated from ANU in 2018 with a combined degree in Commerce and Science and a grade point average of 6.154. She was a full-time student throughout that time and there was nothing to suggest that completion of her degree was delayed by the breaches of duty found by the primary judge. She was intending to commence medical studies.

31. On that basis, the Court of Appeal said (at [181]-[182]):

> We therefore accept the College's argument that on the evidence, SMA's decision to sit the GAMSAT exams with a view to undertaking further study was a product of her underlying intelligence and ambition, combined ultimately with her dissatisfaction with a career related to the financial industry. The finding that ought to have been made is that the decision to change careers was not itself caused by any conduct of the College. The consequence of that finding is that the award of damages for economic loss will be set aside. It then remains to consider whether any compensation for economic loss has been established on the evidence and the other (undisturbed) findings of the primary judge.

32. The total cushion awarded to compensate SMA for economic loss she has or will suffer was reduced to $135,000.

Should aggravated and exemplary damages have been awarded, and in the sum awarded by the primary judge?

33. The primary judge awarded $30,000 for aggravated and exemplary damages. The Court of Appeal, upon review, said that: 'Although it may have been on the higher side or perhaps close to the top of what might separately be awarded for aggravated damages, without more, we are not persuaded it was excessive' (at [203]).

Cross Appeal

Did the primary judge err with respect to the award of general damages?

34. This aspect of the cross appeal did not succeed. The primary judge's application of principle and calculation was correct.

Did the primary judge err with respect to costs?

As costs are a matter of discretion, and there was no misapplication of principle, there was no error.

Outcome

35. The College succeeded in part in relation to its appeal of the orders made by the primary judge, which had a flow on effect to the quantum to be awarded to SMA, as well as the separate costs orders in the court at first instance, and the costs of the cross-appeal, part of which did not need to be determined.

36. Damages were reduced in total from $420,201.57 at first instance to $267,500.

37. As to costs, the Court of Appeal said (at [236]-[237]):

> Although it was not entirely successful on appeal, the College was successful on two issues which were not clearly severable and had the effect of significantly reducing the damages to be awarded. That result may be viewed as substantial success. Accordingly, the College is entitled to its costs on appeal. However, SMA has still succeeded on her claim and is entitled to the costs of the primary proceedings on the ordinary basis. She did not succeed on the cross-appeal, but it was not necessary to determine one of the two issues, and the cross-appeal did not otherwise substantially lengthen the proceedings. Taking those matters into account, the just outcome is to simply order the parties to pay their own costs of the cross-appeal.

IMPLICATIONS

The College was partly successful on its appeal because the Court of Appeal agreed that there was no causation in relation to the breach of duty whereby the College ordered the students to leave the College premises after the Pub Golf event had commenced. The finding was that the same unfortunate circumstances might have arisen regardless of whether that order was given or not.

The College could not prevent the Pub Golf event. The students were adults and chose their own amusements. However, the College breached two duties of care – in sending the students away from the College when they were already very intoxicated, and when the College's own handbook indicated a different path, and in not dealing with SMA's complaint in an appropriate manner.

University colleges must ensure that they have clear processes in place in providing care and attention to their residents, particularly where those residents are vulnerable women who are at greater risk of harm in college cultures which often feature excessive drinking.

As to the College's dealing with SMA's complaint in this case, the evidence revealed, in distressing detail for any female reader, that its approach fell far short of even being adequate. As the Court of Appeal pointedly remarked (at [122]):
While more could be said, it suffices to refer to the comments made to SMA during the meeting [with the Head of College] on 12 November 2015, which we agree were highly inappropriate.

VIEW THE CASE

This case may be viewed at https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTCA/2022/32.html
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