

M+R Reporter

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In this edition of the Reporter, we write about three personal injury cases from New South Wales. The first case note was provided by a client who insures sports clubs. Even though it is a decision of the District Court, it is worthy of mention because of the outcome. In the second case, the High Court deals with the responsibility of Councils for injuries caused by road works. The final case concerns a serious example of school yard bullying.

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BROWN v. DRUMMOYNE SPORTS CLUB
District Court of New South Wales
2 March 2007

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INTRODUCTION

On 10 July 2002, three robbers, carrying pistols or replica pistols, entered the Drummoyne Sports Club where Mr Ross Brown, the Plaintiff, was enjoying a glass of his favourite amber ale.

Brown witnessed the assault of an elderly member of the Club and then felt something poking in his back. He then felt a hand attempting to take his wallet from his back pocket. It so happened that Brown was a pharmacist who was no stranger to hold ups and had successfully hindered previous attempts to rob him and his store. Brown swung his right arm and hit the robber's face. However, this caused him to fall off his stool and break his pelvis. He was unable to work for a period of 13 weeks.

The intruders made away with \$1,581 from the bar area.

THE CLAIM

Brown brought a suit against the Club in the District Court of New South Wales. Initially, he alleged that the

Club was guilty of negligence because of the poorly designed bar stools and inadequate lighting at the front of the premises. Subsequently, Brown amended his pleadings to allege the Club was negligent in failing to lock its front doors after dark.

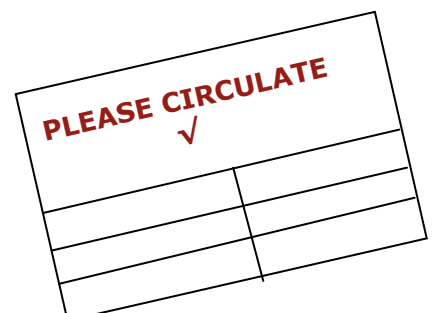
Both parties relied on expert evidence. The Plaintiff's expert was largely dismissed because of poor methodology and factual errors. His Honour largely agreed with the Club's expert, except for his evidence relating to the locking of the front doors after dark. An interesting feature of the case is that His Honour allowed himself to make findings that were not based on expert evidence.

The entrance to the premises was via a set of stairs leading to glass doors which opened outwards on to an exterior landing. When locked, the doors could be opened from the inside by pressing a push bar.

There were 20 to 30 patrons in the Club on the night of the robbery.

Scope of Services:

Construction risk
Contractual + commercial litigation
Directors' + officers' cover
Discrimination law
Employment contracts
Employment law
Equal opportunity
Financial services
General insurance
Life insurance
Medical defence
OH+S
Policy drafting + interpretation
Professional indemnity
Public + products liability
Self insurance
Superannuation
Trade + transport + aviation



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Wednesday nights were a busy night, as cash prizes were offered to patrons.

THE COURT DECISION

His Honour found that if the front doors had been locked, the robbers would have had to break into the premises and the noise from the break in, would have alerted the staff to the robbery. Further, he found that the bar staff would have warned patrons to obey the robbers instructions and therefore, Brown would not have attempted to attack the thief who tried to take his wallet.

"... His Honour held that this case represented an exception to the Modbury principle ..."

In reaching this conclusion, His Honour took into consideration that in the two months prior to the robbery, there had been two attempted burglaries at the Club. One occurred when staff were still inside, at the conclusion of the business day. On that occasion attempts to gain entry to the premises were unsuccessful and the thieves could not get through the front doors which were locked. His Honour felt that these previous attempts had put the Club on notice.

The Club argued that it had no duty to take measures to secure the premises against the criminal conduct of others (*Modbury Triangle Shopping Centre Pty Ltd v Anzil - High Court*). However, His Honour held that this case represented an exception to the Modbury principle. The exception arose if there was a high risk of injury and there existed steps that were not too onerous, that could have prevented the injury.

His Honour found that the Club was negligent in not locking the front doors after dark. The Club did not need to have a security guard patrolling the door.

CONCLUSION

In many respects, the decision is an unusual one. It suggests that Clubs should prevent patrons from gaining entry to their premises after dark.

In total, the Plaintiff was awarded \$72,855.31 with no reduction for contributory negligence, as the Defendant abandoned such an argument.



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**LEICHARDT MUNICIPAL COUNCIL v.
MONTGOMERY**
High Court of Australia
22 February 2007

INTRODUCTION

In a recent decision, the High Court unanimously found that Road Authorities do not have a non delegable or an automatic liability for the negligence of employees of independent contractors.

THE FACTS

Leichardt Municipal Council ("*the Council*") engaged Roan Constructions to perform work on a footpath alongside one of Australia's oldest and busiest public highways. The work was performed between 7:30pm and 5:30am to accommodate heavy pedestrian traffic. When the work was not being carried out, Roan Constructions were required to place artificial grass or carpet over the top of any disturbed area to provide clean and safe access. Leslie Montgomery ("*Montgomery*") was injured one evening when he walked across a carpet that had been laid by Roan Constructions' employees. It was found, at trial, that the carpet had been laid carelessly over a telecommunications pit that had a broken cover.

Montgomery's claim against Roan Constructions was settled for a mere \$50,000. Initially, Montgomery was successful in his claim against the Council with the New South Wales District Court ordering the Council to pay Montgomery \$214,450.75. However, this decision was ultimately overruled by the High Court.

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Montgomery's claim against the Council was based upon an alleged "non-delegable" duty of care for the negligent actions of Roan Constructions in repairing the footpath. If a non-delegable duty of care were to exist, the Council would be responsible for the negligent actions of an independent contractor. Justice Kirby noted that such a finding would be "outflanking the general rule" of the common law in Australia that a principal is not liable for wrongs done to a third party by an independent contractor.

"... The Court would not impose an obligation on the Council to perform the impossible duty of ensuring that no employee of the contractor behaved carelessly ..."

The common law in Australia has, however, recognised certain "non-delegable" duties. These are employer/employee; hospital/patient; school authority/pupil and occupier/contractual entrant in circumstances that involve extra hazardous activities. One consistent element of these recognised relationships is the assumption of a particular responsibility for the safety of a person who is in a situation of special dependence or vulnerability.

THE COURT DECISION

The Court held that the common law was, however, not supportive of a non-delegable duty in this instance. While the Council was obliged to be careful in the appointment of a contractor and in the approval of the contractor's works system, it was implausible for the Council to oversee every single act of Roan Constructions. The Court would not impose an obligation on the Council to perform the impossible duty of ensuring that no employee of the contractor behaved carelessly. The Council was not liable for the negligence of an independent contractor's employees.



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COX v. STATE OF NEW SOUTH WALES Supreme Court of New South Wales 14 May 2007

INTRODUCTION

In 1994 and 1995, Ben Cox, the Plaintiff (then 5 to 6 years old), was enrolled in a government primary school in NSW. He alleged that during this period he was harassed and bullied by an older student and that the school took no steps, or inadequate steps, to prevent the bullying or to protect him from its effects and that, consequently, he suffered severe emotional, psychological and psychiatric injury.

BACKGROUND

During the trial, Mrs Cox gave evidence that prior to attending Woodbury Primary School, her son was doing well, however, after some time she observed a change in his behaviour at home.

He began to suffer headaches, experience nightmares and his behaviour deteriorated. His school work also deteriorated. He began to try and avoid going to school. When she asked him to explain what was happening, he told her there had been a boy stealing things from him, shoving him into walls at school and scaring him. This was happening before school, at recess and at lunchtime.

Mrs Cox said that on several occasions in 1994, the Plaintiff came home from school upset and crying. She spoke to a teacher at the school and told the teacher what was happening.

"... the perpetrator suffered from ADD and this could be the explanation of his conduct ..."

In February 1995, Mrs Cox had another conversation with the Principal of the School. The Principal knew the perpetrator of the harassment and told Mrs Cox that the perpetrator suffered from ADD and this could be the explanation of his conduct towards the Plaintiff. She told Mrs Cox that she would try to keep the Plaintiff and the other child separate at school.

Mrs Cox alleged that on 23 February 1995, she went to the school and found her son shaking and crying with red marks on the front of his neck and what looked like burn marks on the back of his neck. A teacher told her that a student had attempted to strangle the Plaintiff with his hands and that he had actually fallen onto the ground unconscious.

In July 1995, Mrs Cox picked up her son from school and he was crying. When Mrs Cox asked him what had happened, he replied that the same boy had hurt him again. He lifted his shirt and she saw red welts across the back of his body. He said that the other child threatened that if he reported the matter to a teacher he would be hurt again. Mrs Cox walked with the Plaintiff back into the school and saw the Vice-Principal.

"... Judge Simpson found that the school had failed to take reasonable care to prevent the attacks ..."

On 8 August 1995, Mrs Cox went to the school to find the Plaintiff in the office crying with a bleeding mouth. His lower tooth was missing and his lip was swollen, cut and bleeding. The Plaintiff told her that the other boy had tried to shove his jumper down his throat into his mouth. Mrs Cox spoke to a teacher and the Principal. They told her that a letter would be sent to the bully's parents and that he would be placed in detention. At this point, the Plaintiff refused to return to school.

THE PROCEEDINGS

The Plaintiff subsequently brought a claim under the *Civil Liability Act (NSW) 2002*. Counsel for the State sought to rely on *Trustees of the Roman Catholic Church of the Diocese of Canberra and Goulburn v Hadba* ("*Hadba*")¹. This case involved an injury to Hadba, an 8 year old girl who fell from a flying fox in the school yard when two students grabbed her legs. Hadba lost four teeth and broke her jaw in the fall.

In *Hadba*, the High Court found in favour of the school, as the school was able to demonstrate that it had a reasonable system of supervision in place. Further, it was found that it was unreasonable to expect schools to supervise pupils for every single moment of their recess time.

Judge Simpson, in *Cox*, found that reliance upon *Hadba* by the State was misplaced as the facts of the two cases were vastly different. In *Cox*, the child who was bullying the Plaintiff was not engaging in a legitimate activity. Nor was the incident isolated. The bullying conduct was repeated over a long period with very little response by the school. The school was also aware and on notice of the bullying child's propensities.

An education specialist who gave evidence for the Plaintiff, Dr Tronc, identified deficiencies in the school's supervision and in the school's bullying prevention philosophy and methodology. He suggested that, by reason of the persistence and seriousness of the assaults upon the Plaintiff, the child bullying him ought to have been suspended from the school.

THE DECISION

Judge Simpson found that the school's response to Mrs Cox's repeated complaints was inadequate. Accordingly, she awarded verdict for the Plaintiff on the basis that the school had failed to exercise reasonable care to prevent attacks or ensure the safety of the Plaintiff.

She noted that the Plaintiff's adolescence and adulthood had been all but destroyed. He will never more and was unlikely to ever form any meaningful relationships. It was also noted that he would suffer from anxiety and depression for the rest of his life.

The Plaintiff was awarded damages for non-economic loss, past and future economic loss, superannuation and out of pocket expenses. Given the Plaintiff's age, this is likely to amount to close to \$1 million.



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¹(2005) HCA 31