

Court of Appeal slams door - defendant's proof of innocence in negligent (non-intentional) battery

State of NSW v Ouhammi [2019] NSWCA 225 (11 September 2019)

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Background

Mr Ouhammi sued the State of NSW alleging assault, battery and negligence in respect of an incident in custody while he was intoxicated, in which a senior constable rushed to close a holding cell door, which caught and almost severed his right thumb. It was accepted that the senior constable did not intend to cause injury, so fault became the issue in relation to both the tort of negligence and the tort of battery.

On 6 June 2018, the District Court trial judge, Maiden SC DCJ, awarded damages of \$82,000 at common law, rather than under the *Civil Liability Act 2002* (CLA), on the basis of the State's vicarious liability for the senior constable's commission of the tort of battery.

The State argued on appeal to the NSW Court of Appeal that the first error made by the trial judge was to not apply the CLA in relation to both liability and damages when it was not disputed that there was no intention to cause injury. The Court of Appeal had no difficulty addressing this obvious mistake, given that section 3B(1) (a) of the CLA only excludes the operation of (most of) its provisions by its use of the expression '...an intentional act that is done by the person with intent to cause injury...'

On 11 September 2019, in a 2:1 majority, Basten JA and Simpson AJA found that the State was not liable and therefore allowed the State's appeal and set aside the District Court's award of damages.

The more demanding issues addressed by the Court of Appeal were:

- (a) determining which party bears the onus with respect to the issue of fault in cases of non-intentional battery (i.e. those in which intention to cause injury is not established);
- (b) whether the senior constable was in breach of his duty of care in failing to take steps to prevent the door catching the plaintiff's thumb as he lunged towards it after waking from his slumber;
- (c) if liability exists, whether the defence of contributory negligence should succeed in the context of section 50 of the CLA, which is titled *No recovery where person is intoxicated* and which applies where 'the person's capacity to exercise reasonable care and skill was impaired'.

Battery

Leaving aside highway cases, the tort of battery (not the crime) is established by a plaintiff without proof of intention or negligence in relation to the conduct of the defendant that is claimed to constitute the relevant contact or violation.

In the tort of battery a defendant will be excused from liability if the defendant proves on the balance of probabilities that the violation was 'utterly without fault' on their part. Such a finding requires more than negating negligence in the sense of a failure to use reasonable care and skill, and involves (at the least) proof that the defendant's act was involuntary, and/or that the exercise of ordinary care and caution on the defendant's part could not possibly have prevented the contact.

The majority in the Court of Appeal (Basten JA and Simpson AJA) held that the State disproved negligence (and fault of any kind) in establishing that a reasonable person in the position of the senior constable would not have taken the only precaution it was proposed that he could (i.e. giving a warning or a direction to the plaintiff), given that he had minimal time in which to make the assessment of the risk of injury and consider any means of avoiding the risk eventuating.

This was a 'heat of the moment' case in which the urgency and competing duties faced by the senior constable meant that no fault or negligence should be found in respect of his reflexive act of slamming the door without trying to minimise the risk of injury. Although the prospect of injury was foreseeable and significant, it was not something he could reasonably have addressed by acting any differently, given that he was concerned to prevent an escape.

Dissenting on this point, Brereton JA found that the senior constable initiated, voluntarily and without warning, the sudden and forceful closing of the door as he saw the plaintiff approach it. In his Honour's assessment, it could not be said that the senior constable was 'utterly without fault'.

While reaching the same conclusion as Simpson AJA on liability, Basten JA expressed in his dissenting opinion on the onus of proof point that the CLA (particularly Part 1A) had the effect of reversing the common law position, such that the onus of proving a lack of fault/care lies with the plaintiff in negligent battery cases (i.e. those lacking an intention to cause injury).

Contributory Negligence – Intoxication

The plaintiff was placed in the holding cell at around 2pm and his injury was caused by the slamming cell door at 2.12pm. At 4pm, (2.7 hours after arrest) the plaintiff had a high-range blood alcohol concentration of 0.2257g/100mL.

Simpson AJA did not find it necessary to address the defence of contributory negligence.

Basten JA found that given the high blood alcohol reading, the Court should be satisfied that the plaintiff's capacity to exercise reasonable care for himself was significantly impaired, satisfying section 50(1) of the CLA. His Honour noted in this regard that there was evidence that he was unsteady on his feet at the time of arrest and that this and his lurching towards the cell door at the time of injury (as shown on CCTV) were consistent with an impaired capacity to exercise reasonable care for himself.

In case he was in error in relation to his finding of no liability, Basten JA went on to conclude that the plaintiff was not entitled to damages in any event, because his Honour could not be satisfied that the injury was likely to have occurred absent intoxication - section 50(2).

In case he was wrong in that conclusion, his Honour also held that it would not be open on the limited evidence to be affirmatively satisfied under section 50(3) that intoxication did not contribute in any way to the cause of the injury so as to dislodge the presumption imposed by that subsection that the person was contributorily negligent. Basten JA concluded that at best for the plaintiff, any damages would need to be reduced by 25%.

Brereton JA disagreed and found that section 50 was not engaged at all, because although the plaintiff was well intoxicated at the time of his injury, his Honour could not be satisfied that the level of intoxication was such that his capacity to exercise reasonable care and skill was impaired. His Honour explained in this regard that it was necessary to consider the context and in particular the activity in which the person was engaged at the time of the relevant act or omission. His Honour observed that '... the care and skill required of him was no more than that required to be confined in a robustly safe cell.'

Implications

The tort of negligence requires the plaintiff to prove fault in the form of a breach of duty of care. No such breach was found in this case, which involved a 'heat of the moment' decision in the context of the competing duties under which a police officer operates in a custodial setting – to take care of a prisoner and to prevent escape.

The main take-away point from this case – which also involved the tort of battery – is that the CLA does not affect the common law position that it is (except in highway cases) for the defendant to prove that there was no fault on their part in a case of negligent or non-intentional battery, if liability is to be avoided.

It is not the case, as contended by the State on appeal in this case, that the plaintiff bears the onus of proving negligence for the purposes of establishing a cause of action in trespass to the person (which includes the tort of battery, assault and false imprisonment).

This case also serves as an interesting reminder that the intoxication defence in section 50 of the CLA introduces a level of complexity and is not easily engaged. Specific expert evidence (not confined to a blood alcohol reading) will often be needed to ensure that the defence crosses over the section's opening hurdle, which is that it must be shown by the defendant that the plaintiff's capacity to exercise reasonable care and skill was impaired in the relevant sense.

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