

Case Notes

Pritchard v Racecage Pty Ltd & Ors
(1996) ATPR ¶ 41-477 at 41,856

On 24 May 1994, Keith Alan Pritchard was struck by a motor vehicle in the Northern Territory. The vehicle was involved in the "Cannonball Run". Mr Pritchard was a member of the Darwin Motor Sports Club and agreed to act, without remuneration, as an official during the conduct of the rally.

As a result of Mr Pritchard's death, an action was brought claiming that the promoters of the rally had engaged in misleading or deceptive conduct and also in unconscionable conduct in various representations made by them and that Mr Pritchard's death entitled his estate to recovery of damages under s52 and s51AA of the *Trade Practices Act 1974 (Cth)*.

The Basic Pleading

It was alleged that the promoters of the "Cannonball Run" requested members of the Darwin Motor Sports Club to act, without remuneration, as officials during the conduct of the rally. The deceased, who was said to be a racing car enthusiast and a member of the Club, agreed to act as such an official. It was alleged that the promoters of the rally represented to members of the Club, including the deceased; to the Government of the Territory, including the police; and to the public that it was an expert in the organisation, promotion and conduct of events such as the rally, that the rally would be conducted safely, and that officials would not be exposed to any unreasonable risk of injury. It was said that those representations were made in order to persuade the authorities to grant the necessary permits to conduct a rally and to induce the members of the Club to co-operate in the organisation of, and the promotion of, the rally. It was said that these representations were false and that, by making them, the

promoter engaged in conduct which was misleading or deceptive in breach of s52 of the *Trade Practices Act*. It was further alleged that unconscionable conduct was involved in relation to the representations. The plea was made that if the promoter had not engaged in unconscionable conduct or misleading or deceptive conduct, then the relevant authorities would not have permitted the rally to occur or it would have been conducted under more stringent conditions or, alternatively, the deceased would not have participated in the rally as an official. The representations and conduct involved were said to be an inducement leading to the deceased volunteering to be an official and, later, to his death when he was struck by the vehicle of one of the rally competitors whilst carrying out his duties as an official at a finish control point.

The Relevant Northern Territory Legislation

The Northern Territory had enacted the *Motor Accident (Compensation) Act 1974 (NT)*. No claim was made under this Act. It is sufficient here to note that this legislation was a statutory code in relation to motor traffic accidents and prescribed various limitations on recovery of damages. The submission of the Attorney-General of the Northern Territory (who intervened in the litigation) was that this legislation had introduced a no-fault statutory scheme of compensation and that the applicant (the deceased's wife) had been paid her statutory entitlement of slightly over \$99,000. No claim was made in the present litigation under the *Motor Accident (Compensation) Act*.

The Northern Territory had also enacted the *Compensation (Fatal Injuries) Act 1974 (NT)*. This Act, generically known elsewhere under the title "*Lord Campbell's Act*", established the existence of a cause of action for the benefit of third parties as a result of the death of another. However, the legislation was subject to the *Motor Accidents (Compensation) Act* in that, as a result of a motor vehicle accident, any dependent spouse or children of the injured party have their rights under *Lord Campbell's Act* replaced by their rights under the *Motor Accidents (Compensation) Act*.

A third piece of relevant Northern Territory legislation was the *Law Reform (Miscellaneous Provisions) Act*. This Act provided that all causes of action subsisting against, or vested in, any persons survive against, or for the benefit of, that person's estate.

It is basic to an understanding of the case to note that the applicant did not name the driver of the motor vehicle which struck her husband as a respondent. No cause of action in negligence was pleaded and no claim was made in the proceedings under the *Compensation (Fatal Injuries) Act*. Further, no attempt was made to rely on the *Law Reform (Miscellaneous Provisions) Act*. The relevance of all of this legislation was, therefore, that it constituted the legislative background against which the case was decided.

It was not legislation which was pleaded in the applicant's claim.

The comment made by the Court in relation to the pleadings and the relevance of the above legislation to them was as follows:

"It is clear that the pleader has distanced the applicant's case as far as possible from a 'road accident' claim. Indeed, it (was) alleged...only that the deceased's death was caused by breaches of section 52 and section 51AA of the *Trade Practices Act*...The necessary causal link (was)...the plea that the deceased would not have acted as an official but for the conduct of (the promoter)...(it is then pleaded) that by virtue of the breaches of section 51AA and section 52 of the *Trade Practices Act*, the estate and the children have suffered loss or damage..."¹

In other words, the whole case of the applicant was based not upon negligence, but upon a breach of the *Trade Practices Act* in relation to the conduct of the promoter in making the statements that it did. Presumably, the purpose in doing this was to recover damages in excess of those already recovered under the statutory scheme provided by the *Motor Accidents (Compensation) Act* and the limitations in respect of such damages.

The Decision

1. Was the applicant precluded from recovering damages under the *Trade Practices Act* by virtue of the *Motor Accidents (Compensation) Act*?

The Solicitor-General for the Northern Territory submitted that the applicant's case was, as a matter of substance, the equivalent of a claim for damages arising out of the death of the deceased under the law as it existed prior to the introduction of the *Motor Accidents (Compensation) Act*. His proposition was put to the court as a question: "What caused the death of the deceased?"²

As has been set out above, the applicant's case was that the deceased's death was not by the negligent driving of the competitor but by the conduct of the promoter.

The court held that causation was essentially a question of fact to be answered by reference to common law practical or commonsense conceptual concepts of causation. One had to look for the "real, essential, substantial, direct or effective cause of the loss or damage".³

Applying these principles (from prior cases which were cited by the court) the Court was of the opinion that the deceased's death and any

¹ (1996) ATPR ¶ 41-477 at 41,856

² See above, at n 1, at 41,863.

³ Per Gummow J in *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd (No 2)* (1987) ATPR ¶ 40-795; (1987) 16 FCR 410, at 419.

losses sustained by his widow and children as a consequence of his death were "caused" as a result of a motor vehicle accident involving a car that was driven by one of the competitors in the rally. Whether the car was driven negligently or not was not relevant to the question of the "cause" of death.

The Court thus thought it was unrealistic to refer to the challenged conduct as "the cause" of the deceased's death. Conduct of the promoter was at the most, "the cause" of the deceased's decision to become an official and to participate in the rally at as official. Because the death was caused by a motor car accident, the provisions of the *Motor Accidents (Compensation) Act* came into operation.

The Court was satisfied that the *Trade Practices Act* was never intended to have general application to road traffic accidents or to personal claims arising out of such accidents. This was supported by the following line of logic:

- (a) The title of the statute and its provision that it binds the Crown in right of the Commonwealth insofar as the Crown "carries on a business" suggested immediately that the legislation was directed to conduct in trade or commerce and to business and economic issues.
- (b) The High Court had rejected an expanded operation of the *Trade Practices Act* in *Concrete Constructions (NSW) Pty Limited v Nelson*.⁴ In that case, a worker had fallen to the bottom of an air conditioning shaft as a result of his belief that the shaft was safe and representations made to that effect. The worker's claim under s52 of the *Trade Practices Act* was rejected by the High Court because the conduct had to be "in trade or commerce" and bear a "trading or commercial character". The High Court expressly dealt with the question of whether the failure by a vehicle driver to give a correct hand signal was conduct "in trade or commerce". The view of the High Court was that this conduct may be "in relation to" trade or commerce but was not conduct "in" trade or commerce. The court thought that a similar analysis applied to the present case.
- (c) The court dealt with the so-called "side-wind" theory. The question was whether the presumed intention of the Commonwealth Parliament was that s52 of the *Trade Practices Act* would have the "side-wind" effect of preventing the States and Territories from legislating to control and contain causes of action and, in particular, the quantum of damages flowing as a consequence of motor vehicle accidents. His Honour believed that the answer to this question was "no".
- (d) Although s4K of the *Trade Practices Act* did extend the concept of "loss or damage" to "damages in respect of an injury", the court was of the view that the Act did not apply to general negligence cases. The court

⁴ (1990) 169 CLR 594.

held that first there must be a triable issue of action as recognised by the *Trade Practices Act*. There can then be added to that, as part of it, an action for personal injuries. However, this was a different proposition to the applicant's claim that the *Trade Practices Act* gave an injured applicant the right to sue solely in respect of her personal injuries. In those cases where damages for injury had been recovered (and his Honour referred in particular to *Steiner v Magic Carpet Tours Pty Limited*)⁵ there was an economic base to the application. In *Steiner*, for example, the claim related to an arranged tour of Bali in respect of which the applicants had claimed out-of-pocket expenses and, in addition to these, claimed compensation for distress and mental illness.

The Court, thus, held that the applicant's broad proposition that she could claim damages consequential upon the death of a person in a motor accident was never intended to be covered by s52 of the *Trade Practices Act* and that the *Trade Practices Act* was not intended to prevent the States and Territories from legislating to control and contain their causes of action and the quantum of damages flowing as a consequence of motor vehicle accidents. The Court believed that the provisions of the *Trade Practices Act* were not intended to extend, at large, to claims for personal injuries or claims arising as a consequence of death where the injuries or death occurred as a result of a motor vehicle accident and where there were no other circumstances in the nature of "trade or commerce" that would attract the operation of the *Trade Practices Act*. Similarly, the applicant, the estate and the children were not entitled to damages or other relief under the *Trade Practices Act*.

These conclusions meant that it was unnecessary to consider any further questions raised by the applicant as, effectively, the court had held that the statement of claim, as pleaded, disclosed no cause of action. Nonetheless, the court proceeded to answer these further questions. This was done on the basis that these questions should be answered should the view be taken that the above conclusions were wrong.

2. Did a *Trade Practices Act* action survive death?

At common law, of course, a personal action dies with the person. Further, at common law, no action could be brought by a third party who suffered loss through the death of another.

The effect of legislation previously set out, and akin legislation in other States and Territories of Australia, was to change this principle of common

⁵ (1984) 6 ATPR ¶40-490.

⁶ (1942) 66 CLR 603.

law. The High Court in *Woolworths Limited v Crotty*⁶ held that *Lord Campbell's Act* applied equally to cases where death was caused by breach of contract as well as those cases where death was the result of some tortious act.

The Court found that an action for damages under the *Trade Practices Act* is a statutory cause of action. It is neither an action in contract nor an action in tort and s52 "does not adopt the language of any common law cause of action"⁷. His Honour noted that there were some specific provisions in the *Trade Practices Act* (see s75AE in Part VA) which specifically covered the situation of damages suffered by an individual as a consequence of a death and s75AH which applied State and Territory legislation about the survival of causes of action to various sections of the Act in relation to the issue of defective goods. In the opinion of the court, the absence of any like provisions in Part IVA and Part V of the *Trade Practices Act* was conclusive to the effect that *Lord Campbell's Act* did not assist in respect of actions to which those parts of the *Trade Practices Act* applied. There was no provision in those parts equivalent to s75AE or s75AH referred to above.

Relatives and other persons, therefore, could not claim damages under the *Trade Practices Act* because of losses suffered by them pursuant to the death of another.

Further, the Court held that the action of a deceased person did not survive the death of that person. This was on the same basis as previously i.e. the *Trade Practices Act* did not have any specific provisions which expressly so provided except in relation to some quite specific provisions not relevant to the present case.

Thus, if the *Trade Practices Act* applied to the case in question (contrary to the major ruling by the court), the deceased's cause of action did not survive his death and relatives could not bring a case based on the death of the deceased.

3. Was the damage caused by the conduct involved?

In order to claim damages under the *Trade Practices Act*, s82 and s87 required that the loss or damage be caused "by" conduct in breach of the Act.

A fundamental question therefore was the question of causation.

The court referred to a number of prior authorities and concluded:

"In the circumstances of this case, the applicant, as the widow of the deceased, and the children have suffered loss, not as a direct result of the conduct of either respondent, but as a direct result of the death of her husband and their

⁷ *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340, 348.

father...I have therefore come to the conclusion that, in the circumstances of this case, neither the applicant nor the children have suffered loss or damage within the meaning of s82 or s87 of the *Trade Practices Act*.⁸

4. Was the conduct of the promoter "unconscionable"?

The essential feature of the claim of unconscionable conduct against the promoter was that the deceased "trusted and relied" on the promoter to conduct the rally so as to ensure "that the officials were not exposed to an unreasonable risk of injury". It was alleged that this duty was breached in that the promoter acted in its own interests and thereby acted unconscionably in breach of s51AA of the *Trade Practices Act*. These claims were elaborated in greater detail but it is not here necessary to set out the extended pleadings on this issue.

The Court held that in order to succeed in a claim of unconscionable conduct, there must be established some "special disability". For example, the applicants might be elderly migrant parents who were induced to enter into a mortgage in favour of a bank to secure the overdraft of a son's company. The parents might be misinformed by the son about the effect of the mortgage and the bank may be aware that they have been misinformed. This would constitute "special disability" and this scenario represented the facts of *Commercial Bank of Australia v Amadio*.⁹ In *Amadio*, the parents were successful in having the mortgage set aside as they demonstrated a relevant disability.

The Court, in the present case, however, felt that the pleadings fell far short of encompassing any allegations that there was unconscionable dealing in this sense. But even if the pleadings had been amended to allege special disability, the court was still of the view that no action could succeed based on unconscionable conduct.

The crucial issue, once again, was the issue of causation. The loss must be caused "by" conduct of another person. The court construed the word "by" in the same way as previously. Any loss or damage that was sustained was caused by a motor vehicle accident, not by the alleged negligent misstatements of the promoter.

A further reason for the applicant's non-success in its unconscionable conduct claim was that unconscionable conduct involves some transaction giving rise to the litigation. In each case, plaintiffs in unconscionable conduct cases were seeking relief from the consequences of being a party to the transaction. In the present case, the applicant could not identify any transaction from which she, the estate or her children might be likely to seek relief.

⁸ See above, at n 1, at 41,872.

⁹ (1982-83) 151 CLR 447.

Thus, the claim for unconscionable conduct would have failed had the deceased raised it in his lifetime.

As previously noted, the Court held, in any event, that such a claim died with the deceased.

5. Was the Commonwealth legislation inconsistent with Territory legislation?

A constitutional argument was raised in relation to the possible inconsistency of Commonwealth and Territorial legislation. It is not here intended to examine this argument in detail but merely to raise it. The essence of the argument was that even if the *Trade Practices Act* applied to the present claim, the *Motor Accidents (Compensation) Act* of the Northern Territory remained a valid law effectively barring the applicant's action under the *Trade Practices Act*. The court found itself unable to agree with this argument. The Court was of the view that Territory legislation would be invalid if its provisions were in conflict with a law of the Commonwealth Parliament. The *Northern Territory (Self Government) Act 1978* conferred self government on the Northern Territory but did not manifest an intention of the Commonwealth Parliament to cease to treat the Northern Territory as anything but "a territory" with the attendant connotations of subordination to the parent legislature. There still remained a provision for disallowance by the Governor-General of the law of the Northern Territory notwithstanding its passage through the Legislative Assembly of the Northern Territory. There were various other limitations on the powers of the Territorial Parliament stated by the court but in relation to which it is not necessary to delve. The argument put was that in the event of an inconsistency between Territory and Commonwealth law, it is not automatically necessarily resolved in favour of the Commonwealth, or parent legislation. The Court did not consider this argument in great detail but expressed the view that the Commonwealth parent legislation would prevail in the event of an inconsistency between this and Territory legislation. However, as has previously been noted, the Court believed that a claim did not arise under the *Trade Practices Act* at all. Hence the question of inconsistency between this Act as a Commonwealth Act and the *Motor Accidents (Compensation) Act* as a Territory Act was not relevant to the Court's decision.

Lessons from the Case

There are a number of lessons from the case for those interested in s52 of the *Trade Practices Act*.

The decision reinforces the fact that the *Trade Practices Act* is a statute involving trade and commerce and is not a substitute for general personal injury negligence claims. One would have thought that the decision was quite predictable in view of the prior observations of the courts in relation to negligence claims which have attempted to override statutory caps on damages and in view of the prior High Court decision in *Concrete Constructions (NSW) Pty Limited v Nelson*.¹⁰

The case is also interesting in relation to the concept of causation. Causation was crucial to the decision and, one would think, the result would have been the same regardless of the applicability, or not, of other legislation. Put simply, there was no causal link between the conduct of the promoter of the "Cannonball Run" and the death of the deceased. The comments of the promoter may have been relevant to having the deceased act as an official. However, they did not cause his death.

The writer finds it somewhat strange that the judiciary believes that the statutory rights under the *Trade Practices Act* are so different from common law tort and contractual actions that provisions for survival of actions do not apply to them. The writer would have thought that the intention of the legislation in relation to survival of actions was that all actions should survive and that the provisions should apply to *Trade Practices Act* actions as well as any others. However, it has been consistently held to the contrary and it is now, presumably, good law that such actions do not survive.

The above non-survivorship of actions may, however, not be applicable when actions are brought under the *Fair Trading Act* of the relevant State or Territory. Depending on the wording of the survival legislation, it may well apply to actions brought under State and Territory legislation akin to the *Trade Practices Act*. In the present case, proceedings were not brought under the Northern Territory *Consumer Affairs and Fair Trading Act* but were brought under the *Trade Practices Act*. One is inclined to believe that a better result as regards survival of action may have been achieved had the action been brought under Territory and not under Federal legislation. For example, Justice R D Nicholson held in *Premiership Investments Pty Ltd v White Diamond Pty Ltd*¹¹ that an action under the Western Australian *Fair Trading Act* survived death. This was because of the absence in the Western Australian *Fair Trading Act* of any section resembling s75AE and s75AH of the Commonwealth *Trade Practices Act* (see above) and because the specific wording of the Western Australian "survival" legislation applied to actions under the Western Australian *Fair Trading Act*.

¹⁰ See above.

¹¹ At the time of writing, Federal Court of Australia, 17 November 1995 (Unreported). See also W Pengilly, "Misleading or Deceptive Conduct: Does the action survive death?" (1996) 12(1) *ANZ Trade Practices Law Bulletin* 1.

In the present case, whether an action survived death or not, there is no doubt that the applicant was asking for a very wide application of the concept of misleading or deceptive conduct and the concept of unconscionable conduct. The issue of causation alone was enough to defeat the applicant's case and it was on this issue, fundamentally, that the applicant lost.

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