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Duty of care in the *N'Gluka* tragedy

On 8 January 1990 five children drowned when the vessel they were on sank due to overloading. The High Court passed judgment on the case recently, ruling that the vessel's controller did not owe duty of care to the passengers on board. The lawyer representing one of the victim's parents explores some the issues behind this ruling.

Practising the law becomes a difficult exercise when judicial decisions seem to bear no relationship to the community's notion of justice.

Ever since the industrial revolution, human beings have sought to distract themselves with whatever can be created out of the raw materials available. These distractions have put ever increasing demands on our legal system to regulate. The recent High Court decision in the matter of *Frost v Warner*[1] is a case which highlights the fact that human beings can so easily be distracted from matters which involve social and civil justice through the ever increasing demands imposed by modern day living.

It is trite to say that each human being is unique. The way in which each of us live together in a community, however, needs some form of regulation. How a community determines the method by which we very different individuals live together is how that community determines law and order. The law, therefore, is a very changing and dynamic process and involves, like everything else, natural evolution. The law of our community is a mere reflection of the people that collectively make up our community. The judiciary, and perhaps most importantly, the judiciary of the High Court, represents the voice of our community.

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It is suggested that it would be in our community's best interest to examine the decision made by the High Court in the matter of *Frost v Warner* (hereinafter referred to as the 'N'Gluka case') and reflect upon the evolution of the law in this country.

Until the end of the nineteenth century civil law and order was primarily determined by contract and contract only. In other words, unless you specifically had a contract with another individual there was no right to sue for any wrong or

damage that you may have suffered as a result of another's wrongdoing. This changed however, and the ruling in *Donoghue v Stevenson*[2] was a significant step in the development of the concept of duty of care.

In *Donoghue v Stevenson* a woman attempted to have a ginger beer ice cream soda. She had a bowl of ice cream and poured ginger beer over it from an opaque bottle. To her horror, from out of the bottle came a decomposed snail. This caused the woman tremendous hurt in the form of nervous shock. As the law currently stood, she had only a right to sue the person that had sold her the ginger beer. The retail owner, however, had no way of knowing that there was a decomposed snail inside the bottle as the bottle was opaque. The retail owner was the only person with whom she had formed a contract, being the person who had sold her the bottle of ginger beer. The courts nonetheless determined that the manufacturer of the ginger beer was responsible for her hurt by allowing a decomposed snail to be placed inside the bottle before it was delivered to the retail outlet. It was in this way that the courts developed the concept of duty of care.

The classic pronouncement of a general formula for duty is the 'neighbour test' pronounced by Lord Atkin in the case of *Donoghue v Stevenson* as follows:

'There must be, and is, some general conception of relations giving rise to a duty of care, of which the particulars found in the books are mere instances. The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyers' question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, in law, is my neighbour? The answer seems to be ñ persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

The case of *Donoghue v Stevenson* represented a great change in our community. It meant that people would have to take more responsibility for their actions, and the foreseeable consequences of those actions. From this point on we became neighbours who owe a duty of care to each other.

This common law concept is a central notion of the law of tort. As John G Fleming states in his classic book on the subject:

'Unfortunately, no truly satisfactory definition of a tort has yet been discovered. The word derives from the Latin *tortus*, meaning twisted or crooked, and early found its way into the English language as a general synonym for "wrong".'[3]

As a community, therefore, we need to determine what behaviour will be tolerated and in what circumstances. In other words, we need to determine what we consider is a general 'wrong' which requires redress.

Over the years the courts have developed various checks and measures to define and clarify what we consider to be a civil wrong. The key question, of course, is who owes what type of duty to whom and in what circumstances; the proximity of one individual to another individual.

To determine whether or not a duty of care exists, the scope of the duty of care, whether or not there has been a breach of the duty of care, and whether or not damage has flowed from the breach of the duty of care, will, to a large extent, mean an extensive inquiry into the facts of a given set of circumstances. Such an inquiry should proceed upon the basis of the reasonable standard of care each of us would expect from each other within our community.

The facts giving rise to the set of circumstances surrounding the action my clients brought in the N'Gluka case were shortly stated by their Honours in their joint judgment as follows:

'On 8 January 1990 the motor vessel N'Gluka sank in Port Stephens resulting in the death of five children trapped in the front cabin. The Appellants were on board the N'Gluka at the time of the accident and are the immediate family of Amanda Frost, one of the children who died in the accident.'

Whilst their Honours sought to briefly put the facts in their joint judgment it took the primary judge, Judge Garling, some four weeks to hear all of the factual circumstances of the case. After hearing four weeks of evidence, the District Court Judge held that both Mr Warner and Mrs Warner owed the passengers on board the vessel N'Gluka a duty of care, and held both Mr Warner and Mrs Warner had breached their duty of care on that day and as a result of that breach my clients, the Frosts, had suffered loss and damage.

Mr Warner did not appeal. Mrs Warner, however, did appeal. It is of interest, therefore, to know the specific findings of fact made by the District Court Judge in relation to Mrs Warner which was stated as follows:

'She knew about the boats. She had experience, over a number of years. She invited a number of people on board. Not by any means all of the people. She knew or should have known how many people were on board. She should have known that the vessel was grossly and dangerously overloaded.'

It is also important to note that the District Court Judge found as a matter of fact that the vessel did not founder as a result of any negligent navigation on the part of Mr Warner but rather the vessel sank as a result of overloading. There were 49 people on board the vessel on that day. Mrs Warner was present throughout the voyage and was the 'registered controller' of the vessel.

The majority decision in the N'Gluka case given by the High Court on 7 February 2002 determined that under the Water Traffic Regulations Mrs Warner did not owe the passengers on board that vessel a duty of care as registered controller. Essentially, their Honours reached the view that Regulation 11 was premised upon control but did not confer control. The effect of Regulation 11 was to make it an offence against the regulations to navigate the vessel without the authority or consent of the registered controller. Their Honours jointly ▶

stated that, 'the regulations do not confer control; they are premised upon control.'

Justice Gaudron, on the other hand, felt that even if Mrs Warner did have the authority to withdraw her husband's authority to set to sea that day:

'. . . in the absence of evidence that Mr Warner would not have commenced the return voyage if his wife had asserted her rights as registered controller of the N'Gluka, it cannot be said that, in fact, Mrs Warner had any control over the situation which, tragically, led to the loss of life.'

By appearing to examine whether Mrs Warner breached any duty of care, her Honour appears to be accepting that Mrs Warner owed a duty of care. The evidence was that Mrs Warner did nothing to attempt to assert her rights as registered controller that day. In any event, it is difficult to understand the relevance of examining a hypothetical situation of what might have been had she attempted to assert her rights as registered controller if no such duty was owed.

Do the majority judgments properly examine the circumstances of that tragic day? Is this really our community's response to the loss suffered by the Frosts?

Justice Kirby in dissent considered what the regulations were intended to do and the findings of fact of the primary Judge who had, after all, heard four weeks of evidence on the subject. Justice Kirby pointed out that the judgment of the majority sends a signal to the community that people like Mrs Warner can acquire a legal status and then completely ignore the consequences. The majority decision, as Justice Kirby states, 'rewards legal fictions, complacency and indifference.'

It is suggested that by focusing on the Water Traffic Regulations, the New South Wales Court of Appeal and, subsequently, the High Court, were distracted from the key question of who owes what type of duty to whom and in what circumstances.

> "As a community we need to determine what behaviour will be tolerated and in what circumstances."

The N'Gluka case did not rely on a statutory duty of care to the exclusion of a common law duty of care. The manufacturer of the ginger beer in *Donoghue v Stevenson* did not have any formal legal relationship with the end consumer of the ginger beer until the court held that the manufacturer should have reasonably foreseen that its acts or omissions which led to a decomposed snail being put into an opaque bottle would lead to harm to an end consumer. The primary Judge in the N'Gluka case held that Mrs Warner should have reasonably foreseen that the act of inviting excessive numbers of people on board the N'Gluka could lead to harm to the passengers in the event that the vessel foundered.

The decision of the primary Judge can be explained by examining the facts and circumstances of that day to determine whether a common law duty of care was owed on the question of proximity by asking the key question: 'Who is my neighbour?' The primary Judge held that the passengers on board the N'Gluka were so closely and directly affected by Mrs Warner's acts in inviting excessive numbers on board that Mrs Warner ought to have reasonably had the passengers in contemplation as being so affected. Mrs Warner's legal status as registered controller in the circumstances of the 8 January 1990 was sufficient to enliven a common law duty of care. That being so, it is suggested with respect that it should not matter whether the Water Traffic Regulations are premised on control or confer control.

The law is not mysterious. It is a reflection of ourselves and we, therefore, are responsible for the decision in the N'Gluka case. It is suggested that the decision in this case is a clear indication that our community, as expressed through the decisions made by our High Court, is more interested in rewarding legal fiction than in delivering justice. PL

Footnotes:

1 [2002] HCA 1 (7 February 2002).

2 [1932] A.C. 562.

3 John G Fleming, *The Law of Torts*, 5th Edition.