

COUNCIL SWIMS OUT OF THE DEEP END

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Fairfield City Council (the defendant) successfully defended a claim by a patron who suffered personal injury after being assaulted by a third party while attending a Council swimming pool. The plaintiff was unable to establish that a special relationship existed between the parties which would attract a duty of care.

IN ISSUE

The key issue for determination by the District Court of New South Wales was whether the defendant owed a duty of care to respond to the criminal conduct of third parties at a recreation centre.

THE BACKGROUND

The defendant operated Fairfield Leisure Centre (the centre). On 14 December 2016, the plaintiff attended the centre for the purpose of utilising the pool facilities.

A group of young men in the pool were being rowdy which prompted a pool lifeguard to warn them that they would be removed from the pool if their behaviour continued. During this time, the plaintiff pointed out to the lifeguard that he was not part of this group. The lifeguard acknowledged this, and then left the scene. This resulted in the plaintiff being mocked and threatened by the young men. Upon leaving the pool, the plaintiff was followed by the group. The plaintiff described their manner as aggressive and rude. The plaintiff was then encouraged to leave the centre by a friend. The lifeguard then reappeared and informed the plaintiff that police had been called. The plaintiff and his friend made their way back to the pool area where they were then approached by one of the young men who punched the plaintiff to the left side of his face, causing him to fall to the ground and sustain serious injuries.

The plaintiff alleged that the defendant owed him a duty of care to immediately direct the group of young men to leave the centre, and that the incident was caused by the lifeguard's failure to ascertain the risk of assault or battery of the plaintiff.

The plaintiff framed his case in negligence, breach of contract, and breach of the Australian Consumer Law.

THE DECISION AT TRIAL

The Court referred to the decision in *Modbury Triangle v Anzil* (2000) 205 CLR 254 where it was established that the duty of care of an occupier did not extend to controlling the criminal

conduct of others except in “very restricted circumstances”.

The plaintiff conceded that in this case he was required to prove that a special relationship existed between him and the defendant (arising from the defendant’s ability to control the circumstances of the assault and the continued presence of the assailant within the centre). The Court identified that the control of the continued presence of the assailant at the centre, and the degree to which the defendant knew or ought to have known that the harm would follow from lack of action, were considerations in determination of the issue of duty of care.

In an attempt to demonstrate that the defendant had the requisite control, the plaintiff relied on the defendant’s documented protocols and procedures. The Court noted that the lifeguard had not given evidence and therefore there was no evidence of what he observed after warning the group of young men in the pool, and whether he was aware of threats to any person, or physical violence to any person, prior to the assault. The plaintiff submitted that it could be inferred that the lifeguard had observed the conduct of the group of young men following his warning and he was aware of the risk of imminent violence such that it warranted him calling the police. However, the Court noted that the fact of the lifeguard calling the police was insufficient evidence to make such an inference.

The Court found that the evidence did not establish the existence of a special relationship between the parties, such that the specified duty of care was owed to the plaintiff. In particular, the Court noted there was no evidence that the lifeguard knew or ought to have known that the risk of harm consequent on violence between the group of young men and the plaintiff was at a high level or even likely.

The Court further found that nothing in the terms and conditions of entry, nor in the defendant’s protocols and procedures suggested that the defendant’s lifeguards were required to personally deter and control criminals. The defendant’s compliance with its protocols and procedures meant the plaintiff also failed in his case for breach of contract. Nothing contained in the terms and conditions of the contract obliged the defendant to evict for that conduct rather than, as the lifeguard did do, firstly providing a warning.

Given that the defendant did not owe the duty of care alleged and was not negligent, did not breach the terms and conditions of contract, and the plaintiff failed in his causes of action under the ACL, judgment was entered for the defendant.

IMPLICATIONS FOR YOU

The decision reinforces the established principle of common law which provides that there is no duty to control the criminal conduct of others except in very restricted circumstances where a special relationship must be proved in order for this duty to arise.

Carlos Sawa v Fairfield City Council [2019] NSWDC 576

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