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THE OBVIOUS RISK OF A KANGAROO ON A RUNWAY AND A LOCAL COUNCIL'S ALLOCATION OF RESOURCES

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A local Council has successfully appealed a decision of the District Court of NSW which held it responsible for property damage to an aircraft that collided with a kangaroo.

In Issue

Whether the obvious risk provisions in the *Civil Liability Act 2002* (NSW) (CLA) defeated the respondent's claim that the Council was negligent in failing to issue a notice to airmen (NOTAM) stating that kangaroo incursions onto an aerodrome had increased to dangerous levels; and whether s42 CLA applied to the respondent's claim that the Council was negligent in failing to erect a kangaroo-proof fence.

The Background

On 25 February 2014, Dr Alterator flew an aircraft owned by the respondent from Port Macquarie to Kempsey Aerodrome. On landing at the aerodrome, the aircraft collided with a kangaroo that had strayed onto the runway.

Dr Alterator was aware generally of the risk that kangaroos would be present on the aerodrome, which was noted in an online publication produced by Airservices Australia. However, he had not personally seen a kangaroo on 20 prior visits to the aerodrome. The respondent asserted that the number of kangaroo incursions had increased to dangerous levels in the months leading up to the accident.

The Decision at Trial

The obvious risk defence did not succeed at first instance, where it was only faintly pressed by the Council. The trial judge held that the risk of harm was not an obvious risk to a reasonable person in Dr Alterator's position. Alternatively, an exception to the statutory defence in s5H CLA applied because Dr Alterator had requested advice or information about the risk from the Council by consulting publications issued by Airservices Australia that were based on information supplied by the Council.

The trial judge held that s42 CLA did not apply to the Council's operation of the aerodrome

because this was a function it voluntarily assumed rather than one it was obliged to provide. In the alternative, the trial judge found that the Council's evidence regarding its financial position was insufficient, such that it could not be concluded that the respondent's claim amounted to a challenge to the general allocation of resources by the Council, which is prohibited by s42(b) CLA.

The Decision on Appeal

Whether the risk of harm was an obvious risk within the meaning of s5F CLA depended upon the level of generality at which the risk was characterised. Basten JA, with whom McColl JA agreed, held that the risk should be assessed at a "reasonable level of generality". On the facts of the case, it was the risk of an aircraft suffering damage through colliding with a kangaroo or other wildlife on the runway as the aircraft was landing or taking off. The evidence established Dr Alterator had actual knowledge of this risk. Although the level of risk increased depending on the number of animals present on the aerodrome at any given time, the majority did not consider the evidence established there were greater numbers of kangaroos present around the time of the accident, and in any event doubted this created a different risk of which Dr Alterator was not aware.

The majority of the Court of Appeal rejected the respondent's reliance upon s5H(2) CLA in response to the Council's obvious risk defence. This provides an exception to the position that no duty of care is owed to warn of an obvious risk if the plaintiff has requested advice or information about the risk from the defendant. In this case, Dr Alterator had consulted two publications issued by Airservices Australia regarding kangaroo hazards at the aerodrome. The majority of the Court of Appeal held that this enquiry did not enliven s5H(2) CLA because the request for information and advice was made to a third party (Airservices Australia) rather than the Council.

In dissent, Simpson AJA characterised the claim against the council based on its failure to issue a NOTAM as a failure to provide information rather than a failure to warn, to which the obvious risk provisions of the CLA did not apply. Her Honour also adopted a more liberal interpretation of s5H(2) CLA and held that by consulting Airservices Australia, Dr Alterator was in substance seeking advice and information from the Council.

With respect to the second issue on appeal, the Court of Appeal rejected the trial judge's narrow formulation of s42(a) CLA and held that it applied not only to functions that it was required by law to provide, but also those it voluntarily assumed due to the needs of the community. In any event, the prohibition in s42(b) CLA against challenging a public authority's general allocation of resources still applied even if s42(a) was not engaged. The Court of Appeal held the evidence established that the Council did not have the available resources to fence the aerodrome without reducing funds allocated to other works and purposes and that s42(b) CLA prevented a finding of negligence in failing to install the fence in these circumstances.

Implications for you

The decision provides a useful analysis of the obvious risk provisions in the CLA. The majority decision indicates the risk of harm should be assessed at a reasonable level of generality and that matters that increase the likelihood of the risk eventuating are not relevant to whether a risk is obvious. The narrow interpretation applied to the exception in s5H(2), requiring that

any request for information or advice must be made directly to the defendant and not via a third party, is also favourable for defendants and insurers.

This case also highlights the difficulties claimants face when bringing a claim against a public authority. The courts will not distinguish between obligatory and other functions when considering the principles in s42 CLA, which broadens the circumstances in which public authorities can rely upon this as a defence.

Kempsey Shire Council v Five Star Medical Centre Pty Ltd [2018] NSWCA 308

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