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Insurance Law Ealert

No contributory negligence on part of injured passenger

The Full Court of the Supreme Court of Tasmania has recently reversed a finding of contributory negligence on appeal in relation to a plaintiff appellant's decision to ride unrestrained in the rear of a Mini Moke vehicle without a rear passenger seat.

Hunt & Hunt were defending the claim, which arose from a car accident involving an Adelaide insured vehicle that crashed in Tasmania.

The accident occurred whilst the appellant was returning to Port Arthur from Fortesque Bay in Tasmania's south east. He flagged down the respondent for a lift and, along with another back seat passenger, sat on a raised bench at the rear of the vehicle which had no proper seating or seatbelts.

The Mini Moke slid off the road whilst cornering and collided with an embankment before tipping on its side. The appellant suffered a head injury as a result of the impact. While he was successful in his subsequent action in negligence against the respondent, Tennant J at first instance found that he had contributed to his injuries by breaching the duty to take reasonable care for his own safety. Damages were thus reduced by 25% on account of contributory negligence.

The Full Court reversed the trial judge's findings on contributory negligence, finding that whilst risky, his conduct did not amount to a failure to take reasonable care for his own safety. Porter J (with Evans and Blow JJ) observed that the relevant question for resolving the issue of contributory negligence was whether a person of ordinary prudence would, in the circumstances in which the appellant found himself, have taken the lift in the Mini Moke.

Given that the journey was a relatively short one on a road with very little traffic, that there was already a passenger seated on the rear bench, the court found that the appellant's conduct was reasonable in the circumstances.

The court's position in this regard was reinforced by the comments of Porter J at par 7 in his leading judgment:

"the critical findings of the trial judge were that the appellant chose to travel in the particular vehicle in the rear where he did, and that it could be inferred from the fact that he flagged down the first vehicle that came, that there were others coming".

The full court were critical of this determination and found that the inference of the trial judge (that other lift options were available to the appellant) could not properly be drawn from the evidence.

Ultimately, the court found that, as there was no evidence of 'suitable' alternative transport for the plaintiff, his decision to travel with the defendant in the "risky" scenario posed did not equate to any contributory negligence.

Marlow –v– Walsh [2008] TASSC 58

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