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Insurance Law E–alert

Imbree –v– McNeilly [2008] HCA 40 (28 August 2008)

Today the High Court delivered its decision in the matter of *Imbree –v– McNeilly [2008] HCA 40 (28 August 2008)*. It is an important decision.

By majority (6-1), the Court has overruled the principle in *Cook–v– Cook (1986) 162 CLR 376.*

Cook –v– Cook stood for the proposition that there may be circumstances in which a special relationship exists such that the standard of care may vary having regard to matters specific to that relationship. In *Cook –v– Cook*, the Court found that an inexperienced learner driver may owe a lesser standard of care to the supervising passenger (because of the passenger's knowledge of the drivers inexperience).

In Imbree's case, the High Court concluded:

> "...the standard of care which the driver owed the passenger was the same as any other person driving a motor vehicle – to take reasonable care to avoid injury to others. The standard thus invoked is the standard of the "reasonable driver". That standard is not to be further qualified, whether by reference to the holding of a licence to drive or by reference to the level of experience of the driver."

That said, there is still scope to argue breach of duty, voluntary assumption of risk (where permissible) and contributory negligence. Indeed, in Imbree's case the plaintiff's damages were reduced by 30% because the plaintiff failed to advise the inexperienced driver properly of an obstacle (tyre debris) on the road and the appropriate manner of driving.

In practical terms the High Court's reasoning may be favourable to CTP insurers..

Instead of complicating matters with arguments about duty of care and breach of duty, it will allow the trial judge to focus on the practical assessment of responsibility for an accident including reductions for contributory negligence where the passenger has failed to take care of their own safety.

In reality many trial judges are reluctant to apply Cook v Cook because plaintiffs lose outright. Imbree's case gives rise to a greater likelihood that negligence will be established but offers greater scope to reduce claims on account of contribution.

Imbree's case is also relevant to the dispute as to the standard of care to apply in matters involving an impaired plaintiff (in issues of liability). In light of Imbree's case, that standard should be an objective one. Therefore the impaired plaintiff's claim should now be reduced according to the objective standards of a reasonable person.

We also note that Justice Kirby (in supporting the majority view on the primary issues) also discussed the relevance of CTP insurance in negligence matters (and in particular that CTP insurance is a matter to which the Court can and should have regard). That discussion is not endorsed by the other Judges but it is an approach worth being aware of.

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