Lynch v Lynch (1991) 14 MVR 512

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SUPREME COURT OF NEW SOUTH WALES -- COMMON LAW DIVISION
Grove J

2, 3 April, 19-23 November 1990, 1, 2 July, 1 August 1991

Grove J .

Nicole Vanessa Lynch was born at the Mudgee Hospital on 25 May 1973. Although the signs were not immediatley apparent, she was later diagnosed as suffering from cerebral palsy. That classifying description euphemises her multiple handicaps and disabilities but I will use it as convenient terminology.

She brings this action by her father who has been appointed tutor in the litigation in accordance with the rules of court and she seeks damages for her condition. It is alleged that the palsy was caused by injury which she sustained on 22 January 1973 when, unborn and within her mother's womb, she was involved in a motor accident. On that day, Nicole's mother-to-be Patricia Lynch (the first defendant) was driving a Ford F100 utility truck (the vehicle/the truck) owned by her father-in-law Mr Ronald Douglas Lynch. It was being driven within the confines of a family property when it careered down a slope and collided with a bank.

Negligence

Two defendants are joined in the action, the first is Mrs Lynch whose negligent driving of the vehicle is alleged to have caused the damage and the second is the authorised insurer pursuant to the Motor Vehicles (Third Party Insurance) Act 1942 (NSW) which represents the now deceased owner Mr R D Lynch whose negligent maintenance of the vehicle is also and alternatively alleged to have been relevantly causative of damage. The plaintiff relies upon her statutory entitlement to have determined against whom she is entitled to redress and apportionment between them in the event that each defendant is found to have contributed towards the damage.

The defendants were not separately represented and Mr Branson QC who appeared with Miss McFee for both defendants conceded, and asked that I should expressly find, that the first defendant was negligent. He submitted that there should be a verdict in favour of the second defendant. As I can infer from the pleadings, statute and the circumstance that one vehicle only was involved, that the same insurance fund would indemnify either defendant, the apparent reason for discrimination should be mentioned. There is no legal bar to action by a person, now born, against recovery of damages in respect of an antenatal act or omission causing injury, from a tortfeasor in breach of duty to take reasonable care against foreseeable risks to him or her. *Watt v Rama* [1972] VR 353 . *X & Y v Pal* (CA(NSW), 3 May 1991, unreported . Subject to proof of negligence and causation, recovery from the second defendant which represents a third party tortfeasor would be uninhibited. The contrary was not argued, but it was argued that recovery was not possible by a child from its mother essentially because, at the time of tort commission, there was unity of personality. Breach of duty of care to oneself could only lead to circuitous action and it was submitted that that inevitable failure compelled a conclusion of non-existence of such a duty at common law. For that different reason therefore a verdict in favour of the first defendant was also sought.

I turn to the facts of the accident and for this purpose deal with negligence in its conventional terms.

On the date of accident, a cattle muster was taking place and a group of people including the first defendant left a cottage on the property where they had lunched and went in the vehicle to assist. Mr R D Lynch drove onto the home paddock to a point about one and a half miles from the homestead towards which the cattle, now gathered in a mob, were being driven. After passing through a gateway, he proceeded on foot and the first defendant took over the driving. She was, as far as she can recall, in second gear and had driven through a gully and onto a ridge when she saw a steer break away from the mob and she "instinctively" turned the vehicle to head this beast back into the mob. She followed the steer along the top of the ridge at, she estimated, 25 to 30 km per hour. The terrain was rough and she drove about half a mile along the top of the ridge to a stand of trees. Just before the steer reached the trees, it turned to go down the side of a hill. She followed in the vehicle. Her evidence as to what happened next was: "Well, I turned, I lost control just as I turned because it was very stony and

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the subsoil was loose. I can remember being thrown around back and forth and it was fairly rough going down and I didn't anticipate it being so rough as it was."

She remembered the vehicle picking up speed as it descended. It was not fitted with seat belts. Her final recollection before awakening in hospital was described: "I can remember there was a bump and then going up in the air and hitting my head and I don't remember any more after that."

The foregoing has been extracted and quoted from the first defendant's evidence in chief. In cross-examination she confirmed that the truck vibrated as it crossed the rough ground but agreed that the vehicle might have been a little too big for her to handle. She said she had trouble reaching the clutch and brake (pedals). She was specifically asked whether, when she was first driving, the brakes were "alright" and she responded affirmatively. I add that she did not testify that at any time she had difficulty of any sort with braking and specifically she did not claim that the pedal fell off or that the brakes otherwise failed.

A witness to the event was the first defendant's husband, Mr Neville Lynch. He was conducting the muster. He saw the truck turn to chase the steer and observed: "We had commenced to drive the cattle home towards the homestead, there was a steer broke away from the mob, my wife turned the truck to chase after the steer, I think we yelled at her not to worry about it. She kept going, she travelled across the paddock I would say at an excessive speed for the conditions. It was very rough and rocky, to a point where she disappeared from my sight over the crown of the hill."

He rode over to the scene and was able to observe that the vehicle "had gone over a bank, down into an embankment and nosedived into the gully behind".

At the time Mr Eric Pye (Neville Lynch's grandfather) was riding as a passenger in the front of the vehicle. Like Mr R D Lynch, he had died before the hearing. Mrs Hazel Lynch (Neville Lynch's mother) was riding in the rear. She was not called to give evidence. In the circumstances the invitation of counsel to find negligence on the part of the first defendant is irresistible and I am satisfied that it has been proved that the first defendant was negligent in her control and management of the vehicle which she was driving. A reasonably prudent driver would not have pursued a steer over rough terrain at the speed which she did. To do so created foreseeable risk which was obviously avoidable in numerous ways, not the least by slowing down or electing to abandon the pursuit.

Although the issue of negligence on the part of the first defendant was not contested, there was vigorous dispute concerning the negligence of the owner of the vehicle which became represented in the litigation by the second defendant compulsory insurer. The plaintiff sought to prove this case circumstantially and I summarise the evidence and argument.

The vehicle belonged to Mr R D Lynch and its maintenance was his responsibility. The statement of claim (filed in 1986) supplied particulars of alleged breaches relating to the condition of the brakes and specifically a failure to ensure security of a pin which passed through the shanks of the brake and clutch pedals in order to position them. Mr Neville Lynch testified that when he went to the aid of his injured wife he noticed that the brake pedal had dislodged from its mounting and was lying on the floor of

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the cabin. He did not see the retaining nut which should have been on the end of the pin. Such a nut, in proper position, simply screwed onto a thread which was fabricated on the pin.

No witness was called to corroborate the finding of the dislodged pedal. Of course, Mr Pye is deceased and the first defendant was unconscious. Mrs Hazel Lynch had been riding in the rear of the truck and there is no reason to think that

she would have been in a position to make an observation. There is evidence that a Mr Peter Schiemer, a bulldozing contractor who did live and still lives in the area, came from a site about one mile away to help at the accident scene. He physically assisted in the removal of the first defendant from the truck and would have been well situated to see any peculiarity within the cabin such as a fallen brake pedal. Nevertheless I would infer that his principal attention would be directed towards the injured woman. Mr Schiemer was not called and no explanation was offered for his absence. I am less than comfortable about proof that the brake pedal was adrift however I have Mr Neville Lynch's sworn testimony and in the absence of its contradiction I conclude that it is more probable than not that he did make the observation which he described.

The next circumstance is again dependent upon the evidence of Mr Lynch. About two months prior to the accident he was riding as a passenger in the truck which was being driven by his father and on this occasion the brake pedal fell onto the floor. He saw his father simply reset the brake pedal in position by inserting the pin. He said that the locking nut was nowhere to be seen and he noticed that the thread pattern on the pin head was damaged. No one other than the two of them was present at the time. He was cross-examined about his testimony and asked in particular when it first occurred to him that this incident might have some importance and he claimed that it was mentioned to solicitors several years ago. From the particulars to which I have made reference, I infer that this was indeed done prior to the originating process although it could have been at any time in the 13 years between the accident and the commencement of litigation. I am satisfied that the occurrence and the details of observation by Mr Lynch are proved to the requisite standard.

Mr Lynch had driven the vehicle on days leading up to the accident and noticed nothing wrong with the brake pedal and as I have noted the first defendant in answer to cross-examination agreed that the brakes were alright. The postulated deficiency is not, of course, inconsistent with the absence of prior noticeable symptom; the pedal would remain in position and no doubt would appear operable until the pin passed the point of its holding tolerance. I find the evidence of both Mr and Mrs Lynch in regard to this absence of prior noticeable difficulty acceptable but it is inconsequential.

The next step in the circumstantial case was the expert testimony of Mr Simpson, an engineer. He confirmed, as is apparent, that the absence of the locking nut would enable the pin to float sideways until it could pass through the shank of the pedal and permit collapse but he went further and expressed the opinion that vibration, such as passage over rough terrain by the vehicle, would probably cause the movement and collapse rather than a single impact which he said was a very unlikely cause for dislodgment. This thesis remained uncontradicted and hence it was argued on behalf of the plaintiff I ought conclude that the pedal probably collapsed prior to impact

and further should infer that the consequent loss of braking capacity was a probable contributor to the loss of control of the vehicle and resultant damage. I was referred to *TNT Management Pty Ltd v Brooks* (1979) 53 ALJR 267 .

The present is not a case where there was no eye witness. The first defendant could, and did, describe the events leading up to a point when she was struck on the head; an event of which she was specifically aware. Although it incorporates testimony which I have already cited I should set out, in context, what the first defendant said. It was:

> Q -- What did you do after you observed the steer to make a left-hand turn? A -- Well, I proceeded to follow the steer down the side of the hill.
>
> Q -- What happened as you proceeded down the side of the hill? A -- Well, I turned, I lost control just as I turned because it was very stony and the subsoil was loose. I can remember being thrown back and forth and it was fairly rough going down and I didn't anticipate it being so rough as it was.
>
> Q -- Did you observe anything about the speed of the vehicle as compared to its speed as it went across the top of the ridge before the left-hand turn? A -- I just remember we seemed to be travelling fast.
>
> Q -- Was it faster, slower or the same speed as you had been going across the top of the ridge? A -- Faster.
>
> HIS HONOUR: It was picking up speed as it went down, I take it? A -- Yes.
>
> BRANSON: What happened to you in the cabin of the vehicle in relation to the bench seat on which you were sitting? A -- Well, I was thrown back and forth, it was very rough, I was thrown around, thrown forward and back and forth.
>
> Q -- As the vehicle proceeded down the hill did something happen? A -- I can remember there was a bump and then going up in the air and hitting my head and I don't remember any more after that.

I accept this evidence -- it was not challenged -- and find that the first defendant lost control of the vehicle as she turned on the stony surface under which was loose topsoil. She did not suggest that at any time she sought to retard, stabilise or otherwise affect the control of the vehicle by use of the foot brake. I find that there is no nexus between the accident and any defect in the brake pedal security. Mr Simpson's hypothesis did not exclude the possibility of impact dislodgment but, accepting his theory that passage over rough terrain was a more likely culprit, the very rough passage down the hill after the first defendant had lost control is as probable a cause of movement as passage over rough terrain leading up to that point. I give weight to the absence of any suggestion by the first defendant that she was handicapped by an inoperable brake before the loss of control and I repeat that she makes no relevant complaint.

This is not a situation where I have to seek to deduce negligence from the silent testimony of aftermath; I can and do reach a positive finding that the evidence shows that the damage was caused by the negligent driving of the first defendant and it was not caused or contributed to by a defect in the motor vehicle, its equipment or its maintenance. There will be judgment in favour of the second defendant. As there was no separate representation of

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the second defendant and having regard to the way in which the issues of trial were fought I consider that it is proper not to accompany that judgment with any order for costs.

Antenatal tort

To obtain an award the plaintiff must show that her condition, although not manifest until after her birth, was caused by trauma to her then unborn body. At the commencement of hearing the capacity of the plaintiff to prove this circumstance was very much in dispute. As well as Australian experts, the plaintiff called Dr Rosenbloom and Dr Stephenson, consultant paediatric neurologists from the Royal Liverpool Children's Hospital England and the Royal Hospital for Sick Children, Glasgow, Scotland respectively. The content of their intended evidence was not, despite the rules of court, adequately foreshadowed to the defendants. It emerged that Dr Stephenson had been a co-presenter with a Dr King and others of a signficant paper entitled "Cerebral Palsy After Motor Accidents In Pregnancy". This was first published at the British Paediatric Neurology Association meeting in Dublin, Ireland in early 1990. A copy of the paper is now Ex G. It is hardly surprising that research on the part of the defendants, extensive though it has obviously been, did not locate this material which has not even as yet, I am informed, been widely distributed. A lengthy adjournment was necessary in order to enable adequate investigation.

It suffices, however, for me now to observe that the expert witnesses called by the plaintiff, fortified by the published research paper, were able to opine that the accident was the probable cause of the cerebral palsy which was observed subsequent to the plaintiff's birth. Cross-examination on the issue had been deferred and in due course Mr Branson QC informed me that the witnesses would not be required to return for that purpose. The plaintiff's solicitors were given formal notification in the following terms (now Ex 6):

> **Re: Nicole Lynch v Lynch & GIO**
>
> I refer to the above matter and advise the defendant does not want to further cross-examine any medical practitioner or other expert qualified on behalf of the plaintiff nor adduce evidence from any other medical practitioner or expert on the issue in the action viz whether the condition of cerebral palsy which the plaintiff has been diagnosed as having may have been caused by the collision on 22 January 1973 in which the first defendant sustained personal injuries.

I make a finding coordinate with that concession and the evidence in chief of the various medical witnesses.

Acceptance of the invitation to such finding does not extinguish all the grounds of defence relied upon by the first defendant. The thrust of Mr Branson's argument was expressed in written submissions thus:

> (1) At the time that the injury was occasioned to the foetus there was not in existence a legal person who can be identified as the victim of the tortious act of mother.
>
> (2) The common law (United Kingdom, the Commonwealth elsewhere) has not recognised the right of an infant to sue the mother in respect of prenatal injury caused by the negligent conduct of the mother during pregnancy.

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(3) As has been seen, in the United Kingdom the 1976 legislation expressly precludes an infant from suing the mother in respect of prenatal injury *except* in the exceptional circumstance where injury has been caused by the negligent driving of the mother. But for the creation by statute of that right of action there would be no remedy available to the plaintiff in the United Kingdom arising out of a situation identical to the fact situation with which the court is faced here.

(4) The defendants submit:

(i) because of the coincidence of identity between the foetus and the mother at the time of injury to the foetus there is and cannot be a duty of care owed by the mother to herself; nor any resultant breach thereof;
(ii) the injury to the foetus as a result of the negligent act of the mother amounts to an injury to the mother herself;
(iii) upon the material facts here before the court, there are not both a tortfeasor and a victim so as to found a cause of action in negligence.

I consider that these alternatively stated submissions can be accepted or rejected in accordance with the single determinant of whether a person, now born, can successfully bring action against his or her mother for antenatal injury caused by negligence.

The quest for authoritative indication of the answer to the problem has manifestly been the subject of extensive research by counsel for whose endeavours I am indebted. In direct point I have been referred to a decision of the Court of Appeals Michigan, United States of America, where it was held that a child's mother bears the same liability for injurious negligent conduct resulting in prenatal injuries as would a third person. *Grodin v Grodin* Mich App 301 NW 2d 2 . The liability of such third person has been determined in this State, indeed I am bound by authority to hold, as if I may respectfully add I would if unfettered, that a child now born can sue for breach of a duty of care which extends to default occurring prior to birth. *X & Y v Pal*, supr . That case did not involve a child/plaintiff seeking a recovery from a mother/defendant but the consequence of the decision is to limit my inquiry to whether the distinction of incipient motherhood results in legal bar to action.

Mr Evatt of counsel who appeared with Mr J Curran for the plaintiff contended that the question should be answered in favour of the plaintiff by direct application of the conclusion of Barwick CJ in *Hahn v Conley* (1971) 126 CLR 276 . where his Honour said (at 283): "I have examined the case law beginning with *Ash v Ash* (1696) Comb 357 , which in my opinion is of no assistance in the present case, and ending with *Rogers v Rawlings* [1969] Qd R 262 . One proposition which clearly emerges and which, in my opinion, is correct, is that, if there be a cause of action available to the child, the blood relationship of the defendant to the child will not constitute a bar to the maintenance by the child of the appropriate proceedings to enforce the cause of action."

The context of those remarks in litigation where a grandfather was sued for damages in respect of injuries caused to a child struck by a motor vehicle whilst the child was crossing the road after a responsive call from the grandfather that he was "over here" is so different from the present that I am unable to resolve the question in the manner submitted.

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The length of my dissertation on the applicable principles is shortened by the fortuitous circumstance of the delivery of judgment in *X & Y v Pal* between the adjourned dates of hearing in the case. The tests postulated by Clarke JA (with whom Meagher JA agreed without additional comment) are clearly fulfilled by the present plaintiff to the extent that there is a requirement to show negligence by the first defendant and damage suffered as a result of it. Using his Honour's terms, the outstanding issue is whether the first defendant owed a duty to the particular class of persons of which the plaintiff was a member. That class consists of children conceived and not born and the distinction which the defendant seeks to draw is that it does not consist of children conceived in the defendant's own body and unborn at the time of the commission of the relevant act of negligence.

I refer also to the approach of Mahoney JA in *X & Y v Pal* . Using his Honour's analysis of questions to be answered: again, it is plain that the plaintiff, now being born, is procedurally uninhibited from bringing action and, if it be necessary to be born for rights to crystallise, this has happened and there is left outstanding only the "duty question" namely whether there is a special legal bar in the case of child v maternal parent. It is submitted on behalf of the first defendant that a bar does exist and that it is a consequence of unity of personality of the unborn infant and herself. As I

have indicated, save *Grodin*, the first defendant would not appear to be circumscribed by authority from presenting this argument.

I reject the contention advanced on behalf of the first defendant. First, I would hold that an injury to an infant suffered during the stages of its journey through life between conception and parturition is not an injury to a person devoid of personality other than that of the mother-to-be. Nicole's personality was identifiable and recognisable. I find there is no inconsistency between that view and the requirement that birth occur in order for exercisable rights to accrue. Secondly, it does not seem to me to be contrary to any principle that in the class of unborn persons to whom a duty to take reasonable care is undoubtedly owed (*X & Y v Pal*) there should be included those children who will be born out of the tortfeasor's own body. As the test of liability for the consequence of negligent conduct includes foreseeing that injury might be caused to the unborn children of others I can see no reason for artificial exclusion of foreseeability of injury to one's own unborn. The definition of class to whom injury is foreseeable could not rationally specify only the unborn of others in distinction from the unborn of a woman's own. I see no reason of principle or policy for creating a discriminate and restricted rule for the latter circumstances.

I record that I have been directed to the working paper and the consideration of it which led to the Congenital Disabilities (Civil Liability) Act 1976 in the United Kingdom. I observe that the statute proclaimed an exceptional civil liability in the case of injury arising out of the negligent driving of a motor car when insurance availability might be inferred. The history which led to that legislation does not persuade me that the common law was or is any different from my statements above.

I therefore hold the plaintiff is entitled to damages.

[His Honour then proceeded to assess damages in the sum of $2,850,000 and entered judgment for the plaintiff against the first defendant accordingly.]

Judgment for the plaintiff.

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C A Evatt and J Curran instructed by Teakle, Ormsby & Associates, for the plaintiff.

C Branson QC and L McFee instructed by J M Crestani, for the defendant.