November 2023

Case Note

When to Play the Blame Game: Allegations of Contributory Negligence in the ACT – Wilson v Australian Capital Territory [2023] ACTSC 287

The Supreme Court of the Australian Capital Territory has dismissed an application by the plaintiff to strike out aspects of the Territory's defence, pleading contributory negligence in circumstances where a breach of duty of care had previously been admitted with no reference to contributory negligence during pre-litigation.

Background

The plaintiff, Nathan Wilson, made a claim for damages arising out of an alleged trip and fall caused by a paver on the footpath at Gungahlin Place, in the ACT.

In accordance with the ACT's pre-court procedures under section 61 of the *Civil Law (Wrongs) Act 2002* (ACT) *(*the Wrongs Act*),* the Territory admitted breach of duty of care in the following terms:

> *Pursuant to the respondent's obligations under section 61(1)(b) of [the Wrongs Act] I am instructed that the Territory admits breach of duty of care in relation to the failure to rectify the displaced pavers at the incident site, namely the plaza at Gungahlin Place near Gungahlin Anytime Fitness, on or around 20 May 2021.*

Proceedings were filed shortly after the admission in June 2023. The Territory subsequently filed a defence admitting breach of duty of care, but denied several particulars relating to the plaintiff's allegation of breach of duty of care (such as deficiencies in maintenance, warnings and lighting) and alleged contributory negligence for the first time.

The plaintiff then filed the application to strike out aspects of the Territory's defence on the basis that they were inconsistent to its admission of breach of duty of care, and that the Territory was precluded from alleging contributory negligence.

The allegation of contributory negligence

The plaintiff argued that the Territory was precluded from alleging breach of duty of care by virtue of section 61(1)(b) of the Wrongs Act which states:

> *(1) A respondent must, within the period prescribed by regulation (or, if no period is prescribed, within 6 months after the day the respondent receives a complying notice of claim)—*
>
> ...

(b) give the claimant written notice stating—

(i) whether liability is admitted or denied, and

(ii) if contributory negligence is claimed—the degree of the contributory negligence expressed as a percentage.

In his judgment, Justice Mossop adopted the reasoning of Associate Justice McWilliam (as Her Honour then was) in *Carr v Needham* [2019] ACTSC 98 involving the provisions of the *Road Transport (Third-Party Insurance) Act 2008* (ACT) which were in similar terms of section 61 of the Wrongs Act, at [35]:

> *Applying the reasoning of Till [Till v Nominal Defendant [1999] QCA 490; [2002] Qd R 676] and Gabriel [Nominal Defendant v Gabriel [2007] NSWCA 52; 71 NSWLR 150], in the absence of unequivocal language, I would not construe the Act as excluding the common law right of a defendant to raise a defence of contributory negligence once litigation is commenced, despite not having raised the issue at any stage prior to the litigation.'*

Justice Mossop concluded that the Territory was not precluded from raising the issue of contributory negligence in its defence, even though it was not raised pre-litigation and breach of duty of care had been admitted.

Inconsistent pleadings

When considering the allegation of inconsistent pleadings, the plaintiff argued, among other things, that it was inconsistent for the Territory to deny certain aspects of the plaintiff's pleadings when an admission of breach of duty of care was maintained in the defence.

Justice Mossop found that the Territory's admission of breach of duty of care pre-litigation was not inconsistent with the Territory's denial. His Honour stated at [23]:

> *'Insofar as the plaintiff's case is broader than what was admitted by the defendant, it is clearly open to the defendant to deny those broader aspects of the plaintiff's case... [The allegations] are broader than what is admitted because they allege an obligation to maintain the pavers so that no paver may move, install reasonable lighting, warn persons walking on the paved area or construct a barricade.'*

His Honour further articulated, at [25], that the plaintiff is being 'put to proof' on the case that he wishes to run.

Costs

While costs would normally follow the event, His Honour, despite finding in favour of the Territory on the application, acknowledged that the Territory had not complied with its pre-Court obligation to raise an allegation of contributory negligence under section 61 of the Wrongs Act, and did not provide any explanation on the change of position after proceedings were commenced.

His Honour also considered, by virtue of the subtlety in the Territory's defence, that it was not inappropriate for the plaintiff to have brought the application.

His Honour ordered costs to be in the cause.

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Implications

The decision confirms the common law right to plead contributory negligence is not extinguished in claims under the Wrongs Act despite a failure to comply with the pre-court requirements.

However, respondents to claims, should be cognisant of costs that can arise in not ventilating its position on contributory negligence during pre-court litigation where possible.

This Case Note was written by Principal Angel Li and Senior Associate Jesse Iliopoulos. Please contact Angel or Jesse if you have any questions or for further information.

Angel Li

Principal

+61 2 5114 6911

ali@meridianlawyers.com.au

Jesse Iliopoulos

Senior Associate

+61 2 5114 6912

jiliopoulos@meridianlawyers.com.au

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