

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY AND CALLINAN JJ

SUSAN MARY FROST & ORS

APPELLANTS

AND

CAROLYN WARNER

RESPONDENT

Frost v Warner
[2002] HCA 1
7 February 2002
S195/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with G R Kennett for the appellants (instructed by McDonald Johnson)

G K Downes QC with S J Motbey for the respondent (instructed by Selby Anderson)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Frost v Warner

Negligence – Duty of care – Vicarious and direct liability – Motor vessel accident caused by vessel being grossly overloaded – Whether respondent's status as holder of certificate of registration for vessel under Water Traffic Regulations (NSW) conferred requisite degree of control to found direct or vicarious liability – Whether holder of certificate of registration responsible for negligence of person in charge of vessel – Whether status as holder of certificate of registration gave rise to duty of care to prevent vessel sailing while grossly overloaded.

Maritime Services Act 1935 (NSW).

Water Traffic Regulations (NSW), reg 11.

1 GLEESON CJ, GUMMOW AND CALLINAN JJ. This is an appeal from the Court of Appeal of the Supreme Court of New South Wales. The Court of Appeal (Handley and Giles JJA, Rolfe AJA) allowed an appeal from the District Court (Garling DCJ), set aside that part of the judgment awarding damages to the appellants against the respondent, and substituted orders dismissing their actions against the respondent. In this Court the appellants seek orders which would restore their success against the respondent at the trial.

2 The circumstances giving rise to these proceedings may be shortly stated. On 8 January 1990 the motor vessel *N'Gluka* sank in Port Stephens resulting in the death of five children trapped in the front cabin. The appellants were on board the *N'Gluka* at the time of the accident and are the immediate family of Amanda Frost, one of the children who died in the accident.

3 The appellants commenced proceedings in the District Court claiming damages for nervous shock and other psychological trauma suffered as a result of the accident and the death of Amanda Frost. The defendants in that action were Mrs Warner and her husband. Mrs Warner is the sole respondent in this Court. The appellants alleged that Mr Warner was the "navigator and person in charge of the vessel" at all material times. They further alleged that the accident occurred because the vessel was overloaded and that Mr Warner had been negligent in allowing "far too many people to travel on this vessel"¹.

4 The appellants also sought to recover against Mrs Warner on two grounds. They submitted that Mr Warner was at all times acting as her agent and that therefore she was vicariously liable for his negligence. They further submitted that Mrs Warner was directly liable in negligence on the basis that she had "invited people on to the boat and she allowed the boat or vessel to become dangerously overloaded and she knew, or should have known that it was dangerously overloaded and that she should have taken steps to ensure the vessel was safe". Both these submissions were premised upon Mrs Warner possessing a sufficient degree of "control" over the vessel. This "control" was said to arise by virtue of her "status as registered controller" of the vessel under the Water Traffic Regulations (NSW) ("the Regulations"). The Regulations were made under power conferred by s 38 of the *Maritime Services Act* 1935 (NSW) ("the Act").

1 The appellants also alleged negligence in a number of other respects, including the navigation of the vessel and failure to release the interior lock of the escape hatches in the front cabin before allowing the vessel to leave port. The trial judge rejected all of these grounds. The trial judge also rejected the appellants' action against the manufacturers of the vessel.

At trial

5 At trial, Garling DCJ made the following findings in relation to the accident:

"I find that on 8 January 1990 the motor vessel N'Gluka, a 36 foot Steber fly bridge boat skippered by [Mr] Warner sank in Port Stephens. At the time of this accident there were 49 people on board the vessel. It veered sharply to the left. Mr Warner, who had taken control of the vessel, had no control over what then happened.

He immediately substantially cut back the speed of the vessel, causing it to decelerate rapidly. The vessel came back up from the left, or the port side where it had leaned, having veered to the left, and then tipped to the right and eventually sank. ...

I am satisfied that this accident occurred because this vessel was grossly overloaded. I am satisfied that if the vessel was not grossly overloaded, that the veer to the left, or port, would not have caused the vessel to founder. The cause of this foundering of the vessel was gross overloading. ... Mr Warner was the skipper of this vessel. He had the responsibility, or at least a large amount of responsibility for ensuring the safety of all on board. He has a duty to ensure the vessel is not overloaded."

The trial judge thus held that the cause of the accident was the overloading of the vessel and that Mr Warner had been negligent in failing to ensure that the vessel was not overloaded. These findings were not challenged in the Court of Appeal and are not in issue in this Court.

6 The trial judge then went on to consider the liability of the respondent, Mrs Warner. His Honour held that, notwithstanding that Mr Warner was the owner of the vessel and "was basically in control of making all the relevant decisions" concerning the vessel, Mrs Warner was liable both directly for her own negligence and vicariously for the negligence of her husband. After noting that Mr Warner was in de facto control of the vessel at all material times, his Honour said:

"[T]he fact remains that Mrs Warner was the registered controller. One has to ask why a person is registered under the [Regulations] to be registered controllers if they have no responsibility in the control and/or operation of the vessel.

I am of the opinion that having nominated herself and allowed herself to be the registered controller of the vessel, she has a

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responsibility. I am satisfied that she had a degree of control. She also authorised her husband to navigate the vessel and to do all things and to make all decisions relating to the vessel on this day, however, I believe that she still has responsibilities."

7 His Honour also found that "as registered controller in the circumstances of this accident [the respondent] was, herself, negligent". This conclusion was reached on the footing that:

"[the respondent and her husband] invited a number of the people on board, not by any means all the people. [The respondent] knew, or should have known how many people were on board. She should have known that the vessel was grossly and dangerously overloaded. She should have taken steps as registered controller to ensure that the vessel did not leave the dock with that number of persons on board."

8 The trial judge awarded the appellants damages against both Mr Warner and Mrs Warner. Mrs Warner appealed to the Court of Appeal against the trial judge's findings respecting her liability.

In the Court of Appeal

9 The Court of Appeal allowed the appeal. Rolfe AJA, with whom Handley and Giles JJA agreed, held that, as a matter of fact, "putting aside any consequences in law from [the respondent] being 'registered controller' ... Mr Warner had exercised de facto control over all aspects of the vessel's management and navigation, and [the respondent] had exercised no such control". His Honour summarised the decision of the trial judge respecting the respondent as follows:

"It is completely clear that his Honour's findings against [the respondent] were based upon her being 'registered as legal controller' or the 'registered controller' of the vessel. Indeed, having regard to the way in which the case was pleaded and argued against her, they had to be. Quite apart from that, his Honour found that Mr Warner was in de facto control of the vessel on 8 January 1990. He made no finding that [the respondent] exercised any such control. As I have indicated, there was no evidence to support a finding of fact that [the respondent] 'authorised her husband to navigate the vessel and to do all things and to make all decisions relating to the vessel on this day', and his Honour's statement to that effect must have been intended as consequential on her being 'registered controller'.

His Honour's references to [the respondent] having a duty of care were [also] predicated on the basis that she was the 'registered controller'."

10 After observing that reg 11(11) of the Regulations makes it an offence for a person in the position of Mr Warner to navigate the vessel without the authority or consent of the respondent, Rolfe AJA identified the critical questions as whether reg 11(11) "imposed upon [the respondent] any liability as 'registered controller' for the negligent acts of the person who navigated the vessel ... and whether as 'registered controller' [the respondent] otherwise incurred personal liability for those negligent acts".

11 With respect to the first issue, his Honour noted that it was not claimed that the respondent was the owner of the vessel or that she had any other proprietary right or title to it, and that accordingly "she could not be liable as agent or otherwise vicariously by virtue of any such right, title or interest". His Honour observed of the effect of sub-reg (11) that:

"At most [the respondent], as the holder of the certificate of registration, could have authorised or consented to Mr Warner's navigating the vessel, which would have been a defence to a criminal prosecution [of Mr Warner] pursuant to sub-regulation (11)."

After noting that there was no evidence of any express or implied authority or consent, his Honour continued:

"Even if [the respondent] had given her authority or consent, in the circumstances of this case, sub-regulation (11) does not, as a matter of construction, make her by virtue of so doing liable for negligent navigation either on the basis that the person to whom she gave the authority or consent was her agent or she was otherwise vicariously liable. The sub-regulation does not address that point. It is concerned with a different matter, as its words make clear. There may be cases where, independently of the sub-regulation, the relationship of principal and agent or employer and employee may be created, such as to give rise to such liability, but those relationships are not created by the sub-regulation. The statutory regime of registration and authority or consent erected by the Regulations is not for the purpose of creating civil liability and does not do so."

12 The Court therefore held that the respondent's status as "registered controller" did not, in the circumstances of this case, make her liable for the negligence of Mr Warner.

13 Rolfe AJA then turned to the direct liability issue. His Honour held that "there was no evidence that [the respondent] knew or ought to have known that the vessel was 'grossly and dangerously overloaded'". In this respect, Rolfe AJA rejected the trial judge's findings to the contrary. His Honour further held that:

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"[f]or reasons given in relation to vicarious liability, the regime of which holding a certificate of registration is part does not create civil liability, and [the respondent's] being the holder of the certificate of registration did not give rise to a personal duty of care any more than it made her liable for the negligence of Mr Warner. To make good the finding that she should not have allowed the vessel to sail with the number of people on board, the [appellants] would have had to prove at the least that she knew, or ought to have known, that the vessel was overloaded, and that in that knowledge she could have done something to prevent the vessel from sailing. This they failed to do."

14 The Court of Appeal therefore allowed the appeal and set aside the trial judge's findings of liability against the respondent.

In this Court

15 The appellants appeal to this Court on two grounds. The first ground is that the Court of Appeal erred in holding that the respondent's "status as registered controller" of the vessel did not make her responsible for the negligence of her husband (the vicarious liability issue). The second ground is that the Court of Appeal erred in holding that the respondent did not owe a duty of care, which included a duty to prevent the vessel sailing while it was grossly overloaded, by reason of her "status as registered controller" (the direct liability issue). In support of this submission the appellants further submit that the Court of Appeal was wrong to reject the trial judge's findings that the respondent knew or should have known of the overloading of the vessel. The construction of reg 11 is central to both the appellants' submissions. They contend in this Court, as they did below, that the Regulations gave the respondent the power to make another's use of the vessel unlawful and thus conferred an element of control upon her sufficient to found both direct and vicarious liability in the circumstances of this case.

16 It should be emphasised that the trial judge found that Mr Warner had de facto control of the vessel at all material times and that this finding is not challenged. As a result, if the Regulations do not have the effect contended for by the appellants in both branches of their submissions, the appeal must fail.

17 The respondent submits that while reg 11 does stipulate for the making of applications from persons who "control" registrable vessels, it does not, by force of the registration, confer a power of control upon the holder of a certificate of registration if that control otherwise is absent. The respondent further submits, in relation to the direct liability issue, that there was no evidence that she knew that

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the vessel was overloaded or "dangerously unstable" and that in fact the evidence demonstrated that she thought it was safe.

18 The respondent's construction of the Regulations is to be preferred; the Regulations do not confer a power of control on the respondent and the appeal must be dismissed. We turn to consider why this is so.

The Regulations

19 The Regulations have two evident relevant purposes. Part II of the Regulations (regs 3-10) is headed "GENERAL REGULATIONS" and is concerned with prescribing standards of conduct for the operation of vessels. For example, reg 3(1) prohibits a person from navigating a vessel recklessly, negligently or dangerously, while reg 3(2) prohibits navigating or being in charge of a vessel while intoxicated. Regulation 6 sets out certain standards to be observed when towing a water skier or aquaplaner and reg 7 is concerned with "unorthodox method of propulsion of vessels". Regulation 8 provides for activities such as races, displays and regattas to be held only in accordance with an appropriate aquatic licence.

20 Regulation 19 is to be found in Pt IV ("MISCELLANEOUS") (regs 16-20) and provides that:

"Every person who is guilty of an offence against or who contravenes any of the provisions of these Regulations, or who fails to comply with or observe any requirement, condition, term or stipulation subject to which ... any license, certificate, permit or trade plate has been issued by the Board under these Regulations ... shall be guilty of a breach of these Regulations and liable to a penalty not exceeding \$400 and to a further penalty not exceeding \$80 for each day during which such offence, contravention or failure continues."

21 Part III of the Regulations (regs 11-15) is headed "REGULATIONS FOR CERTAIN CLASSES OF VESSELS AND WATERS". It establishes registration and special permit and licence schemes. Regulation 11 is concerned with the registration of what are identified as "registrable vessels"² and is the principal regulation at issue in these proceedings. Sub-regulation (2) provides

2 Defined in reg 2(1). It was not disputed that the *N'Gluka* was a "registrable vessel" within the meaning of the Regulations.

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that "[a] person who controls a registrable vessel may apply to the Board^[3] for registration of such vessel." The reference in sub-reg (2) to "control" is, by virtue of reg 2(3), a reference to "a person who has the right to decide the possession, disposition and use of the vessel".

22 This expression requires further attention. The "right" of decision respecting "the possession, disposition and use of the vessel" is a right conferred by the general law, not by the Act or the Regulations. That right is not necessarily co-extensive with ownership and may be enjoyed by one who is not an owner. Observations made by Lord Herschell LC in *Baumwoll Manufaktur von Carl Scheibler v Furness*⁴ are in point. His Lordship said that the person having "the absolute right to the ship" and who thus is the "owner" may⁵:

"have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person who is, for those purposes during that time, in point of law to be regarded as the owner."

This passage was adopted by Latham CJ in *Australasian United Steam Navigation Co Ltd v The Shipping Control Board*⁶.

23 The circumstances surrounding the registration of Mrs Warner were not explored in the evidence. Mr Warner as owner may be taken to have encouraged or permitted or otherwise brought about or facilitated the registration of Mrs Warner as "registered controller". However, in no other respect did he either indefinitely or for a period confer upon her the immediate and exclusive

3 The Maritime Services Board of New South Wales (reg 2(1)), established by Pt II of the Act. Part III of the Act provides for the powers, authorities, duties, functions and obligations of the Board.

4 [1893] AC 8.

5 [1893] AC 8 at 17.

6 (1945) 71 CLR 508 at 522.

possession of the *N'Gluka* or confer upon her the responsibility for its management and control⁷.

24 The term "registered controller" does not appear in the Regulations or in the legislation, a point noted by Rolfe AJA. The trial judge appears to have used it as a synonym for the legislative expression "holder of the certificate of registration". "Holder of the certificate of registration for a vessel" is defined in reg 2(1) to mean "a person to whom a certificate signifying that a vessel is a registered vessel has been issued by the Board".

25 The application under reg 11 must comply with the requirements of sub-reg (3), which include the requirement that the application be in writing and be accompanied by the prescribed fee. Once the application is granted and the vessel is registered, the Board is to issue a certificate of registration and an identification plate to the applicant (sub-reg (4)). The applicant then becomes the "holder of the certificate of registration" for that vessel. The registration is valid for one year and is renewable (sub-reg (5)).

26 The Regulations impose certain limited obligations on the holder of the certificate of registration. These include obligations to: affix the identification plate to the vessel (sub-reg (6)(a)); produce the certificate of registration when required to do so (sub-reg (6)(b)); notify the Board of any change in address (sub-reg (6)(c)); and return the identification plate and certificate of registration upon expiration or cancellation of the registration (sub-reg (6)(d)). The holder of the certificate of registration is also obliged to make the vessel available, when required, for the purposes of inspection or testing (sub-reg (9)).

27 Upon ceasing to control the vessel, the holder of the certificate of registration is to return the certificate of registration and identification plate to the Board and is to supply to the Board the name and address of the person to whom control of the vessel has been transferred (sub-reg (7)(a)). A person who acquires control of a registered vessel may apply for recording of acquisition of control of the vessel (sub-reg (7)(b), (c)). If that application is successful then that person becomes the "holder of the certificate of registration" (sub-reg (7)(c)). Registration may be cancelled or an application for registration or recording of acquisition of control refused under sub-reg (10). It is significant to note the circumstances in which this power may be exercised. Sub-regulation (10) provides:

7 cf *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175 at 194-195, 215-216, 218.

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"(a) The registration of a vessel may be cancelled, or an application for registration of, or for recording of acquisition of control of, a vessel, refused –

- (i) where any information furnished by the holder of the certificate of registration for the vessel or the application is found to be untrue;
- (ii) where any requirement of these Regulations or any requirement of the Board in respect of such vessel or its registration has not been complied with;
- (iii) where the Board has reason to believe that the noise emitted by such vessel is, or would be, excessive;
- (iv) where the Board considers that such vessel is unsafe to persons or property; or
- (v) where the holder of the certificate of registration for the vessel, or the applicant, as the case may be, does not, or ceases to, control the vessel."

28

Sub-regulation (13) creates certain offences respecting unregistered (par (a)) and registered (pars (b) and (c)) vessels on any enclosed water⁸. Liability is imposed not upon any "registered controller" or person with "control", as indicated in the earlier provisions of reg 11. Those liable are "the owner" and, in some circumstances, "the master". These terms are defined in s 2(1) of the Act⁹. The term "owner" reflects the passage from *Baumwoll* set out earlier in these reasons by stating that it includes:

"any person exercising or discharging, or claiming the right or accepting the obligation to exercise or discharge, any of the powers or duties of an owner, whether on his own behalf or on behalf of another".

"Master" includes:

8 "Enclosed water" means any port or any inland navigable water within the State of New South Wales (reg 2(1)).

9 The effect of s 11 of the *Interpretation Act* 1987 (NSW) is that expressions used in the Regulations are to bear the same meaning, where possible, as their respective meanings in the Act.

"every person having lawfully, or de facto, the command, charge, or management of a vessel for the time being".

29 It is to the master that the government, care, safety and security of the vessel, her crew, passengers and cargo are committed¹⁰. As was said by the United States Supreme Court in *Southern Steamship Co v National Labor Relations Board*¹¹:

"The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and every thing depend upon him."

30 It will be apparent that, whilst she held the registration, Mrs Warner was neither the owner nor the master of the *N'Gluka* in the above senses.

31 The appellants fix upon sub-reg (11). This makes navigation of a registered vessel without the consent of the holder of the certificate of registration an offence. It provides that:

"Any person who navigates a registered vessel, or who, having custody of the same, permits or suffers such vessel to be navigated, without the authority or consent of the holder of the certificate of registration for the vessel shall be guilty of an offence against this regulation."

"Navigate" is not a defined term within either the Regulations or the Act. However, the meaning of the term "navigate" has been the subject of a number of judicial decisions in a variety of statutory settings. Whilst the term is usually equated with moving from one port to another, it may include any sailing, steering, directing or managing of the vessel and it may be sufficient that the vessel is moving in the water currents under the control of its anchor and chains¹².

10 *Kennerson v Jane R, Inc* 274 F Supp 28 at 30 (1967); *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [2000] 3 WLR 1954 at 1961, 1972; noted Baughen, "Navigation or Employment?", (2001) *Lloyd's Maritime and Commercial Law Quarterly* 177 at 177.

11 316 US 31 at 38 (1942).

12 See *United States v Monstad* 134 F 2d 986 (1943).

Control

32 The "control" contended for by the appellants is said to arise from the proper construction of two provisions of the Regulations, reg 11(2) and reg 11(11). It is convenient to deal with reg 11(2) first. The appellants submit that because the only person who may apply for registration is a person having "control" of the vessel, reg 11(2) operates so as to confer the control contemplated by the sub-regulation upon the successful applicant. In this way the respondent is said to have been a person who had the right to decide the possession, disposition and use of the vessel. However, the reasoning depends upon a *non sequitur*. Regulation 11(2) does not confer "control" upon a successful applicant for registration either expressly or by implication. Rather, it operates in a negative sense to restrict the permissible class of applicants for registration to those who have the necessary "control" of the vessel.

33 This construction of reg 11(2) is further supported by examination of the other provisions of reg 11, particularly par (a) of sub-reg (10) dealing with the refusal of applications and the cancellation of registrations. The significance of par (a) is that it allows the Board to refuse an application and to cancel registration if it discovers that the person who is the applicant or holder of the certificate of registration does not in fact "control" the vessel. Further, sub-reg (7)(b) provides that a person who acquires control of a vessel may apply for "recording of acquisition of control" and thereby become the holder of the certificate of registration in respect of that vessel. These provisions have no sensible operation if the holder of the certificate of registration is deemed by that registration itself to have "control". Registration is premised on control, but the Regulations do not operate to confer that control upon a person who does not in fact enjoy it.

34 The appellants' submission respecting reg 11(11) is that it conferred upon Mrs Warner the power to refuse to authorise or consent to the navigation of the vessel and thereby conferred the power to prevent the vessel from sailing on the day in question. The appellants submit that, when exercising that power, the respondent owed the occupants of the vessel a duty of care. The appellants further submit that at the material times the respondent knew or should have known that the vessel was overloaded and that she was in breach of her duty by failing to refuse her consent and thereby preventing the vessel from sailing while overloaded.

35 Regulation 11(11) does not confer a power to refuse to authorise or consent to the navigation of the vessel by a person. That power arises from being in "control" of the vessel in the defined sense. As already stated, the Regulations do not confer control; they are premised upon control. The effect of sub-reg (11)

is to make it an offence against the Regulations to navigate the vessel without the authority or consent of the holder of the certificate of registration.

36 Other provisions of the Regulations support this construction. The Regulations do not seek to impose liability on the person identified as the holder of the certificate of registration. Reference already has been made to the offences created by reg 11(13). It is significant that reg 11(13) makes the owner and the master guilty of an offence where the vessel's identification plate is not properly affixed (reg 11(13)(b)). This is so although sub-reg (6) requires the holder of the certificate of registration to ensure that the identification plate is properly affixed. Further, the provisions in Pt II of the Regulations are not directed at the holder of the certificate. For example, regs 3, 5 and 6 are directed against the person navigating the vessel in violation of the conditions there set out, while reg 7(2) creates offences by "the owner" and "the master" of the vessel, but not by the holder of the certificate of registration.

37 Nor does the Act impose liability upon the holder of the certificate of registration. Section 13SA provides that "[t]he Board may, by notification published in the Gazette, limit the speed of vessels within navigable waters." Sub-section (4) holds the master of the vessel liable if the notified speed is exceeded. Section 13YA holds the owner (and the master if negligent) liable for any damage to the Board's property. Section 21A is concerned with the "[l]iability of master and owner of ship under pilotage". Section 30F obliges the owner of the vessel, or the person having the control of the vessel, to identify the master of the vessel, where the master is alleged to be guilty of an offence.

38 The Regulations and the Act do not render the holder of the certificate of registration liable for contravention of the provisions therein contained or for other wrongs, except in so far as the holder may be either or both the "owner" and "master" of the vessel in question. The respondent was not the owner of the vessel; she did not at any relevant time have de facto control of the vessel; and she was not the employer of the person who did have de facto control.

39 The circumstance that the respondent was the holder of the certificate of registration under the Regulations is not sufficient to found liability either directly or vicariously. It is therefore unnecessary to consider the further point whether the Court of Appeal was correct in rejecting the trial judge's finding that the respondent knew or should have known the vessel was overloaded. Both limbs of the appellants' arguments require acceptance of a construction of the Regulations which should be rejected.

40 We should add that the appellants did not seek to rely upon any "holding out" by Mrs Warner of her husband. Such a submission would turn on their head the facts, and their appearance to those who boarded the vessel. Nor was the

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doctrine of "general reliance" pressed. The existence of such a doctrine was denied by a majority of this Court in *Pyrenees Shire Council v Day*¹³ and, in any event, appears to have been concerned only with the liability of public authorities.

Orders

41 The appeal should be dismissed with costs.

13 (1998) 192 CLR 330 at 343-344 [18]-[19], 385-388 [157]-[165], 408-412 [225]-[232].

42 GAUDRON J. The respondent, Mrs Warner, was the holder of the certificate of registration of the *N'Gluka* under the Water Traffic Regulations (NSW) ("the Regulations"). The *N'Gluka* was a 36-foot motor boat which, on 8 January 1990, sank in Port Stephens. Five children who were passengers on the boat drowned. One of the children was Amanda Frost. The appellants, members of her immediate family, brought proceedings in the District Court of New South Wales claiming damages for nervous shock.

43 So far as is presently relevant, the District Court proceedings were brought against the respondent and her husband, Mr Warner. It is no longer in issue that her husband was the owner of the *N'Gluka* and that it sank whilst under his control. At first instance, Garling DCJ held that Mr and Mrs Warner were each liable to the appellants in negligence and awarded damages against them.

44 Mrs Warner, but not Mr Warner, appealed to the Court of Appeal of the Supreme Court of New South Wales from the decision and orders of Garling DCJ. The appeal was allowed and, in the result, an order was made dismissing the actions against her. The appellants now appeal to this Court.

Relevant findings at first instance

45 At first instance, Garling DCJ found that the *N'Gluka* had 49 passengers on board when it sank and that it sank because it was "grossly overloaded". His Honour held that its sinking was foreseeable and that Mr Warner was negligent in that he knew or should have known that the boat was overloaded.

46 So far as concerns Mrs Warner, Garling DCJ held that, having allowed herself to be registered controller under the Regulations and having authorised her husband to navigate the vessel, she was vicariously liable for his negligence. Additionally, his Honour held that she was personally negligent in that she "should have taken steps as registered controller to ensure that the vessel did not leave the dock with that number of persons on board". In this last regard, his Honour found that Mrs Warner had had experience with boats over a number of years, knew or should have known how many people were on board and, also, should have known that the vessel was grossly and dangerously overloaded.

Decision of the Court of Appeal

47 It was held in the Court of Appeal that there was no evidence that Mrs Warner had authorised her husband, the owner of the *N'Gluka*, to navigate the vessel on the day of its sinking and that the Regulations imposed no liability on her, as registered controller, for his negligence. Accordingly, in the view of the Court of Appeal, she could not be held vicariously liable for her husband's negligence.

48 So far as concerns the finding of Garling DCJ that Mrs Warner was personally negligent, the Court of Appeal held there was no evidence that Mrs Warner knew or should have known that the vessel was grossly and dangerously overloaded. The appeal was allowed and the actions against her dismissed on the basis that:

"the regime of which holding a certificate of registration is part does not create civil liability, and Mrs Warner's being the holder of the certificate of registration did not give rise to a personal duty of care any more than it made her liable for the negligence of Mr Warner. To make good the finding that she should not have allowed the vessel to sail with the number of people on board, the [appellants] would have had to prove at the least that she knew, or ought to have known, that the vessel was overloaded, and that in that knowledge she could have done something to prevent the vessel from sailing. This they failed to do."

The Regulations

49 Part II of the Regulations, as they stood in January 1990, was directed to ensuring that vessels in enclosed waters would not be used in a way that would constitute a danger or annoyance to members of the public. Thus, for example, reg 3(1) provided:

"A person shall not navigate a vessel on any enclosed water recklessly or negligently, or at such a speed, or otherwise in any way that is dangerous to or likely to cause injury ... to ... any member of the public."

Part II was not concerned solely with the obligations of the person who was navigating or was in physical control of a vessel in enclosed waters. Thus reg 5 provided:

"A person whilst using a vessel for any purpose on any enclosed water, whether as the master, or a member of the crew, or as a passenger, or as an aquaplaner or a water skier towed by any means by such vessel, or otherwise, shall not (by his use of such vessel or otherwise) cause any annoyance, nuisance or danger to any person or danger to any property."

50 Part III of the Regulations made provision with respect to the registration of vessels and the granting of various permits and licences. Regulation 11(2) provided:

"A person who controls a registrable vessel may apply to [The Maritime Services Board of New South Wales] for registration of such vessel."

By reg 2(3) it was provided that:

"A reference in these Regulations to a person who has the control of a vessel is a reference to a person who has the right to decide the possession, disposition and use of the vessel."

51 It was pursuant to reg 11(2) that Mrs Warner was registered as the controller of the *N'Gluka*. As such, she had certain administrative duties, including the affixing of the registration plate to the vessel¹⁴, and the return of the certificate of registration upon the expiration or cancellation of the registration¹⁵. By reg 11(7)(a)(i), she was required, in the event that she ceased to control the *N'Gluka*, to "supply to the [Maritime Services] Board the name and address of the person to whom control of the vessel ha[d] been transferred and the date of such transfer".

52 Regulation 11(11), which is central to these proceedings, provided:

"Any person who navigates a registered vessel, or who, having custody of the same, permits or suffers such vessel to be navigated, without the authority or consent of the holder of the certificate of registration for the vessel shall be guilty of an offence against this regulation."

The evidence

53 The evidence was that Mr Warner paid for the *N'Gluka* and that it was never intended that Mrs Warner should have any beneficial interest in it. Moreover, Mr Warner exercised actual control over the vessel and its navigation at all times following its purchase in October 1988. It seems that Mr Warner filled in the form for the *N'Gluka*'s registration under the Regulations and that the form was thereafter signed by Mrs Warner. On two subsequent occasions, Mrs Warner signed the relevant forms for renewal of the registration.

54 So far as concerns Mrs Warner's signing of the application for the *N'Gluka*'s registration and the forms for its renewal, she claimed that she was simply complying with her husband's request, as she had regularly done in relation to various companies with which her husband was associated, without concerning herself as to what was involved. More precisely, Mrs Warner denied that she knew that registration gave her any rights or responsibilities with respect to the *N'Gluka*. She accepted that she "never bothered to find out".

55 In her evidence, Mrs Warner denied any knowledge as to the precise number of people on the *N'Gluka* on the day in question. However, she was on board when, earlier in the day, the vessel had departed from Soldiers Point with

14 Regulation 11(6)(a).

15 Regulation 11(6)(d).

various guests who were going to a restaurant, the Oyster Barn, for lunch. On the journey to the restaurant, Mrs Warner moved through the vessel serving savouries to the guests. She joined the other guests for lunch at the Oyster Barn and returned to the boat for its return, with the various guests, to Soldiers Point.

56 There was evidence that, as at January 1990, Mrs Warner had held a boating licence for nearly five years. She was familiar with the *N'Gluka*, having been on it on several occasions. She knew that there was seating for nine persons on the fly bridge and for another nine in the kitchen area and that it had six berths. She agreed in her evidence that she knew that there was "not anything like 20 life jackets on board". She also accepted that she knew it was dangerous for a boat to be overloaded.

Vicarious liability

57 Notwithstanding the evidence, it is properly to be inferred from the fact that the *N'Gluka* was and remained registered in Mrs Warner's name, that Mr Warner had conceded to her the right, in terms used in reg 2(3), "to decide the possession, disposition and use of the vessel". It is also properly to be inferred from the fact that at all times Mr Warner exercised actual control over the *N'Gluka*, that Mrs Warner had conferred on him a general right to use the vessel as he saw fit.

58 The evidence that Mr Warner was the owner and always exercised actual control over the vessel serves a further purpose. That evidence makes it impossible to infer that Mrs Warner specifically authorised use of the *N'Gluka* on the day of its sinking or that Mr Warner was on that day navigating the boat on her behalf, whether as her servant, agent or in any other capacity. That being so, there is no basis on which Mrs Warner could be held vicariously liable for her husband's negligence.

Actual negligence

59 The claim made against Mrs Warner, personally, is that she was negligent, on the day the *N'Gluka* sank, in that she failed to exercise her power, as registered controller, to prevent its setting off on its return journey. More precisely, it is put that, as registered controller, she should have withdrawn her husband's general authority to have possession and use of the vessel.

60 A duty to take positive steps to prevent a foreseeable risk of injury only arises if there is a relationship which gives rise to that duty¹⁶. The relationship

16 See, generally, *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685-687 per Mason J (with whom Deane and Dawson JJ concurred); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 479 per Brennan J, 502 per Deane J; (Footnote continues on next page)

may come into existence because of the known vulnerability of the persons who are at risk of being injured and the power of the person against whom the duty is asserted to control the situation that gives rise to the risk of injury¹⁷.

61 In the present case, there was ample evidence from which the trial judge might properly infer that Mrs Warner knew the approximate number of people on board the *N'Gluka* and, also, that she knew or should have known the vessel was overloaded. There was, thus, evidence from which his Honour might properly infer that she was or should have been aware that the passengers on the *N'Gluka* were in a position of vulnerability. The more difficult issue is whether Mrs Warner was in a position to control the situation which put those passengers at risk.

62 The first question that arises is whether, in the face of her evidence that she did not know that she had any rights or responsibilities with respect to the vessel, it can be said that she was in any position at all to control the situation on the *N'Gluka* on the day of its sinking. And if that question is decided against Mrs Warner, there is the further question whether the withdrawal of Mr Warner's general authority to have possession and use of the *N'Gluka* would have made any difference. The latter question is not simply a question of causation; it goes also to the question whether, in fact, Mrs Warner did have control of the situation.

63 So far as concerns the first question that arises with respect to control, Mrs Warner cannot, in my view, escape liability on the basis that she did not

Hawkins v Clayton (1988) 164 CLR 539 at 553 per Brennan J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368-369 [102] per McHugh J; *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 at 1060 per Lord Diplock; *Horsley v MacLaren* [1972] SCR 441 at 461-462 per Laskin J.

17 See *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 362 [81] per Toohey J, 372-373 [115]-[116] per McHugh J, 420-422 [247] per Kirby J; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194-195 [12]-[14] per Gleeson CJ, 202 [41]-[42] per Gaudron J, 236 [149]-[151] per McHugh J, 259-260 [215]-[217] per Gummow J, 289 [296] per Kirby J, 326-328 [408]-[416] per Callinan J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 23-24 [42]-[43] per Gaudron J. See also *Stovin v Wise* [1996] AC 923 at 939-941 per Lord Nicholls of Birkenhead. As to vulnerability, see *Hill v Van Erp* (1997) 188 CLR 159 at 186 per Dawson J, 216 per McHugh J. As to control, see *Hill v Van Erp* (1997) 188 CLR 159 at 198-199 per Gaudron J, 234 per Gummow J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 389 [168] per Gummow J and the cases cited therein.

know that, as registered controller, she was in a position to decide the possession, disposition and use of the *N'Gluka*. As a general rule, a person who allows his or her name to go forward for some purpose for which the law provides should not be heard to say that he or she does not know what rights are thereby conferred or what obligations are thereby imposed. At the very least, a person who fails to make inquiry as to the rights or obligations involved should be fixed with constructive knowledge of them.

64 Given that Mrs Warner accepted that she did not bother to find out what rights and responsibilities attached to her as registered controller of the *N'Gluka*, it should be held that she should have known that she could decide the possession and use of the *N'Gluka*. And it may be assumed, although it was not argued, that there was nothing in the terms of her conferral of general authority on her husband to prevent her withdrawing that authority immediately prior to the *N'Gluka*'s departure for its return journey to Soldiers Point. However, that does not determine the matter.

65 On the assumption that Mrs Warner could have withdrawn her husband's authority to have possession and use of the *N'Gluka*, it is a matter of pure speculation as to whether the vessel would then have departed on its return voyage to Soldiers Point. There was no evidence to suggest that Mrs Warner's withdrawal of permission to have possession or use of the *N'Gluka* would have affected her husband's decision to make the return journey and there is much in the evidence to suggest otherwise. In particular, Mr Warner regarded himself as the owner of the vessel and the person entitled to make all decisions with respect to it. He apparently did not think the *N'Gluka* was overloaded and, in any event, it had earlier crossed without incident from Soldiers Point to the Oyster Barn with the same number of passengers on board.

66 In the absence of evidence that Mr Warner would not have commenced the return voyage if his wife has asserted her rights as registered controller of the *N'Gluka*, it cannot be said that, in fact, Mrs Warner had any control over the situation which, tragically, led to the loss of life. That being so, she was under no duty of care to the appellants.

Conclusion and orders

67 The appeal should be dismissed with costs.

68 KIRBY J. This appeal concerns the duty of care owed to others for which the tort of negligence affords redress where a breach is proved that causes loss and damage.

The facts, issues and applicable legislation

69 The facts are stated in the reasons of Gleeson CJ, Gummow and Callinan JJ ("the joint reasons") and of Gaudron J. So are the reasons for the respective decisions of the primary judge in the District Court of New South Wales (Garling DCJ), who found in favour of the appellants, and of the Court of Appeal of New South Wales, which found against them.

70 In the Court of Appeal, the quantification of damages was not contested. As well, although the grounds of appeal on the issue of liability were broadly stated, the eventual contest was confined to whether the respondent, Mrs Warner, owed the appellants a duty of care. The issue of breach of duty, like damages, was not canvassed. Although, in this Court, by a notice of contention, the respondent sought to re-awaken from its slumber the issue of breach of duty, in my view, she should not be permitted to do so. I will, therefore, confine these reasons to the single issue: did the respondent owe the appellants a duty of care that sounded in damages for the breach?

71 Because the facts, issues, arguments and applicable provisions of the Water Traffic Regulations (NSW) ("the Regulations")¹⁸ are all set out elsewhere¹⁹, I am relieved of the obligation to repeat them. I have come to a conclusion different from the majority. I would restore the judgment of the primary judge. I will shortly say why.

72 The primary judge found that the cause of the accident that resulted in the sinking of the vessel *N'Gluka*, occasioning the loss and damage to the appellants, was the gross overloading of that vessel and, therefore, by inference, the commencement and continuance of its voyage in such a state. This finding was not challenged in the Court of Appeal. On the face of things those who, in law, are responsible for allowing a vessel to put to sea in a condition of gross overloading are liable to those who suffer any damage and loss as a consequence.

The status of "registered controller" under the Regulations

73 It may be accepted that the Regulations have nothing, as such, to say about the question of the title to the vessel. But title (in the sense of ownership)

18 Made pursuant to the *Maritime Services Act* 1935 (NSW), s 38.

19 Joint reasons at [19]-[31]; reasons of Gaudron J at [49]-[52].

and possession, represent only two bases for affixing legal responsibility to a person for a civil wrong done to another. The issue presented by the duty of care question is not the ownership or possession of the vessel, as such. It is the issue of power and responsibility. Did the respondent have the power and responsibility in the circumstances to prevent the damage and loss that occurred? Ownership and possession (or control of a vessel by its master) can answer such a question in the affirmative. But so, in a particular case, may other legal relationships – such as that here established by the Regulations.

74 Accordingly, the applicable question presented by the facts is whether, in the circumstances proved, the provisions and apparent purposes of the Regulations carry with them civil responsibility affixing to the "registered controller"²⁰ of the vessel liability for the consequences of setting to sea in circumstances of unsafe overloading of the kind that caused the loss and damage in issue in this case.

75 The respondent was undoubtedly the "registered controller" of the vessel under the Regulations. She was also on board the vessel at all material times and present as it was loaded with its passengers prior to its fateful journey. She must therefore be taken to be aware of the gross overloading of the vessel before it set to sea. Because of the terms of reg 11(11) of the Regulations, a registered vessel such as the *N'Gluka* could not be sailed without the authority or consent of the respondent as "registered controller". Accordingly, both by reason of this sub-regulation and the uncontested fact that the respondent was on board the vessel in its state of overloading, it may be inferred that those who navigated and sailed the vessel or who had custody of it (including the respondent's husband) and who permitted it to be navigated and sailed, did so with the respondent's express or implied authority and consent as "registered controller". Otherwise, they would have committed a criminal offence against the Regulations, an inference that would not readily be drawn in the circumstances. In my view, the inference of the respondent's implied authority or consent is irresistible.

76 The Regulations do not expressly provide that a "registered controller" is responsible in law for the damage and loss suffered by third parties as a result of negligence caused by, or arising out of, the use of the vessel. In this sense, the Regulations can be distinguished from the familiar statutory provisions imposing

20 As the joint reasons point out at [24], the term "registered controller" does not appear in the Regulations themselves. It is used in parentheses as a convenient shorthand, as used by the primary judge, to avoid repeating the phrase "[h]older of the certificate of registration for a vessel", as defined more fully in the Regulations, reg 2(1). See also reg 2(3), set out in the reasons of Gaudron J at [50].

legal liability upon nominated individuals, such as commonly appeared in legislation governing compulsory insurance in respect of motor vehicles²¹.

The relevant powers and responsibilities of the "registered controller"

77 It therefore remains to elicit from the entirety of the facts, including such duties as are imposed by the Regulations, the extent to which the common law imposed upon a "registered controller" of a vessel, such as the respondent, liability for loss and damage caused by the use of the vessel. In this respect it is natural enough to ask, as the primary judge did, "[w]hy a person is registered under the ... Regulations to be [the] registered controller if they have no responsibility in the control and/or operation of the vessel?" The words "controller" and "control" suggest precisely what they say – the "controller" is in "control" of the vessel. He or she is affixed by the law with the specified powers and responsibilities of "control". One obvious purpose of identifying and designating a person as such "controller" is to ensure compliance by a nominated person with the safety regime governing vessels on State waterways, subject to the Regulations. Safety was clearly a purpose of the Regulations. That can be seen from the type of subjects with which the Regulations dealt²². The need for safety on board vessels that carry passengers is self evident. The Regulations provide one means of ensuring such safety. They should not be given a narrow or restrictive interpretation. Nor should they be assigned a meaning that would defeat or undermine the achievement of that objective.

78 The respondent was not just another passenger on the vessel who happened to be its "registered controller" under the Regulations. By law, she assumed and enjoyed the power, and was subject to the consequent duties, that derived from that status. I agree, for the reasons given by Gaudron J²³, that the respondent could not escape legal liability on the basis that she did not know (and did not bother to find out) the entitlements she enjoyed by law as "controller" to decide the possession, disposition and use of a vessel such as the *N'Gluka*. The days in which a wife or other domestic partner of a person could sign documents, acquire a legal status at the behest of that person, and then

21 See eg *Motor Vehicles (Third Party Insurance) Act 1942 (NSW)*: *Genders v Government Insurance Office of NSW* (1959) 102 CLR 363; *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437 and *Motor Vehicle (Third Party Insurance) Act 1943 (WA)*: *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500.

22 See esp reg 11(10)(a)(i)-(v) set out in the joint reasons at [27].

23 Reasons of Gaudron J at [63]-[64].

disclaim legal responsibility when things go wrong have long since passed²⁴. This Court should not encourage their revival. When people acquire a legal status it typically carries not only advantages but also duties.

79 By the Regulations, the power devolving on the respondent upon her registration as "controller" included, relevantly, that of depriving her husband and owner of the vessel, Mr Warner, of command over the vessel before it set out on its fateful voyage. Because the respondent and her husband were both physically present on board the vessel, the respondent had the capacity to exercise that power at any time prior to departure and thus prior to the accident. In fact, she failed to do so. This fact does not absolve her from liability in accordance with the common law, the content of which is adapted to, and expressed in a way consistent with, the applicable statutory law in the form of the Regulations²⁵. We will never know what would have happened if the respondent had put down the savouries she was serving and exercised the duties which her status as "registered controller" permitted. I do not regard it as "pure speculation" to suggest that, had she done so, her husband would have proceeded on regardless²⁶. The one thing that is clear is that the Regulations contemplated that she had the power to withdraw his authority and her consent to his navigating the vessel. She failed to exercise and assert that authority. Indeed, she did not even know that it existed. She simply did as her husband asked - and that is conduct that contradicts the assumptions of the Regulations.

80 It is not to the point to demonstrate that another person, such as the respondent's husband, is also liable at common law as owner or master of the vessel. So much may be accepted. But those facts do not contradict the liability of the respondent for the failure to exercise *her* powers and to fulfil *her* duties as "registered controller". Such failure may render *her* personally liable in negligence where, as here, the failure resulted in a foreseeable injury to the appellants.

81 The joint reasons suggest that the flaw in the foregoing reasoning is that reg 11(11) does not confer "control" on the "registered controller" but is premised upon control²⁷. I disagree. The only way that a "registered controller" could protect himself or herself from breach of the Regulations is to impute a

24 cf *Metal Manufacturers Pty Ltd v Lewis* (1988) 13 NSWLR 315 at 321.

25 cf *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 60-63 [19]-[28], 83 [91]; *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570.

26 cf reasons of Gaudron J at [65].

27 Joint reasons at [33], see also at [32].

power to all "registered controllers" to exercise control to the exclusion of others. By applying to be "registered controller", the respondent asserted that she was entitled to be, and would be, in control of the vessel for the purposes of the Regulations. Those purposes included exercising control over those who assumed command of the vessel. Whatever doubts might have arisen as to her position, had she been absent from the vessel at the critical time, these can be set to one side in this case because she was actually present. At all times she was therefore in both a legal and practical position to exercise her powers and to fulfil the duties contemplated by the Regulations. The fact that she was unaware of those powers and duties is irrelevant. If she did not wish to assume such powers and duties, she should not have procured or permitted her identification as the "registered controller" of the vessel. The Court should not send a signal that people like the respondent can acquire a legal status and then completely ignore the consequences.

82 Far from supporting the contrary interpretation²⁸, the provisions of reg 11(10)(a) to which the joint reasons refer support the construction which I favour. That paragraph addresses the attention of the Board which registers the "controller" to the factual "control" of the vessel. If the respondent was not *in fact* in a position to exercise "control" in accordance with the Regulations, that was a reason to refuse, or cancel, her registration as "registered controller". But it had not been cancelled before the fateful voyage.

83 One reason why, in Australian domestic waters, there have been fewer reported instances of vessels sinking because of overcrowding, with loss of life and much suffering, is that Australian waterways and vessels navigated upon them are subject to rigorous legal regulation. Such regulation is designed, amongst other things, to promote the safety of those who travel on our waterways. The Regulations are part of this fabric of legal regulation. They should not be construed as toothless provisions such as exist in other countries and help to explain the repeated instances of serious shipping mishaps that are reported, with grave loss of life. The Australian Regulations should be interpreted as having, and being intended to have, a real impact, relevantly, on passenger safety. The construction of the Regulations by the primary judge helps achieve that end. That adopted by the Court of Appeal defeats the attainment of safety. It rewards legal fictions, complacency and indifference. I am with the primary judge.

28 As the joint reasons suggest at [33].

The failure to exercise the powers contributed to the loss and damage

84 Because the primary judge made an express finding that what had occurred met the undemanding test of foreseeability²⁹, and because that conclusion was fully supported by the evidence of the expert whose testimony his Honour preferred (to the effect that overloading of the vessel was "visibly observable" and "an obvious sign of danger") the duty of the respondent as "registered controller" was sufficiently enlivened. The liability of the respondent did not derive from her failure to wrest the steering wheel of the vessel from her husband or her failure to stop him increasing the speed of the vessel dangerously. Nor did it arise, as such, from any conduct on her part in loading the vessel. It arose at a point anterior in time. She was the "registered controller" of the vessel. In its condition of overloading, she had the power to stop it from putting to sea. She failed to exercise that power given to her by law. That failure constituted direct evidence of negligence on her part. It caused, or contributed to, the loss and damage alleged. It was not necessary to show that it was the sole cause or that its causative effects manifested themselves immediately, as the respondent suggested. It was enough to show, as was found, that it played a relevant causative part.

85 The appellants did not have to prove more. They proved what was necessary to the issues for trial. They were therefore entitled to recover against the respondent, whatever other rights they enjoyed against other persons, such as the respondent's husband. It follows that the Court of Appeal erred in disturbing the primary judge's judgment and in entering judgment in the respondent's favour.

Orders: verdicts restored

86 The appeal should be allowed with costs. The judgment of the Supreme Court of New South Wales (Court of Appeal) should be set aside. In place thereof, it should be ordered that the appeal to that Court be dismissed with costs and the primary judgment restored.

29 cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44 applying what Glass JA had said in *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 642.