

Condelli v Investnorth Pty Ltd [2000] NTSC 85

PARTIES: CONDELLI, RAYMOND

v

INVESTNORTH PTY LTD
(ACN 009 628 497)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: CIVIL

FILE NO: ALICE SPRINGS No. 84 of 1996

DELIVERED: 10 October 2000

HEARING DATES: 3, 4, 5 and 6 July 2000

JUDGMENT OF: ANGEL A/CJ

REPRESENTATION:

Counsel:

Plaintiff: G R Algie
Defendant: P F McIntyre

Solicitors:

Plaintiff: Morgan Buckley
Defendant: Ward Keller

Judgment category classification: C

Judgment ID Number: ang20007

Number of pages: 8

IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS
No. 84 of 1996

Condelli v Investnorth Pty Ltd [2000] NTSC 85

BETWEEN:

RAYMOND CONDELLI

Plaintiff

AND:

INVESTNORTH PTY LTD (ACN 009 628 497)

Defendant

REASONS FOR JUDGMENT

(Delivered 10 October 2000)

ANGEL A/CJ:

- [1] This is an action for damages for personal injuries suffered by the plaintiff as a consequence of the alleged negligence of the defendant.

- [2] In 1995 the defendant was the owner and occupier of the Plaza Hotel in Alice Springs. At the time the plaintiff was a part owner and performer in a band called "One Step Ahead" which had contracted to perform at the defendant's hotel. The band performed for three weeks in October 1995. The original contract was for a period of six weeks but the contract was, by mutual agreement, terminated early. The plaintiff and other band members were accommodated at the hotel at the time of the incident giving rise to the plaintiff's claim.

[3] On the afternoon of 5 November 1995 the plaintiff, his then girlfriend Julie Eversden, and band member, Nigel Coppin, were by the pool at the Plaza Hotel. The oblong shaped pool runs roughly north/south. On the western side of the pool was a grassed area to the west of which was a garden plot. The plaintiff and his friends were on three deck chairs on the western grassed area, the deck chairs being perpendicular to the western side of the swimming pool.

[4] The essential facts upon which the plaintiff relies in maintaining his cause of action in negligence are pleaded in paragraph 4 of the further amended Statement of Claim as follows:

“At approximately 4.30pm on 5 November 1995 the plaintiff was relaxing on the western side of Plaza’s pool. As the plaintiff stood up to leave the pool area he stood in a hole in the grass adjacent to the pool and fell sustaining injury to his back. The plaintiff had been reclining in a deck chair and fell after he had moved slightly away from the deck chair and took a step backwards.”.

[5] The plaintiff pleaded negligence against the defendant in paragraph 6 of his further amended Statement of Claim as follows:

“Plaza by its servants, agents or employees was negligent in that it:

(a) Allowed a hole to exist in the ground area on the western side of and adjacent to its pool;

- (b) Allowed grass to grow over the hole to the same height as the level area of grass so as to disguise its existence;
- (c) Failed to give any or adequate warning that the hole existed;
- (d) Allowed or permitted its guests to utilize the said grassed area when it knew or ought to have known that a guest may step in the hole sustaining injury;
- (e) Failed to cordon off the said hole;
- (f) Failed to institute and supervise a maintenance program to locate the defect in the grassed area namely the hole and to repair the hole;
- (g) Senior employees failed to instruct other of Plaza's servants, agents or employees to check the level of the grassed area and to make any repairs to level the said grassed area.”.

[6] In the present case there is a sharp divergence of evidence. According to the plaintiff, Ms Eversden and Mr Coppin, after getting up from their deck chairs, the plaintiff and Ms Eversden were standing on the lawn area near the deck chairs when having kissed Ms Eversden, the plaintiff stepped backwards with his left foot and fell to the ground on the left side of his back. According to these witnesses the fall was caused by him stepping into what was identified as a “hole” in the lawn area. Varying accounts were given as to the nature and depth of the “hole”. Some witnesses said it was

difficult to see and evidence was given that the grass in the “hole” was the same height as the grass surrounding it. The “hole” was investigated on 8 November 1995, and a video was taken of the area. The presence of the “hole” was demonstrated on the video by Mr Coppin who stood in the “hole”.

- [7] A quite different account was given by the witness Mr Alexander Wolf, an employee of the defendant at the time. His evidence was that he was in a position at the far end of the north east side of the pool and that at the relevant time at about 4.30 pm he was observing the plaintiff, whom he knew as Ray, and the young woman Julie, whom he understood to be the plaintiff’s girlfriend. He said he saw them sitting on deck chairs on the western side of the pool about one third along the pool’s northern side. He is unsure whether someone else from the band was also present. Mr Wolf said he saw Julie stand and wrap a towel around her and that Ray also stood up and grappled with her. He said the couple danced around as Ray appeared to be forcing Julie in the pool and she appeared to be resisting. In the course of the struggle Mr Wolf said Ray managed to throw Julie into the pool and in doing so fell into the pool himself. He says that Julie climbed out of the pool dragging her wet towel with her after a short time but that the plaintiff remained in the pool for some minutes. He says that he then observed the plaintiff climb out of the pool and slowly drag himself across the paved edge of the pool and on to the lawn, eventually lying prone on his stomach at an angle to the western edge of the pool with his feet still over

the surface of the water. Mr Wolf says he approached the plaintiff and said words to the effect “Are you OK? Is there anything I can do?” and that the plaintiff replied “No, it’s OK, I have hurt my back. I will be alright shortly. It has happened before.”. He says he thereafter returned to his work position at the bar adjacent to the pool.

- [8] In the course of his evidence Mr Wolf was shown the video footage showing Mr Condelli standing in the “hole”. Mr Wolf said “I would call this an undulation. I can still see the man’s feet.”.
- [9] Counsel for the defendant submitted that the plaintiff, Ms Eversden and Mr Coppin all deliberately gave false evidence when giving an account of the circumstances of the plaintiff’s fall. Both the plaintiff and Ms Eversden denied the incident described by Mr Wolf. Ms Eversden stopped having a relationship with the plaintiff following an unhappy breakup after the subject incident. Mr Coppin last played in the plaintiff’s band in August 1998 and had no interest or motive in giving false evidence. It was never squarely put to the plaintiff or his witnesses that they had agreed to lie about the incident of which they gave evidence.
- [10] Notwithstanding the support the plaintiff had for his version of the incident I am unable readily to discount Mr Wolf’s evidence. He gave a forthright account of what he said he saw. He was plainly an honest witness. Part of Mr Wolf’s responsibility was to report any hazards to the safety of guests or members of the Plaza Club that he may have observed at or in the vicinity of

the pool area at the Plaza Hotel. Identified hazards would in the ordinary course be reported to the maintenance department for rectification. At the time a man called Ivor worked at maintenance. Exhibit “P16” is a handwritten note containing the name “Ivor” with a phone number. The note signed “Alex” was written by Mr Wolf. Mr Wolf was unable to give an account of how or why the plaintiff was in possession of the note or how it was that he had written the note. Ivor was not called as a witness. However all this as may be, I am unable, or if able, unwilling, to draw any adverse inference against the defendant arising from Exhibit “P16”.

[11] As was his duty Mr Wolf prepared a security report in relation to his observations. This was Exhibit “D15” which states in part:

“At approximately 16.30 hours while on duty in the hotel swimming area I observed a member of the resident band, OSA, engaged in an act of horseplay with his friend (Julie). His name is (Ray). The pair wrestled at the edge of the pool and resulted in Julie being thrown into the pool. I later spoke to Ray who complained of a painful back.”.

The report is undated. As counsel for the plaintiff submitted the report makes no mention of the plaintiff falling into the pool, of the plaintiff climbing with his hands out of the pool or of the plaintiff lying on the edge of the pool. It was submitted that Mr Wolf’s security report was consistent with an earlier incident described by the plaintiff where he pushed Julie

into the pool and of Mr Wolf speaking to the plaintiff later when he had fallen on to the lawn area. However I am unable to accept that submission as the report clearly places the alleged act of horseplay at approximately 16.30 hours.

[12] Supported as it is by his contemporaneous record I am unable to reject Mr Wolf's account as false or as his having confused, transposed or reconstructed events. I reject counsel for the plaintiff's suggestion that Mr Wolf, recognizing that he had failed in his responsibility in arranging for the "hole" to be fixed, had used an earlier incident by the pool in an endeavor to explain the plaintiff's injury as having occurred in circumstances outside any responsibility or blame upon Mr Wolf, and thus the defendant.

[13] Given Mr Wolf's evidence, the manner in which he gave it, and his report D15, I am unable to find that the incident as described by the plaintiff and his then friends occurred more probably than not.

[14] Varying evidence was given concerning the dimensions and nature of the "hole" referred to in the plaintiff's pleadings. I agree with Mr Wolf's description that the so called "hole" was nothing but an undulation ordinarily to be found in poolside lawn areas. I reject the plaintiff's evidence that the grass at the bottom of the undulation was so long it would hide a golf ball or even a tennis ball. There was no hidden hole. The depression was about a metre in radius, evenly sloped and of a depth from

its centre to its rim of less than the height of an ordinary running shoe. Contrary to the evidence of the plaintiff, and to the pleadings, Mr Coppin described the length of grass across its entire “diameter” as approximately 2 centimetres which is consistent with the tendered video. I accept this evidence in preference to that of the plaintiff and of Ms Eversden.

[15] I am of the opinion and finally conclude that the depression in the lawn was not a danger or a foreseeable risk of injury to ordinary users of the poolside area. If I am wrong in this, the depression in the lawn was no more than an every day risk of danger which ordinary users of the poolside facilities would ordinarily and easily deal with in taking care for their own safety. I am of the opinion that a finding of negligence in this case would be contrary to ordinary expectations and standards and would assume an unrealistically high standard of care to protect other persons from danger. It would also assume an unrealistic level of foreseeability. Concluding as I do that the undulation in question constituted an ordinary undulation in the surface of a poolside recreational lawn the plaintiff’s claim must inevitably fail.

[16] The plaintiff’s claim is dismissed with costs.