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RECREATION, MUSIC AND DUTY OF CARE: *FARISS V AXFORD*

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I INTRODUCTION

It is well-established that a duty of care may be owed in a recreational setting.[1] The case of *Farriss v Axford*[2] involved a plaintiff, Tim Farriss, who injured his hand while endeavouring to secure an anchor on a boat he had chartered from the defendant, John Axford. The first issue was what actually caused the injury, and whether there had been a breach of a duty of care. However, as the plaintiff was a founding member of well-known Australian band, INXS, the case also involved the issue of what economic damages, if any, should be awarded, taking into consideration the fact that the injury Farriss suffered prevented him from playing the guitar and therefore plying his trade.

II *FARRISS V AXFORD*

A *Background Facts*

John and Jill Axford owned a 10.3m clipper named 'Omega' which they had purchased in 1992. It was then hired out on their behalf by Church Point Charter (CPC). On 23 January 2015 Tim Farriss, lead guitarist with the band INXS, hired the boat in order to cruise around Pittwater over the Australia Day long weekend.[3] On the following day he took the boat around to Akuna Bay and, while setting up anchor there, the chain of the anchor fell off the boat's gypsy. The gypsy holds the chain when it is on the deck. Farriss then lifted the chain back into the gypsy, noticing as he did that the motor for the anchor had stopped. He therefore rang CPC for assistance and was advised on how to reset the circuit breaker. After managing to restart the motor, Farriss decided to bring up the anchor so he could move closer to the Akuna Bay marina.[4] Once there, he moved to the area of the deck close to the gypsy, placing his foot on the up button in order to raise the anchor. However, as the chain kept kinking, Farris took his foot off the up button to stop the winch before manipulating the chain with his left hand in order to straighten it. He repeated the procedure a number of times, but on the last occasion he injured the fingers on his left hand when it became caught between the chain and the gypsy. As a result of the injury Farris was no longer able to play the guitar.[5]

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[1] See for example *Langham v Connell Point Rovers Soccer Club Inc* [2005] NSWCA 461; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.
[2] *Farriss v Axford (No 3)* [2022] NSWSC 20.
[3] Ibid, [12].
[4] Ibid, [14].
[5] Ibid, [16].

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He commenced legal action against the owners of the boat and CPC, alleging breach of a duty of care. Montana Productions Pty Ltd, which received 'income through the plaintiff's creative endeavours' was the second plaintiff. Farriss, and his wife, Bethany, were both directors of Montana.[6] A six-day trial took place in September 2021, though there were two earlier interlocutory judgments regarding practice and procedure matters.

B *The Interlocutory Judgments*

The first interlocutory application[7] involved the plaintiffs seeking leave to file an amended statement of claim. The proposed amendments were in regard to incorporating opinions contained in reports made by Professor David Lyons and Geoff Grosskreutz regarding liability.[8] The plaintiff's explanation was that Grosskreutz's report was not based solely on an inspection made on 12 March 2015, 'but also on material that has come into existence, or become available to the plaintiffs, after the commencement of the proceedings.'[9] It was also stated that 'some of the amendments were consequent upon the report of Professor Lyons, whose inspection took place after commencement of proceedings.'[10] The defendants' opposed the application on the grounds that they had suffered actual prejudice, that the amendments amounted to a new cause of action, and that a number of paragraphs were futile. While Justice Harrison acknowledged 'the defendants may suffer some presumptive prejudice,' he granted leave to amend the statement of claim.[11]

The second interlocutory application[12] involved the issue of privilege.

In the course of preparing their case the plaintiffs had served a subpoena on CPC 'seeking access to various documents including all records, correspondence, insurance claim forms, witness statements and other documents.' CPC then claimed privilege in relation to two statements made by Niels Storaker, a director of the company.[13] One of the statements had been made shortly after the accident, the second within nine months of it.[14] The defendant's claim of privilege in relation to those two reports was challenged by the plaintiffs. This however was rejected by Justice Harrison who held that the statements had been obtained as part of the investigation 'for the dominant purpose of either providing legal advice or for the dominant purpose of the client being provided with professional legal services in relation to these proceedings.'[15]

[6] Ibid, [2]-[4].
[7] *Farriss v Axford* [2019] NSWSC 1085.
[8] Ibid, [16].
[9] Ibid, [17].
[10] Ibid.
[11] Ibid, [69].
[12] *Farriss v Axford (No 2)* [2021] NSWSC 1055
[13] Ibid, [7].
[14] Ibid, [10].
[15] Ibid, [22].

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C *The Trial*

The first issue in the case was how the injury might have happened.[16] In his first statement Farriss had stated that at the time of the injury 'the anchor was partly retrieved and the boat was at risk of drifting and running aground.' He therefore took his foot off the up button and had straightened the chain with his left hand. He had then reactivated the up button, but the winch had stopped. Farriss stated that he had kept his left hand near the chain to ensure it did not come off the gypsy when the winch had suddenly started working again. The chain then 'grabbed his hand and pulled it between the chain and the gypsy' and it was this that caused the injury to his fingers.[17]

However, it was noted that in a later affidavit there were some significant differences in his evidence. The first was in relation to where the kinking occurred, as in the statement he had said that it was when the chain came over the bowsprit while in the affidavit he had said that it was after it had passed through the gypsy.[18] During cross-examination he settled on the latter version. Another difference was in regard to where he was actually standing when his fingers were caught as in the affidavit he had stated he had been operating the buttons from the right side. However, he had earlier stated that immediately before the accident he had 'decided quite deliberately to move to the left side to avoid standing on either deck button.' A third difference was in regard to the positioning of his hands with Justice Cavanagh noting 'he seemed uncertain and gave inconsistent evidence'[19] though during cross-examination he settled on what he had stated in his original statement.[20]

Justice Cavanagh then stated it was 'most difficult to understand why there were these errors or differences in his statement and affidavit'[21] and while Farriss described the affidavit as a clarification in regard to the position of his left hand, it was in fact a change.[22]

Farriss' wife, Bethany, also gave evidence, her testimony being that she had recalled her husband 'going back and forward into the cabin complaining that the chain kept stopping' and that he had tried to 'fix things a few times.'[23] She also recalled 'him being on the left side of the boat leaning forward' at the time of the accident and that, 'there was no way he could have had his feet in the area where the buttons were.'[24] A further witness was John Thorogood, another boat owner who was at Akuna Bay at the time of the accident. He testified that Bethany Farriss had called out to him immediately after the

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[16] *Farriss v Axford (No 3)* [2022] NSWSC 20, [28].
[17] Ibid, [35].
[18] Ibid, [38].
[19] Ibid, [46].
[20] Ibid, [48].
[21] Ibid, [61].
[22] Ibid, [107].
[23] Ibid, [64].
[24] Ibid, [67].

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accident and that he had swum over. Once there he found that when he pushed the deck buttons he could hear the motor, but that the gypsy was not going round which meant 'the clutch was not engaging.' However, once he used the handle to tighten the clutch, the chain came up without any problems when the up button was activated.[25]

John Axford also gave a statement providing details of the boat's service and maintenance, and how the winch for the anchor operated.[26] What the defendants maintained was that the system was working as it was intended to. Thus, the reason the chain moved was due to Farriss treading on the up button since there 'was no danger to anyone trying to unlink the chain' as long as no-one pushed one of the switches while holding the chain.[27]

Expert evidence was used by both parties in regard to what had caused the accident, Farriss relying on Professor David Lyons, a naval architect, while the defendants relied on Dr Robert Casey, a mechanical engineer. A joint report was prepared and both experts 'gave concurrent evidence'[28] with both experts agreeing 'that if the chain kinks and jams and prevents the gypsy from rotating, this will be accompanied by the tripping of the circuit breaker.'[29] The experts noted that one way to stop the kinking was to install a chain stripper, with Professor Lyons testifying the reason for the clutch disengaging was 'due to wear from the continuous load placed on it due to the absence of an allegedly required chain stripper.'[30] Evidence was also presented that, for the winch motor to operate, there needs to be electricity coming from the battery, which requires one of the buttons on the deck to be closed. Justice Cavanagh therefore noted there were only two explanations for what happened, either there was a defect or malfunction in the componentry and circuit, or 'someone depressed the foot switch on the deck causing the circuit to close.'[31] The evidence of the experts was that there was 'no evidence of any electrical malfunction'[32] and thus the only explanation was that Farriss must have depressed the deck button.[33] Justice Cavanagh then stated this was the 'obvious explanation.'[34]

The next issue was whether the accident was caused by the defendants' failure to take reasonable care with the claims of a breach of a duty of care including a failure to instruct Farriss in regard to the operation of the anchor system, and a failure to maintain and upgrade the system.

[25] Ibid, [75]–[76].
[26] Ibid, [80].
[27] Ibid, [31].
[28] Ibid, [86].
[29] Ibid, [91].
[30] Ibid, [30].
[31] Ibid, [102]
[32] Ibid, [103]
[33] Ibid, [105].
[34] Ibid, [120].

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Justice Cavanagh noted that it was relevant in regard to these claims that the Axfords had owned the boat for 23 years before the accident and that there 'was no evidence of any earlier accidents, claims or real problem with the anchor system.' Storaker's evidence meanwhile was 'that boat had been chartered two hundred times since the accident without incident.'[35] In regard to the claim that the 'instruction and induction' had been inadequate[36] Justice Cavanagh noted that Farriss 'by his own words and conduct demonstrated what the real danger was and that he was aware of it.'[37] Thus, it was held that prior to the accident Farriss 'was aware of the matters about which he says he should have been informed prior to the accident.'[38]

In regard to the maintenance and upgrade claim, while Justice Cavanagh accepted 'that both the chain stripper and additional spurling pipe could have been installed'[39] he held that 'an exercise of reasonable care did not require it.'[40] Nor would a reasonable person have seen the need to modify a winch system that had been installed 'for over twenty years, apparently without incident or compliant, so as to add a new component not ever recommended by any repairer or maintenance person.'[41]

While it was held that there had been no breach of a duty of care, Justice Cavanagh still investigated the issue of what the damages would have been, had there been such a breach. The first determination was in regard to non-economic loss with Justice Cavanagh taking into consideration that Farriss underwent surgery on his left hand which then required 12 months physiotherapy though he had still suffered pain in that hand. Evidence from a psychiatrist that Farriss was suffering from chronic adjustment disorder was also accepted. Justice Cavanagh however stated that '[i]n the range of injuries that come before this Court the plaintiff's injuries are not in the severe category. He had not lost the use of his hand and does not suffer from a severe psychiatric condition.'[42] While Farriss had submitted 'that he should be assessed at 45% of the most extreme case, Justice Cavanagh assessed it at 33% which amounted to the sum of $229 000.[43]

In regard to economic loss, Justice Cavanagh stated that '[t]he key factual issue is whether I should accept that INXS would have toured after the date of the accident.' The reason for this was that Farriss' economic loss claim was based on this, and not royalties. He further stated that 'the claim is really akin to a claim for a loss of a chance that INXS would tour again and the loss of chance that any tours would be lucrative.'[44] In regard to

[35] Ibid, [162].
[36] Ibid, [177].
[37] Ibid, [185].
[38] Ibid, [187].
[39] Ibid, [208].
[40] Ibid, [227].
[41] Ibid, [229].
[42] Ibid, [251].
[43] Ibid, [254].
[44] Ibid, [275]

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this claim Farriss relied on the expert evidence of Paul Gronsbell-Luntz who was described as being 'not only an expert accountant but a specialist in the music industry.'[45] The defendants meanwhile relied 'on a report made by Lance Kahler of Vincents.'[46]

Gronsbell-Luntz's evidence included that Queen was 'a good comparator'. One reason being was that like INXS, they had to replace an iconic lead singer, in Queen's case, Freddie Mercury, while for INXS it was Michael Hutchence. Reference was also made to other bands who had started at around the same time as INXS and were making, or had made comeback tours. These included the Eagles, Duran Duran, Fleetwood Mac and Midnight Oil. Gronsbell-Luntz also noted there was potential to derive income from music platforms or streaming services, pointing out that artists may enter into agreements to receive payments such as $5000 per million hits on, for example, Spotify, and noting that Queen had recorded 1.4b hits for Bohemian Rhapsody after the release of the movie of the same name.[47]

While the two experts provided a joint report, it was acknowledged by Justice Cavanagh that 'they did not agree on much.'[48] This was illustrated in the suggested amounts for the estimated losses, Gronsbell-Luntz suggesting a figure of $564 000 while Kahler calculated it to be between $54 000 and $172 371. The discrepancy in the figure was due to differences in opinion as to how many tours INXS would have been made, the loss amounting from each of those foregone tours, and the amount of tax that would have had to be paid on the income that they may have generated.[49]

After examining the evidence of both experts, Justice Cavanagh accepted that INXS 'would have probably have toured again' and that 'it may have been likely that there would have been a major tour around 2017.'[50] The loss of earnings from this major tour were assessed at $200 000 while the figure for a smaller tour was $80 000, these being based on figures from previous INXS tours.[51] After taking tax into consideration, Justice Cavanagh assessed the damages of $199 000 for past losses, and $139 000 for losses in the future.[52]

It was noted that, while there was no claim for loss of royalties relating to old songs, Montana Productions did make a claim for damages relating to 'potential increase in

[45] Ibid, [267].
[46] Ibid, [285].
[47] Ibid, [268].
[48] Ibid, [286].
[49] Ibid, [287].
[50] Ibid, [305]. In regard to this issue Justice Cavanagh noted that it was 'puzzling that the plaintiff did not call evidence from other members of INXS in his case' but noted that it was 'important to emphasis the limits of a *Jones v Dunkel* inference.' Justice Cavanagh then stated that the 'only inference I can draw is that evidence from other members of the band would not have made the plaintiff's case any better': at [276]-[277]. Justice Cavanagh noted that '[i]n assessing damages for future loss of earning capacity, I must apply s 13 of the CLA'.
[51] Ibid, [313].
[52] Ibid, [321].

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royalties consequent on touring.'[53] The amount claimed was for $200 000,[54] but was assessed at $40 000. It was also acknowledged that a figure of $55 000 had already been agreed on for past and future treatment and care.[55] Thus, if Farriss had succeeded in his claim, the damages that would have been awarded was $622 000.[56]

III Discussion

The first two issues in the case involved the cause of the injury and whether there had been a breach of a duty of care in a recreational situation, namely, the hiring of a boat. Expert evidence was used to establish what had most likely caused the injury and also that there had been no breach of a duty of care. While the two experts came from different backgrounds, one being a naval architect, the other a mechanical engineer, the court accepted both as having the necessary expertise to provide expert evidence. Another significant aspect of the evidence was the testimony of the plaintiff which was described by the judge as being 'uncertain' and 'inconsistent.' The outcome of the case therefore highlights that it can be hard to win a civil case without solid testimony from the plaintiff.

However, the third issue, the assessment of the damages that would have been awarded had the plaintiff been successful, took the case into the realm of entertainment law. The reason for this was that music was the plaintiff's profession. The loss of part of a finger on the left hand will not greatly affect most people, particularly someone who is right-handed, the majority of the population. However, it is far more significant and potentially career ending for a professional guitarist. This is why in such a case damages will not be limited to non-economic losses, treatment and care, but also potentially more substantial damages for economic loss. This reflects that who the plaintiff actually is can impact on the assessment of damages.

What the case established is that in calculating such losses, it should be seen as a loss of a chance claim, in this case that INXS would have toured again and if so, that it would have been lucrative. In assessing this the court looked at the success of similar bands, in the sense of having started their careers at a similar time, in staging successful comeback tours. A number of references were made to Queen, one reason being that they, like INXS, had had to replace their lead singer. This was one of the factors that had to be taken into consideration when estimating the success of a comeback tour on the earnings from past tours. In regard to this matter, Justice Cavanagh noted that Queen had been more successful that INXS in replacing Freddie Mercury with Adam Lambert.[57] Reference was also made to the potential earnings bands could now make from streaming

[53] Ibid, [256].
[54] Ibid, [264].
[55] Ibid, [333]-[334].
[56] Ibid, [335].
[57] Ibid, [278].

sources, and to the evidence that anything that increases the profile of a band will impact on this. Evidence was presented as to the large number of Spotify hits Queen received after the release of the biographical movie, Bohemian Rhapsody. A successful tour is also likely to have an impact on the number of such hits and therefore potential earnings for a band like INXS.

Thus, while Farriss was not successful, the case provides guidance as to how a court will assess economic loss damages if the plaintiff works within the music industry and can no longer ply their trade due to an injury caused by a breach of a duty of care. This assessment will involve looking at past data, such as money earned on past tours, and an analysis of the likelihood of future tours with expert evidence being accepted to guide the court.

IV CONCLUSION

After the Supreme Court decision, Farriss indicated in the media that he would consider lodging an appeal. However, it is hard to see a Court of Appeal overturning the original decision, given the expert evidence that had been provided, and the problems with the plaintiff’s own testimony. While this case is not a significant one in relation to negligence generally, it is a significant one in the niche area of entertainment law, providing guidance of how a court may assess economic loss within the music industry.

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