
Case Notes

Frost v Warner [2002] HCA 1 7 February 2002

Dr Sarah Derrington

On 8 January 1990, the vessel *N'Gluka* sank in Port Stephen resulting in the death of five children and injuries to other passengers. The vessel was a 36 foot motor yacht which, at the time of the sinking, was dangerously overloaded with 49 people on board. The decision of the High Court not to impose liability for negligence on the holder of the certificate of registration may be considered surprising.

Mr Warner was the owner and master of the vessel and was navigating the vessel on the day of the sinking. However, the vessel was registered in the name of his wife pursuant to the provisions of the *Water Traffic Regulations (NSW)* (the Regulations) made under the *Maritime Services Act 1935*. At trial, Garling DCJ 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. His Honour then considered the liability of 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 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.

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.

Damages were awarded against both Mr Warner and Mrs Warner. Mrs Warner appealed to the Court of Appeal against the trial judge's findings respecting her liability.

The Court of Appeal allowed her appeal and held that Mrs Warner's status as "registered controller" did not, in the circumstances, make her liable for the negligence of Mr Warner. It also held, rejecting the trial judge's contrary findings, that there was no evidence that Mrs Warner knew or ought to have known that the vessel was grossly and dangerously overloaded and so Mrs Warner could not be held directly liable for the consequences of the overloading.

Two grounds of appeal were argued before the High Court:

1. that the Court of Appeal erred in holding that Mrs Warner's status as registered controller of the vessel did not make her responsible for the negligence of her husband;
2. that the Court of Appeal erred in holding that Mrs Warner 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.

By majority, the High Court dismissed the appeal.

The outcome of the appeal revolved around the construction of regulation 11 of the Regulations. It provides for the registration of "registrable vessels" (there was no dispute that the *N'Gluka* was a registrable vessel) and that a person who controls a registrable vessel may apply to the Board for registration of such vessel (sub-regulation (2)). A person who "controls" a vessel is defined as a person who has the right to decide the possession, disposition and use of the vessel (sub-regulation (3)). Regulation 11 imposes certain obligations on the holder of the certificate of registration which may be described as administrative in nature: affixing the identification plate to the vessel; producing the certificate when required; notifying the Board of change of address and so on.

Sub-regulation (11) makes it an offence to navigate a vessel without the authority or consent of the holder of the certificate of registration. Sub-regulation (13) creates certain offences respecting unregistered and registered vessels on any enclosed waters; however, in this case, liability is imposed not on the holder of the certificate of registration but on the owner or master.

The Chief Justice and Justices Gummow and Callinan, in their joint judgment, observed that the circumstances surrounding the registration of Mrs Warner were not explored in the evidence. (Justice Gaudron agreed that the appeal should be dismissed but wrote a separate judgment). Their Honours said, however, that:

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

Their Honours held further that the fact that the Regulations do not seek to impose liability on the person identified as the holder of the certificate of registration, except in so far as the holder may be both the owner and master has the consequence that Mrs Warner's position as holder of the certificate was insufficient to found liability either directly or vicariously. Having made this finding, their Honours said it was unnecessary to consider whether the Court of Appeal was correct in rejecting the trial judge's finding that Mrs Warner knew or ought to have known the vessel was overloaded.

Justice Kirby dissented. His Honour drew attention to the purpose for which the Regulations were enacted, namely to ensure vessels were operated safely in the waters of New South Wales and observed that an obvious purpose for requiring a person to be designated as a "registered controller" is to ensure compliance with the safety regime. His Honour observed:

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

His Honour expressly disagreed with the construction that the majority placed on regulation 11(11), namely that liability does flow automatically because the regulation does not confer "control" on the holder of the certificate but is premised on "actual" control, which, in this case, was exercised by Mr Warner. His Honour held that, by applying for the certificate of registration, Mrs Warner herself asserted that she was entitled to be, and would be, in control of the vessel for the purposes of the Regulations. Crucially, Mrs Warner was in fact present on the vessel on the day of the sinking; she had invited at least some of the people on to the vessel; and had served them drinks and savouries. Justice Kirby held, therefore that Mrs Warner was, at all times, 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. His Honour said, "The Court should not send a signal that people like the respondent can acquire a legal status and then completely ignore the consequences".