Andrew & Renata Kaldor Centre
for International Refugee Law

Casenote

PLAINTIFF S99/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION [2016] FCA 483

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This case note provides an overview of the key facts and findings of the Federal Court of Australia in *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 (*Plaintiff S99)*. The case was originally filed in the High Court before it was referred to Bromberg J in the Federal Court for an urgent hearing and determination.

Facts

The applicant

The applicant in this case was a young African woman who arrived in Australia by boat on 17 October 2013. The applicant had a history of trauma.

Prior to fleeing her country of origin, when she was about 16 years old, the applicant witnessed the murder of her sister. She began to have seizures and continued to experience regular seizures at the time of the hearing. Also at the age of 16, the applicant's father arranged her marriage to a 45 year old man with other wives. In this marriage she said she was 'severely abused, physically, sexually and emotionally', and 'bashed and beaten' (*Plaintiff S99* at [74]). After falling pregnant the applicant ran away to her mother, who arranged the applicant's divorce from her first husband. She remarried, however her first husband tried to force her to return to him. He accused her of adultery and threatened to inform the government. The applicant fled, fearing that she would be stoned to death. She travelled to Indonesia and then to Australia by boat to seek asylum. Her son remains in the care of her mother ([70]-[75]).

Events on Nauru

On 19 October 2013 the applicant was transferred to the Republic of Nauru (Nauru) by Australian authorities pursuant to Australia's agreement with Nauru, against her will. On Nauru the applicant was detained at the Regional Processing Centre (RPC) until she was found to be a refugee. In November 2014 the applicant was granted a Temporary Settlement Visa and moved into a residence in the Nauruan community. Pursuant to its agreement with Nauru, Australia covered all the costs associated with the applicant's settlement in Nauru, including settlement services, visas, accommodation and other residential fees. The applicant submitted that she felt unsafe in the accommodation allocated to her ([76]-[80]).

On 31 January 2016 the applicant submitted that she went outside her room to make a phone call, had a seizure and fell unconscious. It was not in dispute between the parties that the applicant was raped 'while or shortly after suffering a seizure and became pregnant as a result' ([82]).

The applicant received medical support on Nauru for her pregnancy and psychological and/or neurological conditions from International Health and Medical Services (IHMS), a private company contracted by the Australian Government to provide health services to asylum seekers and refugees on Nauru, as well as to people in detention centres in Australia and on Manus Island. The applicant submitted that she told an IHMS doctor on Nauru that she wished to have an abortion ([101]). The fact that the applicant required an abortion was not in contest between the parties. However this procedure was not expected to be straightforward, due to the applicant's neurological and psychological conditions, poor mental health and physical complications.

Taking of the applicant to Papua New Guinea (PNG)

The applicant was taken to PNG on 6 April 2016. While the exact circumstances of her transfer were unclear, Bromberg J held that the evidence supported a finding that the Australian Minister for Immigration and Border Protection (Minister) 'offered and the applicant agreed to be taken to another country so that her pregnancy could be terminated'. However she was not offered a choice of destinations and 'whilst the applicant gave her consent to be taken to another country, she did not give her approval to having an abortion in the medical and legal setting in relation to which she now complains' ([111]). IHMS recommended the applicant be transferred to Australia for the procedure, however the Minister instead arranged for the applicant to be taken to PNG for the procedure ([130]-[157]).

The proceedings

At the time of the hearing the applicant was in Port Moresby, but had not yet undergone the termination procedure for which she had been taken there. Lawyers for the applicant commenced this proceeding in the High Court, and it was subsequently referred to Bromberg J in the Federal Court for an urgent hearing and determination.

The applicant's case

The applicant argued that it would be neither safe nor legal for her to undergo the termination procedure in PNG ([10]-[11]).

Relying on expert medical evidence, the applicant submitted that she would be exposed to grave risks due to the absence of medical resources in PNG, including:

- neurological expertise of a neurologist and EEG diagnostic equipment;
- mental health expertise of a psychologist and other professionals with experience in trans-cultural issues;
- gynaecological expertise of a gynaecologist experienced in dealing with the consequences of the procedure experienced by the applicant as a young girl; and

- expertise of an anaesthetist experienced with newer, safer anaesthetic drugs and anaesthetic techniques and familiar with anaesthesia in an MRI facility.

The applicant also submitted that abortion in PNG was illegal, and that she would be exposed to criminal liability if she were to go ahead with the procedure.

Relying upon the legal relationship between herself and the Minister, the applicant claimed that the Minister had a duty of care to procure for her a safe and legal abortion. The applicant did not argue that the abortion had to be procured and conducted in Australia, but did submit that doing so would fulfil the Minister's duty to her. The applicant apprehended that the Minister would fail to discharge this duty, and sought declarations and orders to preclude the Minister from doing so.

The Minister denied that he had a duty of care to the applicant. The Minister also argued that if there was a duty of care, the procuring of an abortion for the applicant in PNG was both safe and lawful and would therefore discharge any obligation owed. Further, the Minister submitted that if there was a duty of care and an apprehended breach of that duty of care, the Court was powerless to grant the applicant injunctive relief. For that and other reasons, the Minister contended that the proceeding should be dismissed ([12]).

Judgment

Identifying the applicable law

The first issue to be decided was whether the law of Australia or of PNG was applicable to the case.

The applicant advanced her case on the unspoken assumption that the applicable law of tort was that of Australia. However, the respondents contested that assumption, arguing that the substantive law of the claim in negligence is to be determined by the law of the place of the wrong, or threatened wrong (*lex loci delicti*). In this case, that place would be PNG ([158]).

Starting with general principles, in particular those set out by Spigelman CJ in *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 and reaffirmed by Warren CJ in *Puttick v Fletcher Challenge Forests Pty Ltd* (2007) 18 VR 70, Bromberg J noted that the relevant question is 'concern[ed] with substance, not form' and that the relevant place is that 'which gives the plaintiff cause for complaint' ([165]-[170]). Bromberg J thus sought to identify the act on the part of the Minister that gave the applicant her cause of complaint. The relevant act was found not to be located in PNG, as even if damage were to be suffered due to acts occurring in PNG, the source of the complaint would remain the location from which the safe and lawful abortion was not procured ([171]-[182]). As such, Bromberg J held (at [179]):

> the applicable law is the law of the place from which (it is apprehended) the Minister will omit to procure the procedure [and] not the (necessarily hypothetical and indeterminable) place in which the procedure which (it is apprehended) the Minister will fail to procure, would be performed were it to be procured.

This finding was supported by the fact that if the applicable law were to be the law of the place where the abortion was performed, a prospective defendant could control their liability

in tort by negligently procuring the service in a country with a tort law favourable to defendants or providing a defence ([181]).

Did the Minister owe the applicant a duty of care?

The applicant argued that the Minister owed her a duty to procure for her a safe and lawful abortion. Her submissions turned on establishing a novel duty of care based on two main factors:

1. 'the existence and nature of the statutory power exercised by the Respondents in respect of the applicant; and
2. the facts relevant to the 'salient factors' that are critical to ascertaining the existence and scope of any duty in the exercise of those powers' ([200]-[201]).

Bromberg J considered extensive authority and concluded that the correct approach to determining the existence of a duty of care is a multi-factorial approach. The seventeen 'salient features' relevant to determining the existence of a duty of care set out by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649, while noted to be a non-exhaustive list of features, assumed especial relevance here, as the Minister was a repository of statutory power and discretion. For such cases, considerations of coherence with the statutory scheme and policy, as well as control, reliance, vulnerability and the assumption of responsibility were held to be of critical importance ([200]-[229]).

The Minister and the applicant emphasised different salient features relevant to finding a duty of care. Bromberg J found that there was a voluntary assumption of responsibility by the Minister (an assumption relied upon by the applicant) that was a 'potent consideration' in favour of finding a duty of care ([242]).

The applicant had no means of survival independent of the services provided by Australia and it was not possible for the applicant to obtain an abortion without the assistance of the Australian Government. The Australian Government had undertaken several acts, in exercise of its statutory power to implement regional processing arrangements, which created a specific reliance by the applicant on the respondent to procure a safe and lawful abortion. Bromberg J held (at [253]) that the facts demonstrated Australia had, *inter alia*:

- procured medical professionals to assess the applicant's physical and psychological condition and determine what treatment was required, including whether she ought to undergo an abortion and for that purpose be transferred to another country;
- decided to facilitate the applicant's transfer from Nauru to PNG for the purpose of the termination of her pregnancy;
- procured the medical professionals and facilities of Pacific International Hospital (PIH) in Port Moresby in PNG to perform an abortion, and provided them with the applicant's medical records for that purpose;
- procured travel documents and a visa (without the applicant's involvement) sufficient to permit her to travel to PNG and remain there for the purpose of having an abortion;
- made arrangements for the applicant to travel to PNG and be accommodated at a hotel in Port Moresby, and procured security personnel to guard the applicant in Port Moresby;

- procured the services of PIH to treat the applicant when she fell ill in Port Moresby; and
- paid for all costs of and incidental to the applicant's travel to, and care and maintenance in, PNG.

Analysing the relevant facts by reference to Allsop P's 'salient features', Bromberg J held (at [257]-[275]) that:

- it was foreseeable that the applicant would suffer grave harm (including the possibility of extreme harm) if the duty upon which she relied was breached;
- by his capacity to choose the legal setting, the Minister had control over whether or not the applicant would be exposed to the risk of prosecution and conviction for having an abortion, and by virtue of this control the Minister was able to avoid harm to the applicant;
- the applicant was in a position of vulnerability if the Minister failed to procure a safe and lawful abortion for her, as she had no capacity to protect herself from consequent harm and relied entirely upon the Australian Government to procure the abortion;
- it was inherent in the representation given by the Minister to the applicant that a medical procedure would be procured for her, and that such medical procedure would be lawful and safe. The voluntary assumption of these tasks by the Minister, in the context of the applicant's 'specific reliance' on the representation, demonstrated an assumption of responsibility by the Minister to exercise reasonable care to procure a safe and lawful abortion for the applicant. Bromberg J considered this to be a 'potent factor in favour of the exercise of the putative duty' and 'of especial relevance';
- the 'general dependence' of the applicant on the Australian Government created a dependency relationship in favour of the existence of a duty of care;
- the Minister had actual knowledge of the risks of harm to the applicant; and
- a finding of a duty of care would be consistent with the statutory regime and policy.

Bromberg J thus concluded that 'on balance, there are sufficient characteristics displayed answering the criteria for intervention by the tort of negligence'. Accordingly, he held that the applicant had established a duty of care owed to her by the Minister and the Australian Government that they would 'exercise reasonable care in the discharge of the responsibility that they assumed to procure for her a safe and lawful abortion' ([276]-[277]).

Was there an apprehended breach of that duty?

A cause of action in negligence usually has three elements: duty, breach and causation of damage. However in this situation, the breach had not yet eventuated; rather, it was only apprehended. Thus the question was whether the evidence established a reasonable basis for an apprehension that the Minister's duty of care to the applicant would be breached.

To identify an apprehended breach, Bromberg J applied the established test for how a tribunal of fact should decide whether there has been a breach of duty of care, as stated by Mason J in *The Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 (at 47–48). First, Bromberg J asked 'whether a reasonable person in the Minister's position would have foreseen, or in the context of an allegation of a continuing tort would foresee, that his conduct will involve the risk of injury to the applicant'. He then turned to the question of what

a reasonable person in the Minister's position would do by way of response to the risk. In order to answer these questions Bromberg J observed that 'the seriousness of the foreseeable risk is a material factor in framing the requisite standard of care', and considered the magnitude and probability of any risks occurring ([282]).

According to the applicant, the Minister's alleged failure to offer her 'something better' than the care he had procured (or had been prepared to procure) to date gave rise to two possible risks. First, he had failed to procure an abortion for her in a legal setting where she would not be exposed to risks of prosecution and conviction for terminating her pregnancy; and second, he had failed to procure an abortion that would be medically safe (or, more particularly, in which the resources identified by medical experts as necessary to adequately diminish the risk of physical and psychological injury to the applicant would be used) ([283]).

In relation to the first of these risks, and the possibility of the applicant being prosecuted and convicted for terminating her pregnancy, Bromberg J considered the limited circumstances in which an abortion may be procured legally in PNG. He held that the risk to the applicant of being prosecuted and/or convicted was 'real', and not 'far-fetched or fanciful' ([287]). He concluded further that the magnitude or 'prejudicial consequences' of this risk would be 'high to extreme', as they would involve a risk to the applicant's liberty (including the possibility of life imprisonment) ([289]). As to the degree of probability of the applicant being prosecuted and convicted, Bromberg J did not accept that there was no prosecutorial appetite in PNG for the criminal prosecution of a woman involved in procuring a termination of her pregnancy, nor did he accept that there was no real risk of a prosecution. In his assessment, 'whilst the probability of a prosecution alone or a prosecution and consequent conviction of the applicant is, to my mind, very low, the risk cannot be excluded as far-fetched, or fanciful. Whilst very low, the risk is real' ([304]).

Bromberg J turned next to consider the medical risk, if any, posed by the Minister having procured an abortion for the applicant in PNG, and any risk arising from the apprehended failure of the Minister to procure an abortion that was medically safe. On the basis of extensive expert medical evidence adduced by the applicant about her particular medical conditions, and the lack of necessary resources available in PNG, Bromberg J accepted that there was a 'heightened risk of very serious physical and/or psychological harm to the applicant' if she were to terminate her pregnancy in PNG ([382]). Medical evidence established that these risks would likely be alleviated if certain resources were procured, and expert witnesses indicated that the necessary neurological, psychiatric, cross-cultural, anaesthetic and gynaecological expertise and facilities were available in Australia.

On the basis of these findings Bromberg J concluded that there could be 'no doubt that a reasonable person in the Minister's position at the time an abortion was procured by the Minister would have foreseen that the applicant would be exposed to a risk of harm additional to the extent of risk that she would have been exposed to in a better-resourced medical setting such as Australia' ([382]). He held that these additional risks were 'real and are not far-fetched', and that the magnitude of the medical risks were 'high to extreme', including the possibility of death ([382], [385]). Whilst acknowledging that it was more difficult to determine the degree of probability of these risks, Bromberg J was satisfied that he could

safely infer that the probability of their occurrence was 'neither trivial nor insignificant', and that in other words 'the risks are material' ([386]).

In reaching these conclusions, Bromberg J rejected the Minister's contention that there was no breach or apprehended breach because the standard of care he owed to the applicant should be assessed by reference to the medical services available in the country where the applicant is found (in this case, PNG). Bromberg J held this position 'could not be the law' because '[i]t would result in the wrongful act (the careless act of procuring) escaping an assessment as to its reasonableness' ([408]).

Thus, Bromberg J held that that the applicant had established an apprehended breach of duty.

Was the Court precluded from granting injunctive relief?

The Minister contended that even if there was a duty of care and an apprehended breach of this duty, the courts would be powerless to grant the applicant injunctive relief. Accordingly, the Minister called for the proceedings to be dismissed. This argument was based on section 474 of the *Migration Act 1958* (Cth), which provides *inter alia* that a 'privative clause decision' is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. That section defines a 'privative clause decision' as 'a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act'.

Bromberg J rejected the Minister's argument, concluding that the issuing of an injunction requiring the taking of action by the Minister or the Australian Government in this case would not constitute subjecting a privative clause decision to injunction. While he was satisfied that s474 precluded courts from granting an injunction 'in relation to judicial review applications', Bromberg J held: 'consistently with the principle of legality, 'irresistibly clear words' would be required before I would construe s474 as precluding the issue of injunctive relief in the case of a tortious wrong' ([459]). In the present case he was not satisfied that the words of s474 were 'sufficiently clear' to establish this construction. Moreover he noted that the contrary finding, in line with the Minister's interpretation, 'would yield draconian and absurd results' and that 'an intent to effect such results would not readily be ascribed to the legislature' ([448]).

Should an injunction have been granted?

In concluding his judgment, Bromberg J reaffirmed that the applicant had asserted a reasonable apprehension that the Minister would fail to discharge his duty of care, but noted that since damage had not yet been established the applicant required a *quia timet* injunction – that is, an injunction to prevent or restrain apprehended or threatened wrongful acts which have not yet occurred but which would result in substantial damage if committed ([467]).

While cases to restrain the commission of the tort of negligence are rare, there is no doctrinal limitation on their grant. Bromberg J held that the granting of an injunction in this case would be appropriate in light of the magnitude of the risks to the applicant, the

imminence of harm, the insufficiency of damages as a remedy for this harm, and the Minister's concession that the nature of any hardship that may be imposed on the Minister by the grant of an injunction is not a significant factor against an injunction being granted in this case ([490]-[495]).

Further reading

- Federal Court of Australia (Bromberg J), 'Summary: Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483', 6 May 2016, Melbourne
- Tania Penovic, 'Dutton's duty: the Minister's responsibility to provide a safe and lawful abortion', *Castan Centre for Human Rights Law,* 11 May 2016
- Madeline Gleeson, 'Refugee status determination in Nauru', Andrew & Renata Kaldor Centre for International Refugee Law, May 2016
- 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues', 3 August 2013
- Madeline Gleeson, 'Case note: *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors*', Andrew & Renata Kaldor Centre for International Refugee Law, July 2016

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