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PUBLIC LIABILITY CASE REVIEW

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Contents

Public Liability decisions – the year to date

A summary and analysis of superior court decisions from all Australian jurisdictions throughout 2022 and what it means for practitioners in assessing the prospects and prosecuting of these types of cases, moving forwards.

Introduction

While this paper is intended to examine the decision of Australian courts dealing with public liability cases in the 2022 year to date, it also seeks to look at decisions involving a wider group of cases where it will impact on practitioners who routinely act in relation to matters involving occupiers and public liability principles. As a result, the group of cases being considered even includes some decisions which might not appear to be strictly a “public liability” case – but some have been included where they have been decided on principles relevant to claims of this type.

Whilst the concept of personal responsibility remains alive and well, the 2022 cases suggest that common sense seems to be the touchstone of liability in public liability cases in the modern era.

Bryant v The Australian Capital Territory (Represented by the ACT Transport Canberra and City Services Directorate) (Civil Dispute) [2022] ACAT 5

- Senior Member L Beacroft, delivered 21 January 2022

Keywords

Civil Law (Wrongs) Act 2002 – public authority – tree branch falling – strong winds – foreseeability – locality and age of tree – tree pruning or removal – maintenance and upkeep of tree – occupier's liability – breach of contract

Facts

On 23 November 2020, the applicant parked her vehicle near a tree in an ACT carpark. Whilst there, strong winds caused a tree branch to fall onto her vehicle, resulting in damage. The applicant filed an application with ACAT, claiming the ACT were liable for damages on the basis that they were responsible for the maintenance and upkeep of the tree and were negligent in that regard, and/or that the ACT breached its contract to the applicant who was a fee-paying customer of the carpark. The applicant claimed damages in the sum of $4,946.

Decision

The application is dismissed.

Ratio

The Tribunal firstly considered the application of section 112 of the *Civil Law (Wrongs) Act 2002* (ACT), which operates to wholly defeat claims against public and other authorities in particular circumstances. The Tribunal noted section 112 states: "[the] authority is not liable in a proceeding so far as the claim in the proceeding is based on the failure of the authority to exercise, or to consider exercising, a function of the authority". The Tribunal considered the previous decision of *Meyers* in which it was held that section 112 applied because the claim was "based on a failure to exercise a power to regulate or prohibit an activity … and there was not grounds given the facts and the relevant legislation to compel the exercise of the power", however Charlesworth J therein found that "if a decision not to exercise a statutory power, while discretionary is a rational decision, then there can be no duty imposed by common law to exercise the power".

In this instance, the Tribunal held that section 112 did not apply to defeat the applicant's claim in this case for three reasons:

1. The respondent's functions were not proven to be powers to "prohibit or regulate an activity";
2. It was not proven that the applicant would have had standing to have the tree pruned or removed;
3. The respondent's failure to prune or remove the tree was rational and given it was not rotted, therefore the respondent would not have been compelled to do so.

The Tribunal held the respondent owned and managed the land and carpark and had entered into a contract with the applicant for her to park her car there. The Tribunal found the respondent therefore owed a duty of care to the applicant under contract, torts law, and as the occupier of a premises.

The Tribunal found the respondent did not breach its duty of care in negligence, under occupier's liability, or under contract. It was found that the risk of the tree branch falling was not foreseeable, although the risk would have been not insignificant, and a reasonable person would have taken precautions given the locality of the tree, its age, and the proactive approach for the tree that ought to have been taken. The applicant's application was therefore dismissed.

Farriss v Axford (No. 3) [2022] NSWSC 20

- Cavanagh J, delivered 28 January 2022

Keywords

Negligence – breach – accident on a boat – inconsistent versions provided by the plaintiff – version offered at hearing rejected – reasonable precautions

Facts

The first plaintiff (the second plaintiff being a company of which the first plaintiff and his wife were directors) sustained injury to the fingers on his left hand in an accident on a boat on 25 January 2015.

The first and second defendants were the owners of a boat hired by the plaintiff. The third defendant acted as an agent for the first and second defendants in hiring out the boat.

On the day of injury, the plaintiff attempted to drop anchor and secure the boat. The anchor chain was rusty and prone to kinking. The winch motor, which lowered and raised the anchor and anchor chain, was operated by either a button on the deck, or one in the helm.

The first plaintiff sustained injury to the fingers of his left hand when his hand was jammed between the anchor chain, and the chain gypsy (being a winch onto which the chain feeds when being lowered or raised). The plaintiff's case was that his hand was pulled into the gypsy because the chain started moving unexpectedly without him pressing the foot button on the deck.

The plaintiff asserted the anchor system was not working properly, that it was unsafe and defective, and could and should have been fixed or improved to guard against the risk of injury which eventuated. The plaintiff also asserted he should have been given proper instructions about the use of and problems with the anchor chain.

The defendants maintained that the system was working as intended and alleged that the chain moved only because the plaintiff must have trod on the "up" button on the deck.

The plaintiff bought a claim in negligence and pursuant to the Australian Consumer Law.

Decision

1. Judgment for the defendants; and
2. An order that the plaintiff pay the defendants' costs.

Ratio

In considering the circumstances of the accident the court identified that the winch motor, causing the anchor chain to be pulled up, does not operate unless pressure is applied to one of the two switches on the deck (assuming the switch at the helm remained closed). The only two alternatives as to why the anchor chain moved was that there was some form of defect or malfunction in the componentry and the circuit, or someone depressed the foot switch on the deck.

Expert evidence identified no electrical malfunction and the court determined, notwithstanding evidence from the plaintiff to the contrary (the plaintiff had provided inconsistent versions in evidence), that the plaintiff trod on the up button on the deck and caused the chain to move inwards as he had a hold of the chain with his left hand, in front of the gypsy.

The court undertook an analysis in accordance with the relevant provisions of the *Civil Liability Act* 2002 (NSW) ("CLA").

The court outlined that it in a negligence action it is only by the correct identification of the risk of harm that a court can assess what a reasonable response to the risk would be. Once identified, the court can consider whether the risk was foreseeable and not insignificant and whether a reasonable person would have taken the precautions suggested.

The defendants had asserted that the risk of harm was that the plaintiff may injure his hand by holding on to the chain and stepping on the deck button – and that the stepping on the button caused the materialisation of the harm. On the plaintiff's description of the risk of harm, categorisation must include the fact that, on his case, the anchor chain was rusted and it kinked, jammed or bunched, while the defendants included as the critical factor in assessing the risk of harm that that plaintiff trod on the deck button.

The court outlined that the risk of harm should not be defined with too much particularity. On the plaintiff's case, there may be a number of ways in which a person could hurt him/herself in the circumstances which arose, not all of which would involve the activation of the deck switch. The court adopted the broader formulation of the risk of harm, rather than the defendants' narrower submission.

In applying s 5B of the CLA, the Court undertook an analysis – and found that whilst the test of reasonable foreseeability is not a demanding one, the further requirement that the risk be not insignificant is added, is one which requires something more than that the risk be foreseeable - but not by very much.

The court outlined that the law of negligence requires more than the mere identification of the precautions or preventative measures which could have been taken. It is not merely a matter of identifying that a particular risk was foreseeable and not insignificant - but also that the court be satisfied that a reasonable person in each of the defendants' position would have taken the precautions identified by the plaintiff.

The question of breach is to be considered prospectively, considering whether a reasonable person in the defendants' position prior to the accident would have taken precautions - not looking backwards and having regard to the fact that the accident happened and assessing what might have been done to prevent the accident. The fact that the first and second defendants modified the anchor system at some stage after the event, with the addition of a chain shredder, did not of itself give rise to or affect liability in respect of risk.

Even assuming the defendants should have taken some of the precautions identified by the plaintiff, the court outlined that any determination that the failure to take care caused harm to the plaintiff must be on the basis set out in s 5D of the CLA with the plaintiff bearing the onus of establishing any failure was causally related to the accident. Establishing that the plaintiff should have been warned of certain things does not assist the plaintiff unless such a failure to warn caused the accident.

The court rejected the plaintiff's submission that he should have been warned about the idiosyncratic nature of the anchor winch, that it had a propensity to jam, and that a customary warning would be to not put a hand on the chain in the gypsy whilst it was operating under power.

The basis for that determination was consequent upon evidence given by the plaintiff himself that he was aware of the dangers associated with manually adjusting the chain whilst the power was activated. In summary the court found the plaintiff was aware of the matters about which he says he should have been informed prior to the accident and he could not succeed on a failure to warn or instruct case if, despite such failures, he was aware of the risk in any event, prior to his accident.

The court rejected the plaintiff's arguments with respect to there being problems with the anchor system and more particularly the failure to maintain, repair, replace or redesign the system. The sole step, on expert evidence, that may have been causally relevant was the absence of a chain pipe and stripper, which would have allowed the chain to move on to the gypsy more smoothly.

In the court's view, manually adjusting an anchor chain on a boat was not a generally dangerous activity. It was only dangerous when the operator was adjusting the chain

manually whilst the power is on. The court found the plaintiff's hand was pulled into the gypsy when the winch motor activated, which could only have occurred because the plaintiff trod on the deck button.

The court determined that although the burden of taking precautions to avoid the risk was not high, the likely seriousness of the harm was low. The court did not consider, in all the circumstances, that the exercise of reasonable care required the first and second defendants to instal a chain stripper or additional spurling pipe into the winch system prior to the accident. The suggestion that such additional componentry should have been installed was an example of approaching the matter with hindsight.

The court determined that a reasonable person in the first and second defendant's position would not have taken the precautions, as alleged by the plaintiff, of modifying the winch system, where it had been on the boat for 20 years, without incident or complaint. Manually pulling on an anchor chain was considered to involve some risk, but it is a risk faced by boat owners on a daily basis. The anchor system operated under power and provided the power was off, there was no more danger in touching the anchor chain than on any other boat. Whilst the risk of harm was foreseeable and not significant, the probability that harm would occur if care (i.e. with the addition of a chain stripper or spurling pipe) was not taken, was low.

In the court's view, the exercise of reasonable care on the part of the defendants did not require any of them to arrange a new spurling pipe or chain stripper to be installed prior to the accident. It was only those two additional components which, by the end of oral evidence, could be viewed as causally relevant to the plaintiff's injuries.

In commenting on the ACL provisions, the court identified:

- A term of a contract is void (pursuant to s 64 of the ACL) to the extent the term purports to exclude, restrict or modify or has the effect or excluding, restricting or modifying any liability of a person for a failure to comply with a guarantee that applies under the division of supply of goods or services;
- The exclusion of liability clause contained in the hire contract would be rendered void by virtue of s 64;
- S 139A provides that a term of a contract for the supply of recreational services is not void under s 64 only because the term excludes, restricts or modifies or has the effect or excluding, restricting or modifying any liability for a person for a failure to comply with the guarantee under s 60 or 61 of the ACL;

- The effect of s 139A is to exclude the operation of s 64 for the supply of recreational services;
- That exclusion does not apply unless the exclusion is limited to liability for death or physical or mental injury or the contraction or aggravation of a disease;
- The purported exclusion under the hire contract was not so limited and as such s 64 applied.

The parties had agreed that subject to the court's consideration of s 64 of the ACL it was not necessary to consider the claims under the ACL.

Gladstone v Public Transport Authority of Western Australia [2022] WADC 6

- Maclean DCJ, decision delivered 11 February 2022

Keywords

Construction site – parking lot – gravel – gravel overflow to on adjacent road – obvious risk

Facts

The plaintiff was a commuter who ordinarily drove his car to the train station and then got the train to work.

On this day the train station car park was undergoing maintenance, and construction workers had set up a temporary car park next to the existing car park.

The temporary car park surface was comprised of blue metal gravel which was loose.

The plaintiff drove his car into this temporary car park and parked it on top of the blue gravel. He then exited his vehicle and went to walk to the train station.

After he stepped down from the gravel car park onto an adjacent road, he inadvertently rolled his ankle on some loose gravel that had overspilled from the temporary car park onto the road.

The loose gravel on the road was as a result of people walking from temporary car park towards the road and naturally taking some gravel with them to the road.

The plaintiff instituted proceedings against the Western Australia Public Transport Authority, which was the entity that controlled the train station and the temporary car park.

Decision

Plaintiff's case dismissed.

Ratio

It was foreseeable that people may suffer injury from slipping on the overflow of loose gravel, whether when walking on the temporary car park or while on the adjacent road.

The Council owed a duty of care to ensure that the gravel which spilled from the temporary car park was cleaned up in a timely manner.

The risk of a person slipping on loose gravel was an obvious risk, and therefore the public authority did not have a duty to warn pedestrians of this risk.

Due to the obvious risk, the plaintiff was required to take care of his own safety which included a need to take more careful steps when walking on the temporary car park and adjacent road.

The probability of harm was so low that it was reasonable for the transport authority to do nothing in response to the risk, when balancing the burden of taking precautions against the likelihood of harm.

In the alternative, if it was reasonable for the transport authority to take precautions to inspect and remove the gravel, the public authorities defence in the CLA would be available to the Defendant. Here, the Public Transport Authority was constrained by its funding (i.e. the high cost of active monitoring or regular street sweepers) and it was reasonable for it to do nothing in response to the risk.

Newport v Li & Anor [2022] NSWDC 8

- Judge Levy SC, decision delivered 11 February 2022

Keywords

Torts – negligence – inadvertent injurious contact between pedestrians in public area of produce market – whether first defendant vicariously liable for negligent actions of second defendant – second defendant failed to keep a proper lookout – plaintiff struck by box and fell suffering sub-trochanteric fracture of right hip – whether contact was due to materialisation of an obvious or an inherent risk

Facts

The plaintiff claimed damages for personal injuries she sustained on 20 October 2018 whilst standing in a public market area near a produce stall looking to buy vegetables from a retail vendor at the Sydney Markets in Homebush, New South Wales. At the same time, the second defendant was approaching the plaintiff from behind whilst he was carrying a styrene box packed and filled with upright bunches of shallots. As the second defendant approached the area where the plaintiff was standing, he, or more likely, the styrene box he was carrying, made inadvertent but forceful physical contact with her from behind. The force of that contact was sufficient to unbalance the plaintiff, which caused her to fall forward. As a result of the fall, the plaintiff suffered significant physical injuries, which ultimately required surgical treatment for an open reduction and internal fixation of a right sub-trochanteric fracture of her right hip, which was already affected by pre-existing osteoporosis.

The first defendant was the licensee and occupier of Stand 81 within D Shed at the Markets. The second defendant's father was the licensee and occupier of the adjacent Stand 82. Both stands were used by the defendants to display their vegetable produce for sale to customers at the Market. The plaintiff claimed that at the time of the contact, the second defendant was employed by the first defendant at Stand 81 and that he injured her whilst in the course of that employment, such that the first defendant should be held to be vicariously liable for the second defendant's actions. The defendants each denied that the second defendant was employed by the first defendant and that any vicarious liability arises as was alleged by the plaintiff.

Decision

1. Judgment for the first defendant against the plaintiff; and
2. Judgment for the plaintiff against the second defendant.

Ratio

His Honour identified the relevant issues requiring determination to be:

1. Credibility and reliability of testimony of the respective witnesses.
   The defendants gave their evidence with the aid of a Cantonese interpreter. His Honour found that the opportunity to assess the precise verbal content and the spontaneity of answers to material questions was therefore absent. His Honour found the second defendant to be an unsatisfactory witness as he was not persuaded that the second defendant needed the assistance of the Cantonese interpreter on the occasions, he sought that assistance. His Honour found the plaintiff to be a reliable witness.

2. Factual findings on circumstances of the plaintiff's injury.
   His Honour accepted the plaintiff's evidence. He accepted that the foliage at the top of the box being carried by the second defendant reached up to the level of his eyes. He found that this would have at least partially obscured the second defendant's vision of the way in front of him, with the result being that he did not see the plaintiff before she was struck by the box he was carrying.

3. Whether the first defendant employed the second defendant; whether the second defendant was acting in the course of that employment; and whether the first defendant should be held to be vicariously liable for the actions of the second defendant in the circumstances of the plaintiff's injury.

   His Honour found that the evidence did not provide a sufficient basis upon which to make a positive finding or an inference that the first defendant employed the second defendant on the day in question. The plaintiff was therefore unable to succeed in her claim that the second defendant was working for the first defendant so as to base the finding that the first defendant is vicariously liable for the actions of the second defendant

4. Identification of the relevant risk of harm within the meaning of s 5B of the *Civil Liability Act* 2002 (NSW) ("CL Act").
   There was no dispute that the relevant risk of harm to persons in the position of the plaintiff in the circumstances of the collision was that if the second defendant did not keep a proper lookout whilst carrying a box of shallots, this might result in inadvertent contact with such persons, potentially causing them to fall, and suffer bodily injury.

5. Identification of the respective duties of care owed to the plaintiff in the circumstances.
   Duty owed by first defendant – in view of the finding that the second defendant was not employed by the first defendant, his Honour found it unnecessary to further explore this question.

   Duty owed by second defendant – his Honour found it plain from the circumstances that the second defendant owed the plaintiff a duty to take reasonable care when walking within the public Market area whilst carrying produce so as to avoid colliding with persons, including the plaintiff.

6. Whether, in respect of the claim against the first defendant, the sheltering provisions of s 5F, s 5G, s 5H and s 5I of the CL Act, as pleaded, are engaged.
   The second defendant claimed that these provisions gave rise to a defence of *volenti non fit injuria* or voluntary assumption of risk. His Honour found that the described activity of the plaintiff did not engage the defence provided by s 5I of the CL Act. The forceful contact between the second defendant and the plaintiff did not occur as a result of the materialisation of an inherent risk of injury due to the collision of pedestrians. The risk of such contact in this instance could have been avoided by the second defendant taking the precaution of exercising reasonable care and skill.

7. Whether, within the meaning of s 5B and s 5C of the CL Act, there was a relevant breach of a duty of care owed to the plaintiff.

   In light of the finding that there was no relationship of employment of the second defendant by the first defendant, and no vicarious liability, his Honour found that no basis arises for a negligence finding against the first defendant.

   His Honour found that when the second defendant carried the box of shallots into the crowded public area of the Markets, he ought to have known there was a risk of injury to persons such as the plaintiff in the vicinity if he did not maintain a proper lookout so as to avoid colliding with such pedestrians. That risk of collision was not insignificant in the context of him transporting a box of goods in a crowded market where his line of sight was obscured by the height of the shallot leaves in the box he was carrying. His Honour found that a reasonable person in the position of the

second defendant would have taken the precaution of keeping a proper lookout as to the way ahead, in order to avoid a collision with other market users in the vicinity.

8. Whether, within the meaning of s 5D of the CL Act, the plaintiff's injuries were relevantly caused by the negligence of the defendants, either individually or in combination.
   His Honour was satisfied that but for the negligence of the second defendant, the plaintiff's injury would not have occurred.

9. The assessment of the plaintiff's entitlement to damages.

   His Honour assessed the plaintiff's damages as follows:

(a) Non-economic loss	$208,000
(b) Past domestic assistance	$Nil
(c) Future domestic assistance	$35,000
(d) Future treatment expenses	$7,500
(e) Past out-of-pocket expenses	$1,876.71
Total	$252,376.71

Archer v Garcia [2022] VSC 57

- Incerti J, decision delivered 17 February 2022

Keywords

Monster truck and motorcycle event – motorcycle accident – ramp misplacement – recreational activity – voluntary assumption of risk

Facts

On 28 November 2015, the plaintiff was injured while performing freestyle motocross ('FMX') at a monster truck and FMX event Korumburra, Victoria ('the event'). The plaintiff's injuries occurred as the result of 'overshooting' the down ramp while completing an FMX jump and landing directly on the ground causing him to be thrown off his motorbike.

When the plaintiff commenced the jump that resulted in his injuries, he believed that the down ramp was positioned at a distance of 75 feet from the up ramp. The down ramp was in fact, however, positioned at a shorter distance from the up ramp.

The plaintiff commenced proceedings against the defendant, the promotor and manager of the event, contending that the defendant failed to, inter alia, provide a safe event space and take reasonable care concerning the operation, arrangement and management of the event so as to ensure the safety of performers, including the plaintiff. The defendant contended that he had delegated the task of ramp movement to the independent performers, and as such, he had discharged his duty of care, and in the alternative, that the plaintiff had voluntarily assumed the risk of the down ramp being incorrectly positioned.

Decision

Claim dismissed.

Ratio

It was found that during the day, the ramps were moved to facilitate the different performers. There were paint markings on the ground to signal the positions of the ramps at both 55 feet apart and 75 feet apart.

The Court was satisfied that moments before commencing his second set, the Plaintiff was intercepted by Mr Bowen, a 'stunt clown', who warned the Plaintiff that the distance between the ramps was too short for his performance. It was found that the Plaintiff disregarded the warning on the basis that it had been measured by another professional, Mr Schubring, and proceeded to attempt the jump which resulted in him sustaining injury.

The Court considered that the defendant's duty of care to the plaintiff in relation to ramp placement and movement, was a duty to take reasonable care in organising the event, as a promoter and manager of the event. Having engaged competent contractors, communicated the need for ramp movement, supervised the set up and rehearsal at lunchtime and tasked the riders with deciding amongst themselves who would move the down ramp at the relevant times, it was found that the defendant owed no residual duty of care.

The Court further considered that in the event that a finding was made as to the defendant's breach of duty, it would have found that he had no liability to the plaintiff, on the basis that the plaintiff voluntarily assumed the risk of injury as a result of the defendant's negligence.

Buljat v Coles Supermarkets Australia Pty Ltd [2022] ACTSC 47

- Balla AJ, decision delivered 18 March 2022

Keywords

Negligence – occupier's liability – slip on grape in supermarket – system of inspection

Facts

The plaintiff suffered injuries after slipping on a grape at the defendant's store in Woden, ACT on 23 September 2017. The plaintiff was walking through the meats section of the defendant's store, looking at the food on display when her right leg slipped, causing her to fall and land on her right shin.

The plaintiff was not looking at the floor at the time of her fall but afterwards she observed a trail in front of her leading to a squashed grape. An employee of the defendant who came upon the plaintiff after her fall observed a squashed grape in close proximity to the plaintiff and formed the view that the plaintiff would have stood on the grape, taken a step and then fallen as she took her next step.

Decision

1. Judgment for the defendant;
2. Plaintiff to pay the defendants costs; and
3. Liberty to apply.

Ratio

Her Honour considered the provisions of the *Civil Law (wrongs) Act 2002* (ACT) particularly;

1. Section 42 – Standard of Care;
2. Section 43 – Precautions Against Risk – General Procedures;
3. Section 45 – General Principles;
4. Section 46 – Burden of Proof;
5. Section 168 – Liability of Occupiers.

Her Honour found and the defendant conceded, that it owed a duty to take reasonable care in the circumstances to ensure the plaintiff did not suffer injury because of the state of its store.

Her Honour considered the evidence of the defendant's store manager (Ms Skinner) that from time to time there were incidents of persons falling on grapes within the store and therefore the defendant knew of the risk that the customers could do so.

The defendant conceded and it was found, that the risk of such a fall was not insignificant as customers would be looking at the items for sale, not at the floor and that any customer slipping and falling could do so with some force - and therefore the risk was not insignificant.

The final issue to be determined was whether the defendant had breached its duty of care to the plaintiff by failing to take reasonable precautions against the risk of harm posed. The plaintiff pleaded various particulars of the defendant's failures in this regard.

The plaintiff alleged various deficiencies including with respect to the system of inspection and cleaning, allowing the grapes to be sold in open bags and eaten by customers within the store and failing to provide floor mats in the relevant areas (i.e. the meat section where the plaintiff slipped and fell).

The plaintiff did not provide any expert evidence as to alternate packaging available or other means to prevent the grapes being eaten within the store. She did not pursue the allegation that floor mats should have been situated within the meat section of the defendant's supermarket.

It was found that whilst the defendant did not have a formal system of cleaning during its store opening hours, but its staff were instructed to keep a look out for spillages and hazards at all times and in particular, to be vigilant for grapes that may fallen onto the floor surface.

In response to the plaintiff's submission that the defendant should have implemented a system of inspection as identified by the High Court *Strong the Woolworths Ltd* [2012] HCA 5, many authorities had considered alternative inspection and cleaning systems including the "clean as you go" system implemented by the defendant without finding them insufficient - despite not being a periodic and documented system of inspection. Her Honour distinguished the adverse finding against the defendants in *Prasad v Woolworth Limited* [2017] NSWDC 79, differentiating the defendant's "clean as you go policy" in that case - which did not involve any obligation to look for hazards, only to act when they were observed. She noted that was different to the present proceedings.

Further, her Honour found that the plaintiff had failed to establish that the defendant's staff had failed to comply with their training as alleged, citing a lack of evidence as to what the defendant's employees would have or should have seen and noting the absence of any photographs or other diagrammatic evidence of the incident site.

Taking into account the evidence of the defendant's employee, Ms Skinner, of the difficulty in identifying a green grape upon the floor as opposed to a black grape, her Honour found that the plaintiff had failed to establish that the defendant had breached its duty of care to her.

With respect to quantum, her Honour found that the plaintiff's slip and fall had not caused the deep vein thrombosis of her right calf diagnosed some 5 months later nor any associated post thrombotic syndrome or chronic pain syndrome as alleged.

Given the psychiatric evidence was that the plaintiff's various psychological and psychiatric disorders were attributable to the 2018 DVT condition, her Honour did not find that the plaintiff has or has had any chronic pain syndrome caused by, or arising out of, the fall at the defendant's premises.

In summary, her Honour found that the plaintiff had failed to prove that any of her ongoing disabilities were related to the injury she suffered in the fall.

If her Honour had found that the defendant had breached its duty of care, damages were assessed as follows:

- General damages for pain and suffering from the fall on 23 September 2017 up to the estimated date that the calf tear had healed on 15 November 2017 in the sum of $15,000 plus interest;
- Past domestic assistance at 3 hours per week at $48.20 per hour over 7 weeks, equalling $1,012.20 plus interest;
- Nil allowance for future domestic assistance;
- Out of pocket expenses associated with the period between 23 September 2017 and 15 November 2017 in the sum of $526.36;
- Nil for future out of pocket expenses;
- Nil for past economic loss;
- Nil for future economic loss.

NB: the appeal as heard, and judgment given during 2022 – summary later in this paper – decision overturned.

Sanders v Multiplex Engineering & Infrastructure Pty Ltd [2022] WADC 31

- Sweeney DCJ, decision delivered 7 April 2022

Keywords

Construction site – hybrid claim – purlins – supervisor instruction – principal contractor – independent contractor.

Facts

The plaintiff was a bricklayer working at the construction of the Perth Stadium in 2016.

He was employed by a bricklaying company which had been engaged by a principal contractor to perform brick laying works at the site.

The principal contractor had also engaged a supervisory company to supervise all of the works as between the independent contractors at the work site. It was a large project with about 500 workers on site each day.

The plaintiff was constructing a wall for a toilet block when he encountered two overhead steel purlins that were in the way.

The plaintiff single handily went to remove these purlins, when the purlins swung down and injured his left arm.

The plaintiff alleged that a supervisor on site instructed him to perform the task of removing the purlins himself, or alternatively it was reasonably foreseeable that bricklayers when faced with this obstacle would take it upon themselves to remove the obstacle.

The supervisory company's system of work required that if any tradesman encountered an obstacle at the work site which was not within their area of expertise to deal with, they were to report the matter to the supervisory company who would then organise for the appropriate tradesman to attend and perform the subject works.

The plaintiff sued the principal contractor of the work site and the supervisory company in negligence.

Decision

Plaintiff's claim dismissed against both defendants.

Ratio

This was the type of case where the principal contractor owed a duty of care to users of its worksite that the system of work adopted by its independent contractors in performing their works was safe, in accordance with *Stevens v Brodribb Sawmilling Co, & Leighton Contractors v Fox*.[1]

When viewing the circumstances of the arrangement, the court held that:

- The principal contractor had acted reasonably in engaging suitably qualified independent contractors for each separate work task and ensuring that a JSA for every separate work task that the independent contractors were required to do was in place and enforced.
- The principal contractor had acted reasonably in engaging the supervisory company to oversee construction on the site.
- Independent contractors were not permitted under the system of work to do the work of other tradesmen located at the site. The removing of the purlins was technically a job for a steel rigger.
- Regardless, the plaintiff, knowing about this system, took it upon himself to remove the purlins himself contrary to this system, and caused his own injury.
- The plaintiff's allegation that the supervisor instructed him to remove the purlins was rejected, as it was found the plaintiff lacked credibility and the instruction was implausible on the evidence.

[1] (1986) 160 CLR 16; Leighton Contractors Pty Ltd v Fox (2009) 240 CLR 1; [2009] HCA 35 at [20].

Horne v J K Williams Contracting Pty Limited [2022] NSWDC 135

- Gibson DCJ, decision delivered 29 April 2022.

Keywords

Public liability – whether risk of harm foreseeable and not insignificant – obvious risk – whether defendant's response was reasonable.

Facts

In January 2017, the defendant was engaged in building activities on and adjacent to Victoria Road Werrington, New South Wales. On or about 17 January 2017, the defendant erected a line of bright orange barricades adjacent to Victoria Road, as the building work was taking place behind that structure.

On 19 January 2017 at about 9:00pm, the plaintiff and his son, both of whom had passed the building site on many occasions as they resided nearby, were riding their pushbikes along the nature strip beside Victoria Road. As they were riding, the plaintiff's bicycle came into a collision with one of the barricades erected on what had previously been a pedestrian thoroughfare. The collision caused the plaintiff to sustain injuries.

The court considered two issues: whether the risk of harm in colliding with the barricades in poor lighting was foreseeable and not insignificant, and whether the defendant's response to any such risk was reasonable. There was also consideration given as to to whether the obvious risk defence was applicable.

Decision

1. Judgment for the defendant.
2. Costs reserved, with liberty to apply.
3. Exhibits retained until further order.

Ratio

The plaintiff's case was that the defendant failed to properly illuminate the construction zone by the operation of only one operational streetlight and it failed to place warning signs preceding the construction zone.

The court did not accept that the risk of injury was foreseeable as there were no difficulties with lighting and visibility for the plaintiff. Furthermore, this was not a case of “Stygian darkness” requiring immediate action, but a situation where one of two streetlights was not working and where the impact of that light not working may not have been immediately apparent to the defendant. The barricades in use were what was commonly used in road and building construction, they conformed with relevant recommendations and were designed to be seen. The plaintiff also failed to establish that the risk was not insignificant.

The court considered that any warning signs were unlikely to be seen by the plaintiff as he was traveling in the opposite direction and had inadequate lighting on his bike. The court also found that the installation of flashing warning lights was not required due to the common undesirability of these in residential areas.

As the subject works were not being conducted at night, the defendant was entitled to assume that all lights were operational as no faults had been reported and there was not a need for a high level of night lighting. The court therefore found that the defendant had taken all reasonable precautions.

As to an obvious risk, the court concluded that if the plaintiff had an adequate bike light, the large and bright-coloured barricades would have been visible.

In summary, the court found that even if there was a breach of duty, it could not be causative of the plaintiff’s injury.

Greenslade v Hiew [2022] WASCA 47

- Murphy, Beech and Vaughan JJA, decision delivered 4 May 2022

Keywords

Latent defect – tenant – lessor – duty to inspect – notice of defect.

Facts

On 22 June 2013, Mr Greenslade entered into a handwritten tenancy agreement with Mrs Hiew, the property owner. Mrs Hiew had owned the premises as an investment property for around 20 years. Immediately before entering the tenancy agreement, Mr Greenslade inspected the property and identified numerous defects, but none of which related to the ceiling. Severe storms occurred in 2014, which produced heavy rain and hail.

On 11 January 2015, Mr Greenslade was walking through the house when the ceiling suddenly, and without warning, collapsed onto him. Afterwards, Mr Hiew allegedly told Mr Greenslade that he had previously repaired the ceiling.

Mr Greenslade alleged Ms Hiew knew, or ought to have known, there was a defect in the ceiling before it collapsed and had permitted her husband to repair the sag, knowing he was not qualified to do so. Further, Mr Greenslade alleged Ms Hiew's duty of care required her to arrange an expert inspection of the ceiling which would have led to the defect being identified and repaired.

At trial, it was found that the ceiling collapsed without any observable sign of damage or defect as a result of the severe storms in late 2014. The Court accepted Mr Hiew's evidence that he never undertook any repairs of the ceiling.

Mr Greenslade's claim was dismissed at first instance on the basis that Hiew was under no affirmative duty to inspect or repair the ceiling and there were no special circumstances that created any such duty, by way of notice of the defect or any statutory requirement. Mr Greenslade's evidence about defects identified during the initial inspection in 2013 were considered irrelevant because the Court found the damage which ultimately caused the ceiling to collapse was sustained in late 2014 as a result of severe weather events.

Mr Greenslade pursued an appeal on the basis that the trial judge failed to give adequate reasons for material aspects of the decision.

Decision

The appeal was dismissed.

Ratio

The court highlighted that inadequacy of reasons does not necessarily amount to an appealable error and that an appeal court will only intervene when the inadequacy of reasons gives rise to a miscarriage of justice. There was no basis to conclude that the trial judge's reasons were inadequate.

Pietrobelli v Jewell Family Nominees Pty Ltd [2022] NSWSC 660

- Walton J, decision delivered 24 May 2022

Keywords

Pleading of slip – causation – pre-accident conditions – surveillance evidence – expert credibility – stair tread – lighting

Facts

On 2 July 2016 the plaintiff left a children's birthday party that was held in the upstairs room at a putt-putt and children's play centre. The plaintiff pleaded that whilst she descended the stairway her foot slipped off a carpeted stair tread, causing her to fall down the narrow stairway, thereby sustaining injuries. Her injuries included a mechanical injury to her spine, soreness and pain in her neck, chronic conversion disorder, depression and deep vein thrombosis in her right leg.

Despite the plaintiff's pleaded case she couldn't provide a precise account of the circumstances of her fall. Contemporaneous reports to the ambulance and hospital noted that she '*slipped', 'right foot rolled and slipped', 'right foot tripped and rolled' ' Pt unsure how she fell*'.

The plaintiff gave evidence that she paused her descent to alert the other members of the party by saying words to the effect, '*be careful, you can't get your foot properly on the stairs*.'

The plaintiff submitted that the probable, if not only, available inference is that her fall was because the stairs did not comply with the Building Code of Australia on the basis that the goings were less than the required dimension of 250mm resulting in the treads being too small to place her foot and there were inconsistent risings and goings on the steps. This resulted in an overstep on the stair and her foot slipping off the carpeted nosing. She also pleaded that the risk of falling was exacerbated by poor lighting.

The defendant submitted that there were a number of other reasons why the plaintiff fell, unrelated to the stairs, including distraction, pre-existing dizziness and unexplained falls as recently as 2 weeks prior to the incident, obesity and instability in her knee. The defendant also submitted that the plaintiff did not exercise due care for herself and a deduction of no less than 50% ought be applied for contributory negligence. The defendant also employed the use of surveillance video to submit that the plaintiff was overstating her injuries.

The plaintiff was a disability support worker. She had applied for a full-time position prior to the accident where she would have earned $820 net per week. At the time of trial, she was working 3 days per week for NSW Health.

Decision

Judgment for the plaintiff.

Ratio

Despite some of the contemporaneous evidence supporting the suggestion the plaintiff slipped, this did not make up for the shortfall in the plaintiff's evidence that she did not know why she fell. Despite this, His Honour drew an inference from the available evidence and accepted that the mechanism of an overstep had a significant probability of causing the slip and fall.

His Honour concluded that the risk of fall on the subject stairs was not insignificant, and the defendant ought to have taken measures such as rebuilding the stairs or restricting access.

There was no deduction for contributory negligence.

It was accepted that the plaintiff suffered both physical and psychological injuries. His Honour accepted that the plaintiff had pre-existing psychological vulnerability and discounted her psychological injuries by 40%.

The defendant placed reliance on surveillance footage that showed her being able to lift her leg despite her evidence that she had 'foot drop' and was barely able to lift her foot up at all. His Honour accepted the plaintiff's evidence that she suffered some real impairment and did not accept that the footage established that the plaintiff had overstated her injuries. He decided that the footage did not warrant any adverse credit findings as to the plaintiff.

His Honour considered that in the notional situation, there was a 60% likelihood that she would have been offered full-time work as a disability support worker and been able to undertake this work. He then further discounted this by 15% on account of her pre-existing psychological injuries.

Dearden v Ryan & Anor [2022] QSC 111

- Crow J, decision delivered 2 June 2022

Keywords

Public liability – standard of care – scope of duty of care – foreseeable risk – identification of risk – house party – plaintiff set alight by intoxicated partygoers

Facts

In February 2019, the plaintiff attended a birthday party at the homestead on the defendant's property. At dusk, the electricity supply to the homestead failed and in response, one of the defendants, Mr Ryan, drove his utility vehicle from the homestead and over to the fuel store, which was a 5-minute drive away, to collect a generator. Mr Ryan brought the generator and three jerry cans full of fuel back to the homestead, filled the generator with fuel and left a portion of unused fuel in a jerry can.

Sometime around 11pm, a grassfire was started by an intoxicated partygoer and was ultimately extinguished by Mr Ryan. Adjacent to where the fire was lit, Mr Ryan observed one of the jerry cans and he instructed his son to "put it in the shed".

Sometime after midnight, the plaintiff retired from the party and went to sleep in a swag. In a prank which went terribly wrong, a partygoer by the name of Mr Robert Taylor alongside a group of other young men, located the jerry can, tipped some fuel on to the plaintiff and set fire to him. The plaintiff suffered serious burn injuries requiring extensive skin grafts.

Decision

1. Judgment for the Plaintiff against the Defendant for the sum of $600,797.55.
2. Judgment for the Defendant against the Third Party in the sum of $420,558.29.

Ratio

Citing the plurality in *Tapp*[2], his Honour concluded that the correct identification of the relevant risk in the present case was the risk of suffering a burn injury from an uncontrolled fire lit by an intoxicated guest from petrol made available by the defendants.

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[2] Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited [2022] HCA 11.

His Honour found that the risk was foreseeable against a background of there being a hundred or so young and intoxicated adults at the party as well as there being another deliberately lit grass fire only hours before the plaintiff was injured.

Further, his Honour considered that ordinarily, the sheer stupidity of lighting a fire at a party would be sufficient to categorise the probability or risk of occurrence as being low, perhaps even to the level of being insignificant. However, the first grassfire had changed things, as it had demonstrated that the level of intoxication of some of the guests had led to reckless behaviour.

It was considered that the defendants caused the source of danger by introducing the fuel source. In light of the high level of intoxication and irrationality of the young persons at the party, it was further considered foreseeable that one of those intoxicated persons may interfere with it and “spark off danger”.

His Honour held that the defendants had breached the duty owed to the plaintiff as they had failed to control the continued presence upon the property of expected irrational and intoxicated guests by supervising those guests that were acting in an unacceptable or unruly manner.

The scope of liability was contentious. In particular, the defendants alleged that “the scope of liability [does not] extend to the harm so caused because the harm was occasioned by the intentional, criminal or entirely reckless act of Robert Taylor, who is a third party that the defendants had no control over.”

Despite it being accepted that Mr Taylor’s conduct was criminal in nature, his Honour considered that absent the fuel, it is likely that there would have been no injury sustained by the plaintiff. Further, it was considered that as the reckless behaviour of lighting a fire had already been experienced earlier in the evening, and with the continued provision of large amounts of alcohol by the defendants, there was no reason to conclude that such a similar dangerous prank would not be further attempted by an intoxicated person.

His Honour concluded that the fuel source could have been removed easily, and ought to have been removed after the first grassfire, at the very least.

Eddy v Goulburn Mulwaree Council [2022] NSWCA 87

- Bell CJ, Gleeson JA and Kirk JA, decision delivered 7 June 2022

Keywords

Civil Liability Act 2002 (NSW) section 45 – defence – immunity – actual knowledge of particular risk the materialisation of which resulted in the harm – local council – public authority – road authority – non-feasance protection – specific risk – specific area – level of specificity required

Facts

The appellant, Mr Eddy, was going to the Centro Centre in Goulburn on the evening of 27 April 2017. For some time, the Goulburn Mulwaree Council had been conducting repaving works on the footpath outside the Centre. During the works, temporary ramps were placed over portions of the work to allow customers access to the Centre. There were two types of ramps: larger ones with handrails and smaller, portable ones with no handrails. The Council admitted it bore responsibility for securing the ramps in place.

As Mr Eddy walked up the smaller type of ramp, it slipped out from under him, causing him to fall and sustain significant injuries. Mr Eddy sued the Goulburn Mulwaree Council in negligence for failing to secure the ramp.

The Council had been notified of two prior incidents. One incident occurred on 3 April 2017 where a wheelchair user had almost fallen because of the steepness of one of the larger ramps with handrails. The second incident occurred on 20 April 2017 following which another wheelchair user advised the ramps were unstable and asked for someone to investigate and look at securing the ramps.

The Council relied upon the non-feasance protection in section 45 of the *Civil Liability Act 2002* (NSW). The primary judge, Strathdee DCJ, found that section 45 applied and dismissed the claim because:

1. The ramp encountered by Mr Eddy was a different type to those which were the subject of the two prior notifications to the Council; and
2. Mr Eddy had not proven the Council was aware of the particular risk which materialised.

Mr Eddy appealed that decision.

Decision

Appeal allowed with costs. The orders of the District Court dismissing the plaintiff's claim are set aside. Matter remitted to the District Court to be determined according to law.

Ratio

The first issue for the court of appeal was whether the ramp encountered by Mr Eddy was a different type to those which were the subject of the two prior notifications. In examining the prior complaints, the court held, on balance, the second notification to the Council more likely than not related to the same type of ramp as was the subject of Mr Eddy's claim and involved the same issue – instability.

The next issue was whether that prior notification to the Council of issues with ramps constituted knowledge of the particular risk. That issue required examination of the characterisation of the risk and the level of specificity required. It was not contended that the Council knew the precise location of the ramp in question at the time of Mr Eddy's incident, but that the Council knew the smaller ramps used in that area could be unstable unless secured, and they were not always secured.

The court considered the application of *Goondiwindi Regional Council v Tait* (2020) 92 MVR 218; [2020] QCA 119, stating that section 45 (and its Queensland equivalent) can "operate too stringently if required to be applied at a very high level of specificity".

Considering the context and purpose of section 45, the court had this to say regarding "actual knowledge of the particular risk the materialisation of which resulted in the harm":

1. "It will usually involve a higher degree of particularity than that required by the s 5B breach analysis (assuming that s 5B analysis is called for at all, that is, that it is a claim involving negligence).
2. It must meaningfully capture the risk that has come home, so that it reasonably can be said that the roads authority did know of a particular risk which caused the injury prior to incident in question. Factors likely to be important in this regard include the precision of the road authority's actual knowledge of the location (eg a particular location as opposed to a large area) and of the nature of the risk to be found there (eg the knowledge that there were dangerous potholes, as opposed to some generic concern being raised that the roadway is unsafe).
3. It does not require knowledge of every aspect of the precise causal pathway that led to the claimant suffering harm."

Kirk JA held (with which Bell CJ and Gleeson JA agreed) that the primary judge erred in finding the Council did not have actual knowledge of the particular risk the materialisation of which resulted in the harm. The court held the Council **did** have knowledge that there was a risk the ramp was not properly secured by reason of the second notification and, as such, the section 45 immunity did not apply.

James v USM Events Pty Ltd [2022] QSC 63

- Brown J, decision delivered 14 June 2022

Keywords

Public liability – sporting event – obvious risk – identification of the risk – reasonable precautions

Facts

In February 2018, the plaintiff had arranged to compete in the Gold Coast Triathlon ("GCT"). Due to weather and water conditions in the lead up to the triathlon, the event was changed to a duathlon the day prior the race. It, therefore, only involved a run leg, a cycling leg and a further run leg.

As a consequence of the change in the event format, the method for releasing the various classes of para-athletes and able-bodied athletes was altered, which ultimately resulted in there being a period of time during which para-athletes and able-bodied athletes were sharing the course.

Whilst undertaking her first run leg, the plaintiff was knocked to the ground by a para-athlete in a racing wheelchair, Mr Chaffey, who was on his final leg of the race and travelling at significant speed. The Plaintiff was struck from behind at a "bend" here the run course narrowed.

Decision

Judgment for the plaintiff in the amount of $1,073,530.27.

Ratio

Identification of the relevant risk

Counsel for the plaintiff defined the relevant risk of harm to be "the risk of somebody in the position of the plaintiff suffering serious harm or even death as a consequence of a collision between a para-athlete in a wheelchair and an able-bodied athlete attributable to the fact that those parties are on the course concurrently."

The defendant submitted that the risk be characterised much more broadly as "the risk of a collision between an able-bodied athlete and a para-athlete in a wheelchair at some undefined point on the course, which is not in proximity to the start."

Her Honour concluded that characterising the risk as submitted by the defendant would be too broad and would fail to account for the fact that speed was a factor, and as such considered the risk of harm was sufficiently raised on the plaintiff's case.

Reasonable precautions

In considering section 9 of the *Civil Liability Act 2002,* her Honour was satisfied that a reasonable person in the position of the defendant would have "identified those parts of the course which narrowed and where athletes were likely to bunch up and have erected barriers similar to those used to separate cyclists or witches' hats with signs directing the athletes and para-athletes as to the side which they were to separate them, given the risks of collision in the circumstances outlined above".

Her Honour therefore found that the plaintiff had established that the defendant had breached its duty of care by not providing a barrier; either hard or soft. She further confirmed that her finding would have been the same had she considered the question of breach pursuant to common law principles.

Australian Consumer Law

The plaintiff had also advanced a claim with respect to a breach of Australian Consumer Law ("ACL"), contending that the defendant's services in providing the triathlon event were not rendered with due care and skill.

In her Further Amended Statement of Claim, the plaintiff had pleaded:

2A. Pursuant to s 60 of Schedule 2 ("The Australian Consumer Law") to the Competition and Consumer Act 2010 (Cth), there was implied within the agreement a guarantee that the defendant's services of and incidental to the plaintiff's competing in the GCT would be rendered with due care and skill.

2B. Further or alternatively, it was an implied term of the agreement that the defendant would take reasonable care for the safety of the plaintiff while she was competing in the GCT.

As to the implied term, the plaintiff relied upon the payment of an entry fee giving rise to a contract between the parties, however her Honour found there to be an insufficient basis for the implication of such a term.

The defendant submitted that section 60 of the ACL does not imply a guarantee into the agreement, it rather creates a standalone guarantee. It was further submitted that none of the material facts supporting a cause of action pursuant to section 60 were pleaded.

Her Honour ultimately took the view that the plaintiff had not sufficiently pleaded section 60 to properly raise a cause of action pursuant to that section, not only by its pleading of the guarantee as an implied term, but also because of a failure to plead any entitlement to damages under the ACL.

NB: The Defendant appealed the liability findings, and the appeal has been heard. At the time of this paper being sent for printing, the Court of Appeal had not yet handed down its decision.

Khanna v Woolworths Group Limited [2022] NSWCA 94

- Gleeson JA and Leeming JA, decision delivered 14 June 2022

Keywords

Leave to appeal – slip and fall case – challenge to factual findings of trial judge re obvious risk, breach of duty and limitation.

Facts

The applicant, Mr Khanna, alleges he suffered injuries on 18 April 2015 at a Masters Home Improvement store at Rouse Hill, New South Wales operated by the respondent. He was shopping with his wife who he said tripped on the leg of a stack of chairs negligently placed at the end of an aisle by the respondent's staff - which he alleged created a trip hazard.

Mr Khanna alleged that his wife tripped and fell and that and in the process of attempting to stop her falling, he fell, causing injuries to himself.

The Trial Judge found that that Mr Khanna's wife tripped on the front legs of the chairs causing her to fall and land on her knees suffering injury. The Trial Judge also found that Mr Khanna also fell injuring his right knee but did not fall backwards hitting his head as he asserted.

The Trial Judge further found that Mr Khanna had failed to commence court proceedings within the requisite three-year limitation period. In the event that conclusion was wrong, the trial judge considered Mr Khanna's claim in negligence, finding that although he and his wife were owed a duty of care by the respondent, it had not breached that duty and that the risk of harm posed by the stacked chairs was an obvious one. His Honour also rejected the respondent's defence of contributory negligence and assessed Mr Khanna's damages (in the event that he did successfully appeal the primary judgment) in the amount of $56,294.60.

Having failed at first instance, Mr Khanna (who was self-represented) sought leave to appeal on various grounds including the Primary Judge's findings with respect to (no finding of) breach of duty and (the finding of) obvious risk and the extent of his injuries.

The respondent opposed the leave being sought by Mr Khanna.

Decision

1. Leave to appeal refused;
2. Applicant to pay the respondent's costs.

Ratio

Two procedural issues raised by Mr Khanna (regarding the production of documents in response to a Notice to Produce and the Primary Judge's refusal to issue a subpoena to Woolworths upper management) were rejected.

In dismissing the remaining grounds of appeal, Gleeson JA referred to the findings of the Primary Judge, finding that there was no "fairly arguable basis" for Mr Khanna in challenging them.

An attempt by Mr Khanna to widen the allegations of negligence in his pleadings was rejected, as was that with respect to obvious risk, again on the grounds that there was no arguable basis for challenging the findings of the Primary Judge.

In summary, leave to appeal was refused on the basis that the proposed appeal did not raise any issue of principle or question of general public importance - nor any injustice suffered by the applicant, Mr Khanna.

Liccardy v Daniel Payne t/as Sussex Inlet Pontoons Pty Ltd and Anor [2022] NSWDC 246

- Judge Levy SC, decision delivered 5 July 2022.

Keywords

Marine accident - finding that the master of the vessel was negligent – finding that the owner of the vessel is vicariously liable for the master's negligence – rejection of defences claiming *volenti non fit injuria*; obvious risk in relation to dangerous recreational activity; intoxication; contributory negligence – rejection of claim made pursuant to *Australian Consumer Law* in respect of statutory warranties

Facts

On 25 January 2020, a marine accident occurred during a leisure outing with a group of 10 people on the water at Sussex Inlet, NSW. The accident occurred when the intoxicated plaintiff, Adam Liccardy, dived into the water from the vessel to retrieve a hat blown into the water by the prevailing strong wind. Whilst re-boarding the vessel using a fixed ladder at the stern, his left lower leg and knee became injured when he came into contact with the submerged propeller of the vessel's outboard motor.

The vessel was owned and operated by the first defendant, Daniel Payne, a sole trader trading under the business name Sussex Inlet Pontoons Pty Ltd. At the time of the accident, and at the behest of the first defendant, the vessel was under the control of the second defendant, Derek Allred, as master.

The first defendant charged a total fee of $750 for the charter of the vessel for the day, which included the provision of a suitably skilled master for the vessel. The arrangement involved the second defendant collecting the balance of the agreed hiring fee and passing the whole amount on to the first defendant.

There was a factual dispute as to whether the relevant relationship of employment or agency and vicarious liability existed between the first and second defendants. Liability in the plaintiff's claim was also in dispute.

In addition to framing his case against the defendants in negligence, as against the first defendant, the plaintiff also relied upon statutory warranties claimed to arise pursuant to the consumer protection provisions of ss 60 and 67 of the *ACL*.

Decision

Verdict and judgment for the plaintiff in the amount of **$464,773.25**. The defendants are to pay the plaintiff's costs on the ordinary basis unless a party can establish the basis for some other costs order.

Ratio

Employment

There was no contractual consideration for that agreement flowing between the first defendant and Mr Allred, where Mr Allred was not being paid for his services. The Court found that Mr Allred had previously been paid cash for his efforts from time to time in the course of business activity. The Court did not accept that Mr Allred was on a work trial. Mr Allred had been sent out on the charter unsupervised because, from Mr Payne's observations, he was capable of the task, and it provided financial benefit to Mr Payne's business.

The Court found that Mr Allred was an employee of the business and not an independent contractor, which then raised the spectre of agency.

Agency and Vicarious Liability

The vessel used was expensive and it belonged to Mr Payne. Mr Payne charged and received financial benefit for both the vessel and its master, notwithstanding the fact that Mr Allred received no financial benefit.

When the charter was originally booked, it was to be run by Mr Payne. Due to unexpected family commitments, Mr Allred was asked to master the vessel in his stead, which suggested a relationship of agency. The Court found that there was a relationship of employment and agency between Mr Payne and Mr Allred. Mr Allred had the necessary qualifications to operate the charter, Mr Payne asked him to fulfil an obligation he couldn't, and it was of no consequence that Mr Allred was not paid for his efforts. The Court was satisfied that the evidence justified a finding that there was a sufficient business connection to establish a relationship of agency and vicarious liability and Mr Payne is to be held liable for Mr Allred's acts.

The negligence of Mr Allred was also established.

Contributory Negligence

The defendants pleaded a number of particulars for contributory negligence and relied upon the maxim *volenti non fit injuria* as an allegation of contributory negligence. The Court found

that the Plaintiff did not dive towards the propeller or hazard zone, and he was entitled to assume that Mr Allred was taking care of his safety. He was unaware that the vessel was in reverse when he was proceeded to reboard it. As to the plaintiff's level of intoxication, the Court found that if the plaintiff was injured when diving into the water or by a near drowning event, then contributory negligence would be considered. But as the source of his injury was different and caused by the actions of Mr Allred, the defence did not establish a relevant causal nexus between any alleged contributory negligence of the plaintiff and the injuries he suffered.

The Court made no finding of contributory negligence.

Obvious risks, dangerous recreational activity and intoxication

The defendants pleaded the defence of an obvious risk, and that the plaintiff was engaged in a dangerous recreational activity. The Court contended that the defence was not available as the plaintiff did not intend to place himself near the propeller when he dived into the water, for as long as he kept himself clear of the vessel, he did not invite any obvious risk of harm and it was the second defendant who activated the propeller where the plaintiff was in the water. Therefore, the circumstances did not constitute a foreseeable risk to a reasonable person in the position of the plaintiff.

As to the dangerous recreational activity defence, the Court concluded that the act of diving into the water to retrieve a hat is not characterised as a dangerous recreational activity.

Mr Payne claimed that the plaintiff was intoxicated at the time and submitted that fact should operate as a defence. However, the Court concluded that it was not the plaintiff's intoxication that led to his injury, it was the action by the second defendant which would have occurred regardless of whether the plaintiff was intoxicated. The defence was rejected.

Application of Australian Consumer Law

The plaintiff claimed that Mr Payne was providing a service and that he was a consumer in accordance with the statutory warranties provided by the ACL. The defendant denied that he agreed to provide the plaintiff with services within the meaning of the ACL and denied that the plaintiff was a relevant consumer. The Court rejected the plaintiffs claim as the agreement to provide services was between Mr Payne and Mr Tooth (another member of the group), not specifically with the plaintiff. It was found that:

> 226. In my view, the first defendant's denial as to the applicability of the *ACL* has substance in that the agreement to provide the services in question was between Mr Payne and Mr Tooth on behalf of unnamed members of a group and not specifically

with the plaintiff. The subsequent agreement between Mr Tooth and the other participants must be seen to be separate from the services which Mr Payne agreed to provide to Mr Tooth, and which Mr Payne delegated to Mr Allred.

227. In those circumstances, in my view, the plaintiff is unable to successfully invoke the statutory warranties that he claims as against the first defendant in respect of that defendant's vicarious liability for the acts, neglects and defaults of Mr Allred. Accordingly, the plaintiff's claim under the *ACL* must fail.

NB: On this ACL point, the decision is difficult to reconcile with other authority.

It is generally accepted that to take the benefit of an ACL guarantee, there does not need to be a contract between the Defendant and the particular Plaintiff. For example, in *Scenic Tours v Moore* [2018] NSWCA 238 at [173], Sackville AJA (with whom other members of the court agreed) found that:

"But the Care Guarantee (sec 60 of the ACL) may also be enlivened without any enforceable contract coming into existence. For example, a consumer may have a contract with one person, but the services may be supplied by a third person with whom the consumer has no contractual relationship."

In *Scenic Tours*, the point wasn't in issue when the High Court considered an appeal.

McIntosh v Canberra Choral Society [2022] ACTMC 16

- Magistrate Stewart, delivered 15 July 2022

Keywords

Personal injuries – award of damages – temporary stage set up causing hazard – duty of care – breach of duty and causation – contributory negligence

Facts

The plaintiff (Lady McIntosh) was injured on 23 March 2018 when she stepped into a "gutter gap" between rented "rises" and the elevated altar floor forming a temporary stage upon which she was walking after attending a choir rehearsal at St Christopher's Cathedral.

The plaintiff was, at the time of her injuries, the newly elected president of the defendant, and one of approximately 70 chorists rehearsing for a performance on the following evening.

The plaintiff was injured when she fell whilst attempting to negotiate/step over a gutter gap at the end of the first rehearsal session. The plaintiff was not present for any specific warning about the hazards posed by the rises or the gutter gap and knew little about them until she was physically upon them.

Decision

1. Judgment for the plaintiff against the defendant in the sum of $260,621.56;
2. Interest; and
3. Defendant to pay the plaintiff's costs.

Ratio

It was accepted that the defendant, having regard to its function as a small not for profit organisation staffed by volunteers, owed a duty to avoid exposing the plaintiff to unnecessary, reasonably foreseeable and not insignificant risks at the time of her injury.

Regarding breach of duty it was found that:

- The gutter gaps presented a significant risk;
- There were no handrails, physical barriers or human guides to help the choristers traverse the gutter gap;
- There were no physical warnings of the inherent danger of the gutter gaps nor verbal warnings given at the interval during the rehearsal, at the end of which the plaintiff was injured;

- Some of the choristers were of an advanced age and less steady and more frail than the younger members;
- The performance itself was not inherently risky but rather the use of the risers was;
- The hazard was obvious and known to the defendant and not rectified by it once the hazard was realised;
- The gutter gaps could have been filled with timber structures or ramps;
- There were obvious alternative methods of entry and exit onto and off of the risers that did not require the choristers to traverse any gutter gaps;
- The risers could have been removed and the choir situated upon the normal floor pan of the cathedral, albeit with a loss of view of the conductor for some of the choristers;
- The defendant chose a hazardous route to and from the risers for its members and therefore exposed them to an unnecessary and unreasonable risk;
- The issuing of a verbal warning and prior traversing of the gutter gaps did not negate the defendant being aware the gutter gaps were a foreseeable risk; and
- Expert evidence on the gutter gaps was not required given the multiplicity, depth and width of the gutter gaps meant that they represented such an obvious obstacle.

Causation fell for determination under the *Civil Law (Wrongs) Act* 2002 (ACT). The court found that if there were no risers then there would not have been gutter gaps and therefore nothing for the plaintiff to fall into, determining the plaintiff had established causation on the civil standard.

The defendant alleged contributory negligence on the part of the plaintiff in that she:

- Failed to keep a proper lookout;
- Failed to take reasonable care for her own safety;
- Failed to heed the advice of the defendant's committee of which she was in charge to move carefully;
- Failed to give effect to the warnings that were issued to exercise care when moving around the area; and
- Failed to make alternative suggestions to remove the gutter gap.

In dismissing the claim of contributory negligence, the court found that the gutter gaps presented a significant risk to all of the chorists every time that they were traversed, and that forgetting the hazard was present and/or not seeing a known hazard did not equate to negligence on the part of the plaintiff, noting the absence of suitable reminders about the hazard and the extraordinary risk that it presented.

The court found that the defendant had failed to prove more than inadvertence, inattention or misjudgement on the part of the plaintiff in the face of an extraordinarily dangerous hazard created by it and as such the claim for contributory negligence must fail.

Alternatively, His Honour indicated that if he had erred with respect to contributory negligence, he would only have been inclined to award a small reduction in the order of 10% on that basis.

Moyes v Ensco Australia Pty Ltd [2022] WASCA 104

- Buss P, Murphy JA, Vaughn JA, delivered 9 August 2022

Keywords

Negligence – personal injury – fall at work – where plaintiff alleged forceful fall causing nociplastic pain – where medical evidence based on plaintiff's reports of symptoms and pain – adverse credibility findings against plaintiff – where judge found causation of nociplastic pain not established – where no challenge to the finding of fact that causation had not been established – whether trial judge nevertheless erred in law when there was 'no evidence' as to the degree of force required to cause nociplastic pain – procedural fairness – whether trial judge erred in law in denying procedural fairness to plaintiff on alleged basis that plaintiff had not been cross-examined on relevant evidence – rule in Browne v Dunn – whether judge was bound to accept plaintiff's evidence – where relevant matters were put to plaintiff and cross-examined on

Facts

The appellant brought a claim for personal injuries sustained in January 2012 whilst working on an offshore drilling rig. He alleged he slipped on a mud mixture which caused him to fall. The appellant claimed he suffered a fracture at T8, disc protrusion at T7/T8 and damage to sensorial nerves resulting in nociplastic pain, and as a result, developed a psychiatric condition.

The appellant brought a claim against the first respondent, as operator of the drilling rig, and the second respondent as the labour hire company which employed him. Both respondents denied the fall occurred and asserted that the appellant was an unreliable historian. At the conclusion of the trial, the appellant conceded the claim against the second respondent could not be made out because the appellant did not meet the statutory impairment threshold to bring a common law claim under the workers' compensation legislation.

At first instance, the court found that the first respondent breached its duty of care, but that the Plaintiff was not a credible witness and had not established the fall occurred in the matter alleged, or proven that personal injuries were sustained.

The appellant appealed the decision on the grounds the trial judge erred in law:

1. By finding he did not fall with sufficient force to cause injury to his nerves when his evidence was not challenged at trial, and there was no evidence of the degree of force necessary to cause nociplastic pain; and

2. By denying the appellant procedural fairness by making findings on medical causation contrary to the appellant's evidence when he had not been cross examined on those aspects of his evidence in chief.

The appellant sought orders that the decision be set aside, and judgment entered against the defendant for damages to be assessed.

Decision

Appeal dismissed.

Ratio

Ground 1(a)

The court found the appellant did not establish there was any error of law, and the trial judge did not misunderstand the evidence for two reasons:

1. The appellant raised a *Browne v Dunn* point contending that the trial judge was bound to accept the appellant's evidence regarding the degree of force with which he fell because it was not challenged in cross-examination. It was observed the appellants evidence was challenged regarding the existence and extent of his alleged pain and disability, and there was no challenge to the trial judges' findings that the appellant was given the opportunity to answer the challenges regarding him not accurately or truthfully reporting to his doctors to make out his claim; and
2. There was no requirement that the trial judge must accept evidence that was not the subject of cross-examination as cross-examining a witness on a point is merely a relevant factor to be evaluated and weighed in deciding to accept/reject that evidence. Further, the appellant failed to establish that the trial judge misunderstood the evidence that appellant fell forcefully on his back as alleged.

Ground 1(b)

The issue was whether the applicant established the fall caused injury the sensorial nerves and associated hypersensitivity of the nervous system, resulting in nociplastic pain. The trial judge concluded that whilst it was open to find that soft tissue injuries can take time to appear, the development of pain one month later was considered outside of the ordinary timeline associated with the existence of nociplastic pain. The court observed that medical causation was a question of fact on which appellant bore the onus of proof, and whether the onus was discharged is not a question of law. The court found the appellant cannot assume the evidence ought to be accepted, and a finding which is averse to the weight of the evidence does not establish a basis for judicial review.

Ground 2

The court found that the principles in *Browne v Dunn* were not infringed and observed the matters complained about by the appellant were sufficiently put to him in cross-examination. In addition, the court commented that the rule in *Browne* could not be applied without qualification to challenge the credit of a plaintiff in an action for damages for personal injuries regarding his evidence. It was held that the medical evidence did not demonstrate there was a sensorial disturbance giving rise to nociplastic pain.

Devic v AMP Capital Investors Limited [2022] NSWDC 371

- Weinstein SC DCJ, delivered 26 August 2022

Keywords

Occupiers' liability – breach of duty of care – categorisation of risk of harm – misstep – fall off wings of kerb ramp – walkway crossing – height difference – painted lines – foreseeable risk – precautions – obvious risk – contributory negligence

Facts

On 17 December 2019, the Plaintiff attended the Defendant's Casula Mall Shopping Centre together with her three young children. On exiting the mall, there was a walkway which led to a crossing, part of which was raised so that it was level with the walkway. The raised area of the walk crossing gave way to the road at each side. The Plaintiff alleged she was walking across the crossing when she encountered an unexpected variation in the height of the crossing which caused her to misstep and fall. She alleged she suffered injuries as a result. The Plaintiff brought a claim in negligence against the Defendant. Liability was in issue.

Prior to the Plaintiff's incident, the Defendant had painted the kerb and pedestrian crossing yellow as a visual cue. The Plaintiff alleged that the step from the edge of the crossing ought to have been painted a different colour to make it visually distinct to a person walking from the mall entrance towards the car park, or that barricades or bollards ought to have been placed at the end. The Plaintiff's liability expert submitted the highlighting of the pavement was inadequate, and that the area could have been fenced off with bollards which was inexpensive and would have obviated any risk, whereas the Defendant's expert submitted that the highlighting of the ramp provided an adequate visual cue, and that bollards or fencing were unnecessary.

Decision

Judgment for the Defendant. Plaintiff to pay Defendant's costs of the proceedings on the ordinary basis.

Ratio

Firstly, the Judge categorised the risk of harm as being: "that of a customer, in the position of the plaintiff, stepping onto a crossing who would misstep due to the presence of the height variation and suffer an injury as a result". The Judge considered the Defendant's duty as the occupier of the mall as a duty to exercise reasonable care to make their premises safe for entrants exercising reasonable care for their own safety. The Judge then considered the

factors set forth in sections 5B and 5C of the *Civil Liability Act* 2002 (NSW). The Judge found that a person traversing the crosswalk from the mall, taking reasonable care for their own safety, would not have assumed the first part of the ramp was flat, as the yellow lines clearly indicated sloped edges. The Judge found the step down from the wings of the ramp was visually distinct because of the painted yellow lines at the kerb and the curve of the first yellow line onto which a pedestrian would step.

Accordingly, the Judge found:

- The risk was foreseeable;
- Adequate precautions were taken in the form of effective highlighting of the site which provided an appropriate visual cue;
- The risk was not insignificant but there were no known prior incidents;
- A reasonable person in the Defendant's position would not have undertaken different coloured highlighting or erected bollards or fencing;
- Any risk assessment would not have identified a "not insignificant risk";
- The probability of the harm occurring was low;
- There was not a real likelihood of the Plaintiff sustaining serious bodily injury; and
- Whilst the financial burden of taking precautions to avoid the risk of harm was low, the precautions were not necessary or reasonable.

The Judge found the Defendant had done what was necessary in the circumstances: it painted the strip of pavement adjacent to the walkway in yellow which ought to have alerted the Plaintiff to the variation in height. On that basis, the Judge found that the Plaintiff's case should fail. The Judge also held the risk would have been apparent to a person when approaching the walkway and therefore classified as an "obvious risk", to which the Defendant did not have a duty to warn. The Judge held that, even if the Plaintiff's case did not fail, she would have been subjected to a deduction of 50% for contributory negligence.

Chol v Sydney Trains [2022] NSWSC 1266

- Cavanagh J, decision delivered 21 September 2022

Keywords

Negligence – train accident – intoxication – contributory negligence

Facts

The plaintiff was a commuter at a train station who rushed towards the open doors of a train as the doors were closing, attempting to get in. As the plaintiff reached the edge of the platform beyond the yellow line, the doors closed in front of her, although the straps of her handbag were caught in the door. The plaintiff attempted to tug the handbag free to no avail.

As the plaintiff remained holding onto the strap of her handbag, the guard whistle blew, and the train begun to depart the station. The plaintiff, on the very edge of the platform, then fell between the train and the platform from the propulsion and sustained catastrophic injuries.

The defendant train operator disputed liability on the basis that they in place a proper system of checks and balances to mitigate against the risk of injury of commuters rushing towards closed doors, and they had acted appropriately in compliance with that system the circumstances. The defendant also alleged contributory negligence at 100%, alleging the plaintiff was heavily intoxicated at the time causing her to stumble and fall, and further that the plaintiff failed to take reasonable care for her own safety at the time of the event.

Decision

Plaintiff successful at trial with contributory negligence found at one third.

Ratio

The court was satisfied that the persons in charge of the train's movement were properly trained and instructed, and that there was a system in place intended to ensure the safety of rail customers within the confines of that which the defendant needed to do, being, getting the passengers on and off the trains and moving the trains in accordance with the timetable.

In the circumstances, evidence suggested that trains were still permitted to depart the station even though commuters may be beyond the yellow line, if the guard was satisfied that the commuters were not at risk of injury from the train departing.

It was held that the occurrence of the injury itself meant that the defendant did not comply with its own system: the guard on duty permitted to train to depart in circumstances where the plaintiff, on the very edge of the platform and holding onto the handbag strap, was in a plainly precarious and very dangerous position, without first ensuring the plaintiff had moved away from the dangerous position that she was in before he allowed the train to move.

The defendant was unable to persuade the court that the plaintiff was intoxicated at the time, there being a lack of evidence, and the plaintiff was held to be one third contributorily negligent for voluntarily placing herself in the dangerous situation.

De Roma v Inner West Council & Ausgrid [2022] NSWDC 425

- Levy SC J, delivered 23 September 2022

Keywords

Torts – negligence – occupiers liability – plaintiff injured following trip over uneven margin of sunken utility pit lid on footpath – findings on negligence and contributory negligence – rejection of defence of obvious risk – plaintiff unsuccessful in claim against first defendant – plaintiff successful in claim against fourth defendant; damages – assessment of claimed heads of damage

Facts

On 2 February 2017, Lynda de Roma "tripped and fell whilst walking over the sunken surface of a checker-plate metal utility pit cover embedded withing the footpath surface."[3] Ms de Roma, as a result of her fall, suffered from multiple injuries, contusions and abrasions to her face, chest, fingers, hands, and knees.

Ms de Roma brought a claim for damages on the basis that where she fell was a trip hazard for pedestrians – her claim was against Inner West Council ("Council") and a partnership of five entities trading as the Ausgrid Operator Partnership ("Ausgrid"), being the "occupiers responsible for the inspection, maintenance and safety of the pit cover and footpath."[4]

Decision

The District Court made the following orders:

1. Verdict and judgment for the first defendant on the plaintiff's claim against that defendant;

2. The plaintiff is to pay the first defendant's costs on the ordinary basis unless a party can show an entitlement to costs on some other basis;

3. Verdict for the plaintiff against the fourth defendant in the assessed amount of $354,142.38;

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[3] [1]
[4] [2]

4. After applying the contributory negligence finding of 20 per cent, judgment for the plaintiff against the fourth defendant in the amount of $283,314.00;

5. The fourth defendant is to pay the plaintiff's costs of the proceedings against that defendant on the ordinary basis unless a party can show an entitlement to costs on some other basis;

6. The exhibits may be returned; and

7. Liberty to apply on 7 days' notice if further or other orders are required.

Ratio

Issue 1 – Ausgrid's criticism of the plaintiff's pleaded case

In its written submissions, Ausgrid raised criticisms that the plaintiff had not identified the precise risk of harm in her pleadings, and she only pleaded a common set of particulars for negligence against both defendants.

With respect to the first complaint, although His Honour agreed there might be "some force behind that complaint", he held that Ausgrid should have raised its criticisms at an "interlocutory stage, or at the outset of the hearing, and not at the conclusion of the case where the parties had conducted themselves that there was a pleaded case."[5]

With respect to the second complaint, again, His Honour agreed there may be "some force behind that complaint" but also considered that Ausgrid had not previously raised this point but rather "ha[d] taken a position and responded to the plaintiff's case by gathering and tendering documents, calling a senior employee as a witness, and cross-examining the plaintiff's expert witness."[6]

Further, His Honour relied on the High Court decision in *Tapp v Australian Bushmen's Campcraft & Rodeo Association Limited* [2022] HCA 11 where generality over precision was preferred when identifying the relevant risk of harm.

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[5] [177]
[6] [179]

Issue 2 – Relevant risk of harm

"When determining whether negligence has been established, [it] necessitates [an] identification of the relevant risk of harm at the appropriate degree of generality."[7]

The importance of doing so is to identify whether or not a defendant has taken the appropriate "precautions to avoid the "not insignificant" risk of harm from eventuating."[8]

His Honour went on to say that "the identification of the risk of harm involves enquiring into the mechanism or circumstances that gave rise to the potential for the harm which bases the plaintiff's claim for damages in respect of the injury at the appropriate level of generality, where there is no universally correct formulation of the risk to suit all cases."[9]

The parties submitted the following submissions in relation to the relevant risk of harm:[10]

Party	Relevant risk of harm
Plaintiff	A pedestrian would trip as a result of having their foot clipped by either the metal frame of the pit lid, or by the concrete that surrounded that structure
Council	The risk of tripping over an improperly positioned pit lid
Ausgrid	A trip hazard is one being where there is a raised edge of the footpath adjacent to a metal lid that was not sitting properly on the pit.

His Honour ultimately held that the relevant risk of harm could be identified as being an "injury that might occur from tripping whilst walking on an uneven surface of a footpath where the footpath surface comprised varied surface levels and textures, such as concrete and steel plate, where the levels of the walking surface were not at all at an even level."[11]

[7] [185]
[8] [186]
[9] [187]
[10] [188] – [190]
[11] [191]

Issue 3 – Duty of care, scope and content

With respect to the duty of care, His Honour said that "the duty owed by occupiers pre-supposes that a reasonable person in the position of the plaintiff would take reasonable care for their own safety when walking on the public footpath."[12]

His Honour went on to say, "the defendants owed members of the public a duty to take reasonable care with regard to the maintenance and repair of defects on the surface of the footpath where such defects posed a foreseeable risk of injury that could have been avoided by the exercise of reasonable care."[13]

In arriving at his decision as to what is the appropriate duty of care on the subject facts, His Honour took into consideration the following points:

- Ausgrid inherited the pit and lid;
- The structure of the pit and lid was not in a state of disrepair;
- The height differential between the pit lid surface and the frame was of longstanding origin and not something Ausgrid nor the Council created; and
- Had Ausgrid or the Council carried out proper inspections of the asset, they ought to have been aware of the height difference and considered what, if anything, should be done about that height difference.

His Honour ultimately held "the duty on the occupier, being cognisant of the existence of that height differential, was to take reasonable common-sense precautionary steps to warn pedestrians of the risk of harm from tripping posed by that heigh differential."[14]

Issue 4 – Breach of duty of care

The plaintiff pleaded the following particulars of negligence:[15]

- Failure to exercise reasonable care;
- Placing the plaintiff in a position of peril;
- Failure to properly and routinely inspect the footpath at the accident site;
- Failure to keep the accident site in a reasonable state of repair;

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[12] [192]
[13] [193]
[14] [198]
[15] [206]

- Failure to ensure that the footpath at the accident site had an even height and sat flush;
- Failure to repair the footpath at the accident site;
- Failure to erect permanent fencing or other barricade around the raised edge of footpath at the accident site; and
- Failure to paint a warning as to the raised edge of footpath at the accident site.

His Honour held that the plaintiff had failed to establish its case against the Council because it had failed to prove what the Council knew, or ought to have known, of the existence of a trip hazard at the location where the plaintiff fell. That is, whether it was aware, or ought to have been aware, of the height differential the subject of the plaintiff's claim.

In contrast, His Honour held that as against Ausgrid, the plaintiff had satisfactorily established the ten elements of negligence as per sections 5B and 5C of the *Civil Liability Act 2002* (NSW).

For an in-depth discussion of how the plaintiff satisfied each element, see [228] – [239] of the judgement.

Issue 5 – Causation

With respect to causation, His Honour accepted that had the "plaintiff been warned of the existence of the trip hazard…she would probably have seen and heeded that warning, and avoiding stepping on or over any area of unevenness, and she would have taken special care not to trip.[16]

Issue 6 – Obvious Risk

With respect to the defence of obvious risk, Ausgrid submitted that

- "the pit lid was an ordinary pit lid sitting on an ordinary footpath, that it did not require either a barricade or any painting around the pit lid to warn pedestrians of the

[16] [243]

existence of a height differential in the walking surface of the footpath that was available to pedestrians.";[17]

- "there was nothing about the way in which the pit lid appeared which would have constituted a hidden or concealed trap upon which unsuspecting pedestrians could trip while traversing the uneven surfaces within footpaths"[18]
- "[uneven surfaced] footpaths are encountered on an everyday basis as one walks around the urban environment."[19]

In response, the plaintiff submitted that "whether an obvious risk existed was dependent upon the perspective from which one looked at the pit lid."[20]

His Honour preferred the plaintiff's submissions in this respect and held Ausgrid had failed to establish the elements of obvious risk on the basis that:

- It is common knowledge the existence of uneven walking surfaces could constitute an obvious risk of injury from tripping. However, the pit lid had an "extraordinary height difference of up to 10mm between it, the surrounding frame and the surrounding concrete footpath."[21]
- An ordinary reasonable person in the position of the plaintiff could easily have had their attention divided between keeping a lookout as to where they were placing their feet and continuing to make periodic glancing observations of the waiting bus; and
- "absent any warnings drawing attention to a height differential, within the available walking surfaces ahead, and absent any shadows that might have potentially been cast from differing heights, the risk of tripping over the raised edge within the pit lid / footpath structures would not have been obvious to an ordinary reasonable person in the position of the plaintiff at the time as that person walked quickly towards the waiting bus."[22]

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[17] [251]
[18] [252]
[19] [252]
[20] [257]
[21] [264]
[22] [269]

Issue 7 – Contributory Negligence

With respect to the defence of contributory negligence, Ausgrid submitted that:

- The plaintiff was running. His Honour rejected this submission on the available evidence;[23]
- The plaintiff's attention was diverted towards the bus. His Honour also rejected this submission and accepted the plaintiff was dividing her attention between looking where she was going and glancing at the bus; [24]
- The plaintiff was carrying objects in her hands. His Honour held that there was no credible evidence to suggest the plaintiff's attention was distracted by what she was carrying in her hands; [25]
- The plaintiff's attention was so diverted that she would not have noticed any markings or barricades. His Honour rejected this submission as it was an assumed and an overstated assumption and no justification was provided for this submission.[26]

Whether or not Ausgrid had established contributory negligence ultimately came down to whether the plaintiff was inattentive to the extent that justified a finding of contributory negligence.

His Honour held that something more than a momentary or fleeting inattention is required. On the available evidence, His Honour found that an "element of a lack of due self-care occurred on the plaintiff's part as she approached the pit lid because as she approached the pit lid, there was a need for her to consider whether the pit lid and its structure was a safe thing to walk upon as it may not have been a uniform area of uninterrupted pavement."[27]

His Honour, therefore, held the plaintiff was contributory negligent to the extent of 20%.

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[23] [275]
[24] [276]
[25] [277]
[26] [278]
[27] [301]

Issue 8 – Assessment of Damages

The defendants submitted a quantum assessment of $44,884.00 in comparison to the plaintiff's assessment of $737,294.00. In summary, His Honour assessed the plaintiff's damages as follows:

Head of damage	**Amount**
Non-economic loss	$159,500.00
Past economic loss	$47,200.00
Past loss of employer funded superannuation	$5,192.00
Future economic loss	$80,000.00
Future loss of employer funded superannuation	$9,600.00
Past out of pocket expenses	$36,650.38
Future out of pocket expenses	$6,000.00
Future domestic assistance	$10,000.00
TOTAL	**$354,142.38**

However, His Honour made a reduction of the above total on the basis that Ausgrid had established its defence of contributory negligence to the extent of 20%. The plaintiff was, therefore, awarded damages in the amount of $283,314.00.

For an in-depth discussion of how His Honour determined the above quantification, the reader can refer to [310] – [361].

Cecilia Si Chen v KMART AUSTRALIA LIMITED [2022] NSWDC 519

- Montgomery DCJ, decision delivered 28 October 2022

Keywords

Public liability – injury to a child – right eye scarring – assessment of damages

Facts

On 8 January 2020, the plaintiff (who was six years of age) was walking through the children's section of Kmart at Chatswood, and her right eye came into contact with a metal rail on which children's apparel was hung. She underwent two surgeries to repair the right eyelid and was left with scarring.

Liability was not in dispute.

Decision

Judgment for the plaintiff in the sum of $59,929.36.

Ratio

As to the plaintiff's physical injuries, the court preferred the evidence of Dr McGlynn, a cosmetic surgeon, over that of Dr Delaney, an ophthalmic surgeon. Dr McGlynn considered that the permanent visible scarring did not affect the plaintiff's capacity for study or work. He assessed her prognosis as "fair" and qualified his opinion as resting on the risk that the plaintiff might become more conscious of her appearance during her teenage years. Whilst Dr McGlynn did not think that the scarring required further treatment, if in the future, the plaintiff requested revision surgery it would be possible to undertake such a procedure at a cost estimated at $12,000.

Through his reports, psychiatrist Dr Lee consistently commented on the plaintiff's symptoms in the context of his consideration of the threshold to satisfaction of the formal psychiatric diagnosis according to DSM 5, Adjustment Disorder. Over time, Dr Lee's opinion had changed from the plaintiff meeting that formal diagnosis to only being at its threshold.

Dr Lee had explained that whether or not the plaintiff satisfied the diagnosis of an Adjustment Disorder pursuant to DSM 5, this was not determinative of whether or not psychological treatment was reasonably required. Dr Lee considered changes in the plaintiff's behaviour and demeanour to be significant in the consideration of the plaintiff's present and future needs for psychological treatment. He further concluded that there was a

significant probability of psychological disturbance, which was increasingly likely to affect the plaintiff as she grew older.

Against that background, the court was satisfied that the plaintiff's demeanour and zest for life had been severely impacted by the defendant's negligence, and as such non-economic loss was assessed at 25% of the most extreme case pursuant to section 16 of the *Civil Liability Act 2022* (NSW). Future treatment expenses were assessed at $8,000.

As to future economic loss, the court considered that no matter what occupation the plaintiff decided to pursue in the future, she would be required to engage with people and self-consciousness of scarring to her right eye was likely to cause some disadvantage to her.

The court acknowledged that there was some possibility that the plaintiff's career choices would be limited due to her scarred appearance, or that there would be some degree of inhabitation or diminished self esteem affecting her competitiveness during job interviews or when dealing with customers. Against that background, the court made a buffer award to future economic loss according to the approach taken in *Penrith City Counsel v Parks* [2004] NSWCA 201 in the amount of $5,000.

Black v The State of Western Australia [2022] WADC 92

- Sharp DJC, decision delivered 7 November 2022

Keywords

Torts – negligence – defendant involved in accident – duty of care – duty to warn – obvious risk – liability of owner – turn on own

Facts

The defendant is the owner and occupier of Woodman Point boat ramps in Coogee, Western Australia (a southern coastal suburb of Perth). There were eight boat ramps in total for public use, with four being on the eastern side, and four on the western side. The eastern side boat ramps were newer than the western side, and each boat ramp included a 'finger jetty'. The eastern boat ramps included handrails, together with warnings signs painted on the concrete, the western side did not.

2015-Photograph 1

This is a photograph of two of the western ramps, taken in June 2015. The ramp on the left side is the ramp which the plaintiff chose to use on 15 February 2015.

On 25 February 2015, the plaintiff drove to the boat ramps with his trailer and boat. He used one of the boat ramps at the western side as all four eastern boat ramps were being utilised. The plaintiff's evidence was that he reversed his trailer to the point the trailer's back wheels were level with the water line and then exited his vehicle, walking up the concrete abutment to secure his boat. Having secured his boat, he walked back along the finger jetty and concrete abutment, stepped back to the concrete apron, and whilst stepping down, his right foot slipped causing him to fall heavily onto the boat ramp. As a result, the plaintiff sustained a fracture to his lumbar spine, bruising and abrasions, and subsequently developed a secondary psychological injury.

The plaintiff claimed damages, alleging that the defendant owed a duty of care at common law and under statute as occupiers of the boat ramps, and that they breached that duty. He alleged that the western boat ramps were not fit for purpose, though conceding the boat ramps likely met the Australian Standards, said the standards are minimal and did not alleviate the need for the defendant to analyse the risk.

The defendant accepted they owed a duty of care and to prevent foreseeable risks of harm, and that the nature of the risk (i.e. slipping and falling) was not in issue as it was reasonably foreseeable the plaintiff could suffer injury. The Defendant accepted that it was obligated to take reasonable steps to discharge its duty. However, the defendant argued the steps it took to discharge that duty included the design and construction of the boat ramps in accordance with Australian standards/guidelines, engagement of regular maintenance and cleaning, including a blast clean which occurred one month prior to the accident. The defendant further alleged the plaintiff was contributorily negligent as he failed to avoid an 'obvious risk', whilst adopting unsafe practices when using the boat ramp.

The issues for determination were:

1. Did the defendant owe the plaintiff a duty of care?
2. What was the risk of harm against which the plaintiff alleges that the defendant was negligent for failing to take precautions?
3. Was the risk of harm an obvious risk within the meaning of the CL Act to the effect that the defendant did not owe a duty to the plaintiff to warn of that risk?
4. Was that risk foreseeable and not insignificant?
5. If so, what precautions would a reasonable person have taken against that risk?
6. Did the defendant fail to take those precautions?
7. If the defendant breached its duty of care, did that breach cause the plaintiff's injuries?
8. If the defendant was liable, was the plaintiff also negligent?
9. On what basis should damages be assessed?
10. What final orders are appropriate?

Decision

- Plaintiff has not established that the injuries he sustained on 25 February 2015 arose from any breach of duty of care that the defendant owed to him.
- Plaintiff's claim dismissed.
- To hear from the parties as to the appropriate orders.

Ratio

Duty of care

The defendant admitted that it owed a duty of care to members of the public when using the boat ramps, and that the scope of that duty was to take reasonable care to prevent foreseeable injuries.

Identification of the risk

His Honour referred to *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; (2007) 234 CLR 330, which provides that only through correct identification of the actual risk, that assessment can be made of a defendant's knowledge of the specified risk, and the possibility of the risk occurring, to evaluate the reasonableness of the defendant's response (or lack of) to the risk.

The plaintiff alleged that the defendant knew, or ought to reasonably have known, that as a result of the design, construction of the boat ramps and its exposure to the sea, members of the public would be at risk of slipping, falling, and suffering injury. The defendant did not expressly agree with or deny the formulation of risk. His Honour considered the actual risk of harm which the defendant must take reasonable steps to avoid, was the risk of the plaintiff slipping and injuring himself at any stage during the launching of his boat.

Obvious risk

The plaintiff alleged the defendant failed to erect warning signs for members of the public. The defendant denied any such duty to warn of the relevant risk was it was an 'obvious risk', - such that there was no duty to warn in accordance with section 5O of the *Civil Liability Act 2002* (WA) ("CLA").

His Honour referred to *Nikolich v Webb* [2020] WASCA 169 which considered the issue of obviousness as a risk, stating an obvious risk as defined in section 5F of the CLA is either clearly apparent, easily recognised or understood, and the risk would have been obvious to a reasonable person in the plaintiff's position, noting this is an objective test. Further, the inquiry must consider the plaintiffs objective circumstance, the nature of the conduct or

hazard that caused the harm, and to the surrounding circumstances immediately prior to the relevant harm, to identify the factual scenario and identification of the obvious risk, which is to be undertaken prospectively and without hindsight, as a question of fact.

His Honour was satisfied that a reasonable person in the position of the plaintiff would have known the boat ramp might be slippery because of the proximity of the sea water, particularly because the plaintiff walked down the concrete apron to the water's edge, and then back along the concrete apron to tie his boat off at the finger jetty. Further, a reasonable person in the position would have known, among other things, because vehicles would drive up and down the boat ramps with wet tyres, the concrete apron is likely to get wet, become slippery, and stepping up or down from concrete abatement at an incline or decline would be a risk. His Honour concluded that he was satisfied the risk of slipping and falling on the boat ramp was an obvious risk within the meaning of section 5F of the CLA, noting the slipperiness of a boat ramp is a hazard that a user would expect to encounter and be on the lookout for.

Breach of duty

In considering whether the defendant breached their duty of care, His Honour referred to *Wyong Shire Council v Shirt* (1980) 146 CLR 40, to consider what a reasonable person would have done in the position of the plaintiff, with the issue of breach determined by reference to section 5B of the CLA.

The defendant conceded, and His Honour found, that the was a foreseeable and not insignificant, however, His Honour rejected the plaintiff's argument the ramps should have been designed, constructed, or installed additional handrails and/or nonslip surfaces. His Honour did not consider it reasonable for the defendant to prospectively take steps to install additional handrails and/or nonslip surfaces, and that the defendant carried out regular maintenance and cleaning of the ramps. His Honour was satisfied with the steps taken by the defendant was collectively a reasonable response to risk the defendant had foreseen.

Hodges v Townsville City Council [2022] QDC 272

- Coker DCJ, decision delivered 7 December 2022

Keywords

Torts – negligence – duty of care – reasonable foreseeability of damage – park maintained by the defendant – stepped into a concealed hole – lack of observation of surrounds – whether the defendant maintained the park

Facts

On 15 October 2015, the plaintiff met her daughter and grandchild at a park in Mundingburra, dressed and planning for exercise, as she had previously done in the past. The plaintiff arrived before her daughter and was looking at exercise equipment when she noticed her daughter and started walking back towards the car park. Whilst walking across a grassed area, the plaintiff stepped (with her left foot) into what she described as a hole, causing her fall, and suffering injuries. The plaintiff was subsequently attended to by two ambulance officers, placed on a stretcher and when she was to be moved, the stretcher toppled over the same hole.

The plaintiff alleged she stepped into a hole that was concealed by grass as she was unable to see it. The defence suggested it was 'a slight depression or unevenness'.

The defendant acknowledged its responsibilities and duties owed to such persons as the plaintiff, arises pursuant to the *Civil Liability Act 2003* (Qld) ('CLA'). However, liability was in dispute.

Quantum was agreed by the parties in the sum of $301,603.23.

The issues for determination were:

1. Whether there was a hole, rather than a slight depression or unevenness;
2. If there was a hole, whether it created a risk which the defendant was required to take precautionary steps against; and
3. If so, were such reasonable precautions taken by the defendant.

Decision

1. Defendant liable for the injuries sustained by the plaintiff; and
2. Judgement for the plaintiff in the sum agreed by the parties, $301,603.23.

Ratio

Responsibilities and duty owed

His Honour considered sections 9,10, 11, 12, 13, 35 and 36 of the CLA as the provisions relevant to the claim, noting there was a duty owed by the defendant to users of the park, including their obligations to exercise reasonable care to ensure the park was reasonably safe for use, and to take reasonable steps to take reasonable precautions in respect of risks of harm which are reasonably foreseeable and not insignificant.

Hole or uneven ground

His Honour found the plaintiff to be an honest and open witness and found the most influential evidence of there being a hole and it being a hazard, was the fact the ambulance officers, being aware of the hole and no doubt observed it, still found themselves in the situation where the stretcher toppled over due to a wheel falling in the subject hole. His Honour considered that such a degree of destabilisation does not come from unevenness, indentation, or slight depression.

His Honour was satisfied the hole was concealed and that the photographs tendered in evidence clearly exampled the difficulties in discerning a hole, even with its presence was known.

Risk of injury

His Honour considered the plaintiff's outline of argument that there were five factors making the hole hazardous for users of the park. The defendant argued there was no hazard and that it was 'uneven land varying about 20 millimetres at most'. This argument was not accepted as the photographs showed more than uneven land varying about 20 millimetres at most, where a foot could be placed in the hole around ankle deep, and more significantly, the defendants own witness estimated the hole at 5-6 centimetres deep, constituting more than unevenness.

The defendant submitted it was an insignificant depression but simply a hazard or danger not readily able to be perceived, due to the hole being concealed by grass. His Honour noted in such situations, citing *Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512, *'…there may be foreseeable risk of harm to persons taking reasonable care for their own safety'*, and in this regard, referred to *Fuller v Logan City Council*, where Judge McGill said:

[28]… The footpath becomes a particular danger to users, in the nature of a trap, if the grass is short enough so that people are not actually deterred from using it, but long enough to conceal the presence of hazards which might cause them to fall.

[29]… This was a matter mentioned in the joint judgment in Ghantous (supra) at [163]:

"Certain dangers may not readily be perceived because of inadequate lighting or the nature of the danger (as in Webb v State of South Australia (1982) 56 ALJR 912), or the surrounding area (as in Buckle v Bayswater Road Board (1936) 57 CLR 259), where the hole was concealed by grass). In such circumstances, there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety. These hazards will include dangers in the nature of a 'trap'…

His Honour found it was clear that the position of the hole near the carpark gives rise to a foreseeable hazard where users of the park walk across the grass to depart from and return to their vehicles. Additionally, where the hole was concealed as it was, it constituted a risk for which the defendant was required to take precautions and did not. The inspections from the evidence of the Council employees were that there was no indication that they or anyone else had responsibility for inspections of the areas near the carpark, and it is clear there was a lack of any real or serious observation. His Honour concluded the inspections undertaken by the Council workers did not include an inspection of the grassed area near the carpark.

The defendant argued on the basis of previous cases that there was no breach of duty, but His Honour thought each case as distinguishable from the present case, particularly finding there was a concealed hole, the Council and its employee had not performed any real inspection or observation and that there was a real distinction to be drawn between those engaging in more strenuous activities, with the obvious risks inhered in such activities and that of the user of a park, walking over a mown and apparently even surface.

His Honour noted that any argument the plaintiff failed to take any reasonable care for her own safety and wellbeing fails when recognition is given to the finding the hole was concealed by grass.

Breach of duty

In relation to the provisions of section 35 of the CLA which sets out the principles which apply when deciding whether a public authority has breached its duty, the defendant argued that what existed was a depression of minimal depth concealed by grass and which was barely noticeable. The argument was rejected for the reasons outlined above.

Russell v Carpenter [2022] NSWCA 252

- Meagher, Gleeson and Kirk JA, decision delivered 8 December 2022

Keywords

Public liability – slip or overstep and fall on stairs

Facts

The appellants were the owners of a short-stay holiday rental property where the respondent and some of his friends were staying as part of a golfing weekend. After a presentation of the golfing results, the respondent was awarded some golf balls and after dropping one of them he went to retrieve it. The respondent took one step down some stairs and as the ball of his right foot landed on the first step down, the respondent slipped on the edge. This caused him to fall and sustain injury.

At trial, Strathdee DCJ found for the (Plaintiff) respondent and awarded him $284,092.18 in damages.

Decision

1. Appeal allowed.
2. Orders 1 and 2 made by the District Court on 31 August 2021 are set aside and, in lieu thereof, the statement of claim is dismissed with costs.

Ratio

There were three main issues on appeal; the nature of the duty of care owed by the appellants, the issue of breach and whether the appellants should have installed a handrail and lastly, whether the installation of a handrail would have made any difference.

As to duty, the court found that the trial judge had misstated the duty in holding that:

1) The defendant owed a duty of care to the plaintiff as an invitee to the property and as a consumer of services pursuant to the rental contract.
2) The duty of care included an obligation to ensure that the premises were safe and free of hazards.
3) The obligation in relation to safety was an obligation to ensure that persons present could engage in ordinary social discourse and move around the premises freely and without encountering undue hazards.

The court considered that the primary judge's reference to the respondent being a consumer of services pursuant to the rental contract was a distraction from the common law duty.

It was found that the appellants' duty of care to the respondent, as a lawful entrant on the property, was simply "to take reasonable care to avoid a foreseeable risk of injury": *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488; [1987] HCA 7.

On the issue of breach, the primary judge had identified that the relevant risk of harm was "that of a person slipping or falling on external helical stairs where no handrail was present". It was accepted that the risk of harm was one which was reasonably foreseeable within the meaning of s 5B(1)(a) of the *Civil Liability Act 2002* (NSW) (**CLA**).

Two experts had agreed that the stairs were made from a material which was safe and non-slippery even when wet. The court found that there was no proper basis for the primary judge's conclusion that the stairs were slippery due to the accumulation of sea spray, or moss or a combination of both. The description of the slip given by the respondent indicated that his fall was caused by an overstep which, significantly, both experts had agreed could be mistaken for the sensation of slipping. The court found that the risk of a person slipping and hurting themselves on the stairs – whether from a slippery surface and/or from overstepping – was slight, inherent and obvious.

In relation to the precautions that a reasonable person would have taken, the court considered that the stairs were an unremarkable set of short (only three) outside steps. It was considered that if a handrail was required for these steps to avoid a breach of duty, it would be required for countless other such short sets of helical steps in houses across the country. Their Honours held that "The law does not require that resources be spent on risks such as those at issue here which are slight, inherent and obvious. Life is not required to be lived surrounded by cotton wool."

As to causation, the primary judge had found that a handrail could have assisted in either preventing or mitigating a fall. On appeal however, the court found that the respondent did not make use of a vertical pole next to the stairs, the fall happened quickly, he was holding golf balls in his hands in any event, and his own evidence was that he had stepped as far to the outer edge as he could go. Against that background, it was held that there was no basis for suggesting that the position would have been any different had a handrail been in situ.

Buljat v Coles Supermarkets Australia Pty Ltd [2022] ACTCA 71

- Elkaim, Mossop and Kennett JJ, decision delivered 16 December 2022

Keywords

Public liability – supermarket – slip on loose grape – system of periodic cleaning and inspection

Facts

On 23 September 2017, the appellant was shopping in a Coles supermarket. When she was alongside a fresh meat display, she slipped on a stray green grape and fell to the ground sustaining injury.

The trial judge dismissed the claim on the basis that the Respondent did not breach its duty of care to the Appellant.

Decision

1. The appeal is allowed.
2. The orders made by the Supreme Court on 18 March 2022 are set aside.
3. Judgment is entered for the appellant in the sum of $27,309.

Ratio

At the relevant time, the respondent operated a “clean as you go” cleaning system during trading hours. The system relied entirely upon staff members, going about their normal duties, to detect hazards.

The day in question was a busy one at the store however the evidence indicated that the area in which the appellant fell was not an area that was regularly passed by staff. There was evidence that a member of the meat department was in the area at the time when the fall occurred but no evidence as to the activities of that person in relation to detecting slipping hazards.

As to reasonableness of the “clean as you go”, the court considered:

Of significance in the present case was that there was no evidence led by Coles in its case on this issue. It did not, for example, lead any evidence about the effectiveness of a system which involved all staff being required to keep a general lookout in the course of doing their jobs, but had no staff dedicated to that job or (set) any particular time at which an inspection ought to be made. While the onus remained on the appellant to establish that there was a

breach of duty, that conclusion is more easily reached when the evidence discloses apparent inadequacies in the system of a large national business such as Coles and a deliberate choice is made to lead no evidence from the organisation which would support the reasonableness of its approach having regard to issues of cost and effectiveness.

In the absence of such evidence, we conclude that a reasonable person in the position of Coles would have taken additional steps to ensure that particular attention would be paid to the issue of potential slipping hazards on the floor in the area in question. That would not necessarily require that there be separate staff whose job it was to make such an inspection, but that at least there be some system which required staff to specifically direct their attention to that issue not less frequently than once every hour.

The appellant sustained injury when the store had been trading for over six and a half hours. It was considered that a system of dedicated inspection would have detected a grape or other spill or slip hazard in the area. The court considered that it was more likely that the grape had been dropped in the earlier five hours and a half hours rather than the one hour immediately preceding the fall, and therefore if a reasonable system would have included hourly (or more frequent) inspection, the probability was that such a system would have prevented the harm that occurred.

Against that background, and contrary to the conclusion reached by the trial judge, the court considered that breach had been established on the evidence.

Barcos v Fairfield City Council [2022] NSWDC 642

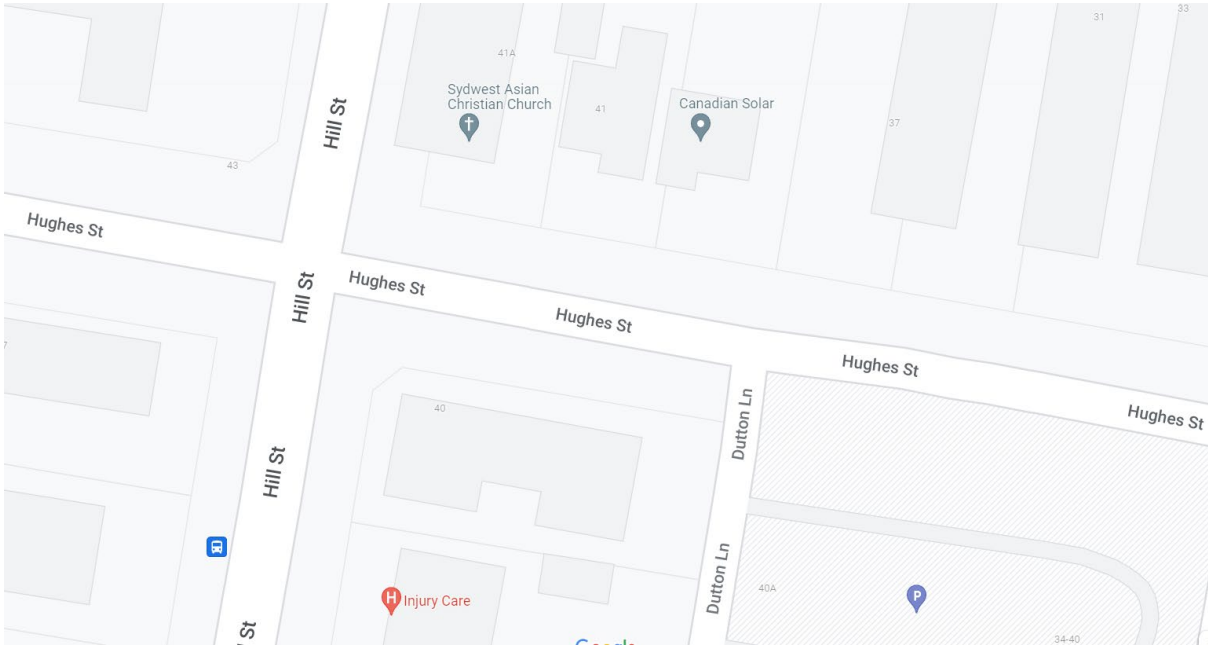
- Weber SC DCJ, decision delivered 16 December 2022

Keywords

Actual knowledge, s 45 Civil Liability Act – Protection for road authorities – s5F Obvious risk – s453A Special Statutory Power

Facts

The defendant was a local road authority with control over the road surface of Hill Street in Cabramatta. On 11 February 2019, the plaintiff was walking towards Hill Street along Hughes Street and turned right onto the footpath of Hill Street. There were pedestrian crossings on Hill Street at the intersections of Hughes Street and John Street. Rather than availing herself of either pedestrian crossing, the plaintiff crossed Hill Street at a point opposite Dutton Lane. She walked towards the western corner of Dutton Lane and Hill Street. There was a great deal of pedestrian and vehicle traffic, and the plaintiff was in a hurry.



At the junction of the concrete gutter and asphalt road surface, there was an isolated small depression which tapered from nil to about 20 millimetres. The tapering lip was about 30cm in length. As the plaintiff attempted to step on the opposite footpath on Hill Street, she felt her heel catch on something; she fell to the ground and twisted her right ankle. The plaintiff conceded she did not see the depression because she was watching the traffic. The defendant submitted that there was no reason why the plaintiff was unable to see the depression, even in circumstances where she was checking for vehicles.

The Council's Asset Maintenance Program stipulates no need for intervention for depressions in road surfaces of less than 40mm. The process which developed the slight depression in the road surface of Hill Street is unknown.

Decision

1. Judgement for the defendant against the plaintiff.
2. The plaintiff to pay the defendant's costs.

Ratio

Section 45 of the CLA

The Council argued that it was immune from liability pursuant to section 45 of the CLA. However, the plaintiff suggested that there were two occasions upon which the Council had actual knowledge of the particular risk which manifested itself in this case. The first occasion was when the Council's Environmental Standard Officers inspected the works, including the asphalt inlay, for the purposes of issuing an Occupation Certificate in 2013. This argument was rejected as the plaintiff failed to prove whether any depression in the bitumen was evident at that time. The plaintiff further relied upon the statement of an expert witnesses who agreed that saw cuts in bitumen sometimes sink and therefore suggested that the Environmental Officers were aware of the need to regularly monitor that segment of road for sinkage in the asphalt. The plaintiff's argument was rejected on the basis that it was inconsistent with section 45 of the CLA which is concerned with *particular risks*, not potential risks.

Secondly, the plaintiff contended that the Council had actual knowledge of the depression as a result of regular inspections of the council's roadways. The Council's Asset Maintenance Program required inspections every four years. This argument was rejected as there was no evidence of when such an inspection took place and therefore, there was no evidence of the state of the relevant bitumen segment at the time of the inspection. The court further noted that regardless of when the inspection took place, a Council Officer who saw the depression sometime prior to the plaintiff's fall, would realise that the subsidence existing in the road surface did not meet the Council's required criteria for intervention (40mm). As such, the court was not satisfied that the Council had actual knowledge of the particular risk which materialised.

Common law

The Council further submitted, by relying on the High Court's decision in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 that even if it was not protected by section 45 of the CLA,

it was not liable since, as a road authority, it was under no legal obligation to warn of, or repair, the depression. This was submitted on the basis that the depression was an obvious risk, and it did not pose a danger in the nature of a "trap" disguised from view. The court accepted the defendant's contention that the depression in the road was not "a trap".

The plaintiff conceded that as a general proposition, it is not negligent for a council to fail to repair every pothole or sunken area in roads. However, the plaintiff distinguished the present case from this general proposition by submitting that the area in Hill Street, where the plaintiff's fall occurred, was a "high pedestrian traffic area". The plaintiff referred to a signpost on the Hill Street footpath adjacent to the fall site which stated as such. Rather than the standard imposed by its policies, and the common law in relation to road surfaces, the plaintiff argued that it was the duty of the council to remedy imperfections in the road surfaces to a standard to be equated to Council's requirements in respect of footpaths or pedestrian crossings. The court did not accept the plaintiff's argument that the footpath sign placed a duty on the Council to the road imperfections in the present case beyond its duty at common law as a road authority.

As such, the court held that the defendant did not owe a duty of care at common law to the plaintiff to repair the Hill Street road surface in the circumstances.

Sections 5F and 43A of the CLA

The Council further submitted that the depression was an obvious risk for the purposes of section 5F of the CLA and the court accepted this argument; the difference in levels of the bitumen would have been obvious to a reasonable position in the plaintiff's position. Lastly, the defendant asserted that it was immune from liability due to the operation of section 43A of the CLA; and its failure to carry out the repair work was not so unreasonable that no reasonable authority could consider the failure to be a reasonable exercise of the *Road Acts* powers. The court accepted this contention.

Houghton v Potts & Anor. (No 2) [2022] NSWSC 1778

- Chen J, decision delivered 22 December 2022

Keywords

Public liability – landlord's duty of care – fall over balcony wall – categorisation of risk

Facts

On 28 December 2014, the Houghton family invited the Long family to their unit for dinner. Shortly before 8:00pm, Mr Houghton and Ms Long fell over a balcony wall – some 2 metres to a carport roof below. Mr Houghton suffered injuries that resulted in incomplete quadriplegia.

Mr and Mrs Houghton each commenced proceedings for damages alleging that the accident was due to the negligence of Mr and Mrs Potts – the owners of the property. Mr Houghton pursued a claim for damages for personal injury and breach of contract whereas Mrs Houghton's claim was for "nervous shock".

Damages were agreed and the trial proceeded on liability issues only.

Decision

Judgment for the defendants

Ratio

Whilst there were competing versions of events, it was ultimately found that the accident occurred when Mr Houghton held Ms Long over the balcony wall in a playful manner, and he had lost his balance – causing him, and Ms Long, to fall onto the carport roof below.

It was considered that the correct categorisation of the risk of injury (for the purposes of section 5B of the *Civil Liability Act 2002* (NSW)) was the risk of a person suffering injury by falling over the balcony wall.

The plaintiffs had contended that the defendant had breached its duty of care in three ways. Firstly, the balcony wall was required to be at least 865 mm high, when it was not. Secondly, at the time of entry into the lease, the defendants should have raised the balcony wall to a height of 1 metre in accordance with the Building Code of Australia. Thirdly, the lip at the base of the balcony wall was a tripping hazard and should have been removed.

The judge took the view that there was nothing in the condition of the balcony wall that would be sufficient to put an individual on notice that further action was or may have been required, or that it constituted a danger. Whilst there was some evidence that the wall was 5mm lower than what was allegedly required at the time of construction, the judge considered that a difference of that kind was imperceptible.

The judge noted Mr Houghton's evidence that he himself did not consider the balcony to pose any particular risk. Having resided in the premises for almost five months, the judge considered he was well-placed to make that assessment. Further it was considered that the conduct of the plaintiffs, in entertaining on the balcony on multiple occasions, was inconsistent with any of them being on notice about a risk created by the height of the balcony wall.

With respect to the requirements as at the time of construction, the relevant provisions of the statute relied upon where not put before the court. The plaintiffs did not tender any expert evidence addressing the issue, nor was there any other evidence dealing with building construction, or related, issues such as non-conformity with proper and required practices. In any event, the judge did not consider that a small departure of between 5mm and 25mm in of itself evidenced want of due care or a form of non-compliance that is actionable (either in tort or contract).

Similarly, the statutory provisions relied upon to support the allegation that the defendants were obliged to upgrade the balcony wall to a height of 1 metre at the time of leasing premises, were also not put before the court. It was noted however, that it was well-established that, generally speaking, there is no obligation for a homeowner to upgrade their premises on an ongoing basis to conform with the prevailing standards of the day.

With respect to the lip, there was no evidence at all to support a finding that the presence of it constituted breach of any duty and as such, the submission failed.

Against that background, the judge found that the plaintiffs had not established any breach of duty and accordingly, their claim had failed.

The claim in contract

In relation to the claim in contract, the plaintiffs had submitted that, having entered into the lease, they were entitled to advance a contractual claim (and recover damages) unaffected by the provisions of Part 1A of the *Civil Liability Act* because "the claim in contract is not one for damages for harm resulting from negligence". The submission, which partly picked up the language of section 5A(1) of the *Civil Liability Act* was not further developed and no authorities were cited to support it.

The definition of ‘negligence’ in section 5 was considered – “negligence means a failure to exercise reasonable care and skill”. Against that background, negligence is therefore “not a reference to the tort, but to a category of conduct, which may be an element of a cause of action in tort, in contract, under statute or otherwise”[28].

Citing *Paul v Cooke*, the effect of section 5A “is that Part 1A of the Act applies uniformly to a class of claims for damage, irrespective of how the cause of action has been formulated, so long as the damage results from a failure to exercise reasonable care and skill”.

Although, it was found that no liability arose. If liability had arisen for any one or more of the alleged omissions of the defendants, the judge considered that a “failure to exercise reasonable care and skill” as had been alleged in the statement of claim – that is, what was put by the plaintiffs was that the defendants were obliged to make modifications to the balcony wall (and the lip), but they failed to do so.

The judge took the view that allegations of this kind would be a “failure to exercise reasonable care and skill” (section 5) with the consequence that the claim would be “for damages for harm resulting from negligence…” (section 5A (1)) and therefore the provisions of Part 1A would have been would have been inescapable.

[28] *Paul v Cooke* (2013) 85 NSWLR 167; [2013] NSWCA 311 at [40].

Karaoglu v Fitness First [2022] NSWSC 1772

- Campbell J, decision delivered 23 December 2022

Keywords

Public liability – occupier's liability – duty of gym to member – weight machine

Facts

On 25 June 2015, the plaintiff was training in the defendant's gym. The plaintiff was using a leg press machine loaded with 240 kilograms. After completing ten repetitions, he engaged the support bars with his hands in order to support the weight before demounting the apparatus. As the plaintiff took hold of the foot plate to pull himself free of the operator's position, the foot plate descended and collided with his head causing him injury.

Decision

Judgment for the defendant.

Ratio

The plaintiff's case was that after he engaged the support bars, the weight bar fell or moved off of the supports bringing the footplate into contact with his head due to some alleged defect in the apparatus and/or its parts.

It was considered that the correct categorisation of the risk of injury (for the purposes of section 5B of the *Civil Liability Act 2002* (NSW)) was the risk of personal injury arising out of the unexpected descent of the weight bar from the top stop limit of the supports as the user was in the process of dismounting from the apparatus.

Expert evidence was heard concurrently from Dr Hugh Stark, a Consultant Mechanical Engineer and Dr Tim White, Mechanical Engineer. Both experts agreed that there was no actual "locking" device for the user to engage when they finish with the leg press. Rather the weight is held there by operation of ordinary physical forces – in particular, the positioning of the support by engaging the support bars in the correct position. Both experts agreed that whatever the cause of a sudden fall of the weight bar an essential element was "a misalignment between the weights and the supports". Further the experts gave evidence that provided that the support bars had been engaged correctly, there was no realistic chance that the weight bars could have slipped off the top of the supports given the mechanical design and operation of the leg press.

The judge found the expert evidence compelling and against that background the plaintiff's evidence about having brought the supports into the "locked" position with the weight bars resting on the centre of the top stop limits was rejected. The judge was also not persuaded on the balance of probabilities that a defect due to a failure to exercise reasonable care to maintain the leg press apparatus caused the plaintiff's injury.

It was considered that through some inattention or otherwise on the part of the plaintiff, he had failed to engage the support bars in the proper position and as the supports were unstable, the plaintiff's action of taking hold of the footplate to lift himself from the chair caused the weight bars to separate from the supports and descend suddenly onto his head.

The plaintiff had given evidence that he had not been given any training on using the equipment including the leg press, nor was he provided with any risk warnings concerning the use of that apparatus. He contended that the pictogram affixed to the leg press was entirely inadequate to explain to the user its proper operation. It was argued that reasonable care therefore required the defendant to instruct him and demonstrate proper operation of the leg press and in particular achieving the correct position of the support bars before removing one's feet from the footplate to dismount.

On that issue however, the judge was satisfied that when the plaintiff joined the gym, he was a very experienced bodybuilder and well versed in the use of leg-press apparatus. The plaintiff's own evidence was that he regarded himself as being better qualified than the defendant's staff in the use of the gym equipment.

It was found that even had the exercise of reasonable care on the part of defendant required it to instruct the plaintiff prior to allowing him to use the apparatus, the judge was not persuaded that the plaintiff had proven that he would have accepted and followed instruction given his attitude, his previous experience and his familiarity with the apparatus.

On that basis, the plaintiff's claim was dismissed.

Obvious risk, dangerous recreational activity and contributory negligence

It was considered that had the plaintiff made good his claim of a defect in the leg press, it could not have been an obvious risk within the meaning of s 5F of the *Civil Liability Act* and accordingly neither sections 5G nor 5L would have been available, although it was certainly arguable that using the apparatus was a recreational activity within the meaning of section 5K.

Given the plaintiff's evidence was that he was aware that the weight bar may have been unstable if the supports were not properly brought back into the "locked" position, absent

defect, the risk of harm would have been considered an obvious risk and the defendant would have been under no duty to instruct or warn the plaintiff about that risk (pursuant to section 5H). In that scenario, the materialisation of the risk would have been the materialisation of an obvious risk of a dangerous recreational activity (pursuant to section 5L).

The judge considered that had he arrived at a different view of the plaintiff's case based on the defendant's failure to instruct him in the proper use of the leg press, the plaintiff's knowledge of the risk and his inattention constituted by failing to bring the supports to the "locked" position would have justified a finding of contributory negligence assessed at 40% in the circumstances.

Proper Categorisation of the Risk

- The High Court's decision in *Tapp* has provided a structured set of guidelines as to how a court is required to properly categorise the "risk" to be considered. It's a task which a court must necessarily undertake in many cases of this type, whether they be dangerous recreational activities, claims against highway authorities or circumstances said to involve "obvious risks".

- Since the *Civil Liability Act* 2003 (QLD) was introduced (as similar legislation was to many Australian States) over 20 years ago, there has been some inconsistency in the way in which the "risk" has been categorised. Where the risk has been considered very generally, it has been difficult for plaintiffs to succeed. Where the risk has been considered very narrowly and in a very specific way, it has made it difficult for defendants to successfully raise a CLA defence.

- To give some context to this, a handful of decisions over the last two decades where the task has been undertaken are as follows:

- 2011 – *Felhaber v Rockhampton City Council* [2011] QSC 23 (24 February 2011) – where the plaintiff was injured when diving from a rope swing into the Fitzroy River at an area controlled by the Rockhampton City Council – the risk in question was thought to be the risk of impact with the bed or bank of the river, or something floating in the water, in a manner likely to cause injury:

- 2011 – *Laoulach v Ibrahim [2011] NSWCA 402* (16 December 2011) – where the plaintiff was injured when he dived from a moored mustang sports cruiser boat into Botany Bay and struck his head on the bottom – the trial judge thought that the risk was that arising from impact on the bottom of the bay upon diving into water on uncertain depth:

- 2013 – *Perisher Blue Pty Limited v Harris* [2013] NSWCA 38 (27 February 2013) – a case involving a plaintiff who injured when as a school student on an excursion, suffered serious injuries during a beginners skiing lesson, when he failed to negotiate a ditch at the bottom of the beginners slope – the primary judge found that the relevant risk was the presence of a ditch on a beginners slope and that the risk was both reasonably foreseeable and not insignificant – on appeal, the defendant contended that the risk should be categorised as either falling while learning to ski or

getting out of control and falling over learning to ski – but this argument was rejected and the primary judges' formulation of the risk was accepted:

- 2013 – *Collins v Clarence Valley Council (No 3)* [2013] NSWSC 1682 (15 November 2013) – a case involving a cyclist who was injured when crossing a wooden bridge during a charity ride when her front wheel became stuck in a gap between planks on the bridge. The defendant's counsel contended at the relevant *"risk of harm"* was the risk of a cyclist falling off the bridge because of the condition of the bridge surface, whereas plaintiff's counsel submitted that the relevant risk was the risk of a cyclist having the wheel of their bike stuck in a gap on a bridge and falling over. The trial judge found that viewed prospectively, the relevant *"risk of harm*" that materialised was the injury that might be suffered from a cyclist falling over after their wheel becomes stuck in the holes or gaps in the planks on the bridge:

- 2014 – *Liverpool Catholic Club Ltd v Moor* [2014] NSWCA 394 (18 November 2014) – case involving a plaintiff who was wearing ice skating boost and began to descend a flight of stairs which provided access to the ice rink and slipped and fell backwards – the primary judge had proceeded on the basis that the risk was not only that of slipping or falling when descending the stairs whilst wearing ice skating boots, but also involved the uneven dimensions of the stairs and the fact that they were wet – the Court of Appeal however, found this to be in error and determined that *"the risk of harm which materialised and caused the respondents injury was that of slipping and falling whilst descending the stairs and skate boots"*:

- 2015 – *McDermott v Woods [2015]* NSWDC 27 (13 February 2015) – a case involving a plaintiff injured during a horse riding lesson when the instructor tightened the horses bridal to the tightest notch, despite knowing that the horse did not like tight equipment over her nose and mouth. The trial judge found that the relevant risk was the risk of injury resulting from the bridal being tightened to the tightest hole on a horse with a known sensitivity to equipment being placed around her nose and mouth (the plaintiff succeeded):

- 2015 – *Sharp v Parramatta City Council* [2015] NSWCA 260 (2 September 2015) – a case involving a 24 year old plaintiff who jumped from a 10m diving tower at the Paramatta War Memorial Swimming Centre and was injured. The Court of Appeal thought that the particular risk which materialised and caused the appellant's injuries

was that of impact with the water surface from a heigh in an uncontrolled or unintended way:

- 2016 – *Coffs Harbour City Council v McLeod* [2016] NSWCA 94 (3 May 2016) – a case involving a plaintiff who fell on a patch of water on a concrete footpath at Coffs Habour where there had been previous complaints of a similar nature – the trial judge identified the risk of harm as the likelihood of a pedestrian slipping and falling at night on the slip hazard created by the wet patch on a footpath – the Court of Appeal found no error in the way in which the risk was categorised:

- 2017 – *Greater Shepparton City Council v Clarke* [2017] VSCA 107 (9 May 2017) – the case involving a plaintiff who tripped on a storm water pit whilst traversing a reserve at 8:00pm at night – the trial judge identified the risk of harm as being that of a pedestrian crossing a reserve at night who would encounter the pit and come the grief on it – the Court of Appeal dismissed an appeal:

- 2017 – *Ratewave Pty Limited v BJ Illingby* [2017] NSWCA 103 (19 May 2017) – a case involving a plaintiff who tripped over the corner of a raised timber platform while walking across the lobby are of a hotel – the primary judge identified the risk of harm *"as being that people might trip on the raised platform injuring themselves"* – this was not disturbed on appeal:

- 2018 – *Bunnings Group Ltd v Giudice* [2018] NSWCA 144 (3 July 2018) – a case involving a customer at a Bunnings store who tripped and fell when entering a children's play area – there the Court of Appeal categorised the *"relevant risk of harm as being that a person would trip from a standing start as he or she placed his or her foot on the elevated surface of the playground, or in the inclined slope adjacent to the gate, thereby sustaining injury"*:

- 2018 – *Kempsey Shire Council v Five Star Medical Centre Pty Ltd [2018] NSWCA 308* (13 December 2018) – a claim involving a plaintiff pilot who landed at Kempsey aerodrome and struck a kangaroo. The trial judge found that the relevant risk was the risk of an aircraft suffering damage thought colliding with a kangaroo or other wildlife on the runway as the aircraft was landing or taking off:

- 2019 – *Carter v Hastings River Greyhound Racing Club* [2019] NSWSC 780 (27 June 2019) – a case involving a plaintiff who was volunteering to assist enclosing a gate at Greyhound racing track and was struck by a moving lure – the trial judge found that the risk was that of a person suffering serious injury by being struck by the lure if standing in its path while operating the catching pen gate:

- 2019 – *Singh v Lynch* [2019] NSWSC 1403 (18 October 2019) – where the plaintiff was a jokey injured during a horse race. The trial judge found that the correct categorisation of the risk was not a breach of the rules of racing by another jokey – the most specific formulation of the risk that materialised would be on the facts, the risk that another jokey would ride carelessly in breach of the rules when riding out from the rail, carrying another horse with him, thereby causing the second horse to intrude on the rightful running of the plaintiffs mount and bring him down causing injury:

- 2020 – *Shaw v Oakdale Junior Motorcycle Club Inc* [2020] NSWCA 180 (6 March 2020) – where the plaintiff was injured as a result of participating in a motocross event at 19 years of age on a motorcycle track which was alleged to have not met the regulatory requirements. The plaintiff was injured when he was clipped by another bike and fell. The trial judge thought that the proper categorisation of the risk was the falling off the bike as a result of coming into contact with another bike (and rejected the plaintiff's submission that the risk was the risk arising from a noncompliant track):

- 2020 – *Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65 (2020) NSWCA 65 (21 April 2020) – a case involving a claim by a plaintiff who was seriously injured when her horse fell while warming up before a competition at the Wagga Wagga show. Her horse had been spooked by a noise made by some children playing on a fence. The Court of Appeal thought that the risk was one which was quite general – the risk of a horse being spooked by some external stimuli:

- 2020 – *Goondiwindi Regional Council v Tait* [2020] QCA 119 (5 June 2020) – where the plaintiff was riding her motorcycle through a floodway and struck a large pothole in circumstances in which the defendant council's patching crew had previously attended and erected signs which were not secured and subsequently had fallen over by the time of the accident – where the trial judge found that there was a foreseeable risk of injury from the surface of the road becoming unfit for the passage

of vehicles that would ordinarily be a safe and lawful speed. On appeal, the council argued that the particular risk was the pothole or defect in the surface of the road which caused the loss of control. Council's argument was rejected:

- 2021 – *JFIT Holdings Pty Ltd t/as New Dimensions Health & Fitness v Powell* [2021] NSWCA 137 – a case involving a plaintiff who was injured when cleaning up and putting away a 25kg weight plate which had been left on the floor by another gym user when she needed to use the floor space for her own routine – where in the Court of Appeal the defendant contended that the primary judge had formulated the risk of harm unduly narrowly and said that the primary judge had focussed purely and precisely on the circumstances in which the plaintiff suffered her injury – the court accepted the formulation by the primary judge was unduly narrow and focussed purely and precisely on the circumstances in which the plaintiff suffered her injury, however it was thought that even a more general formulation of the risk of *"suffering injury while putting weights away*" would have not changed the outcome:

The Decision in *Tapp*

Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited [2022] HCA 11 (6 April 2022)

- In *Tapp*, the majority (Gordon, Edelman and Gleeson JJ) thought that the proper assessment of the breach of duty depends on the correct identification of the relevant risk of injury. In their judgement, it was said:

- [106] The proper assessment of the alleged breach of duty depends on "the correct identification of the relevant risk of injury"[29], because it is only then that an assessment can take place of what a reasonable response to that risk would be[30]. The enquiry is concerned with determining what person, thing or set of circumstances gave rise to the potential for the harm for which the plaintiff seeks damages[31]. The characterisation of the relevant risk should not obscure the true source of the potential injury[32].

- [107] The correct approach to characterisation of the risk for the purposes of breach of duty under s 5B of the *Civil Liability Act* was adopted in *Port Macquarie Hastings Council v Mooney*[33]. In that case, a pedestrian slipped and fell into a stormwater drain on an unlit, temporary gravel footpath. The characterisation of the risk ignored the manner in which the pedestrian fell, and the particular hazard which precipitated the fall (the stormwater drain). Sackville A-JA said[34]:

- "The relevant risk of harm created by the construction or completion of the footpath was that in complete darkness a pedestrian might fall and sustain injury by reason of an unexpected hazard on the path itself (such as an unsafe surface or variation in

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29 Roads and Traffic Authority (NSW) v Dederer (2007) 234 CLR 330 at 338 [18].
30 Roads and Traffic Authority (NSW) v Dederer (2007) 234 CLR 330 at 351 [59].
31 Perisher Blue Pty Ltd v Nair-Smith (2015) 90 NSWLR 1 at 22 [98].
32 Perisher Blue Pty Ltd v Nair-Smith (2015) 90 NSWLR 1 at 22 [99], quoting Roads and Traffic Authority (NSW) v Dederer (2007) 234 CLR 330 at 351 [60].
33 (2014) 201 LGERA 314.
34 (2014) 201 LGERA 314 at 329 [67].

height) or by unwittingly deviating from the path and encountering an unseen hazard (such as loose gravel, a sloping surface or a sudden drop in ground level)."

- [108] Section 5C(a) of the *Civil Liability Act* reflects, and is consistent with, the common law. The effect of this provision is that a defendant cannot avoid liability by characterising a risk at an artificially low level of generality, that is, with too much specificity. As this Court said in *Chapman v Hearse*[35], "one thing is certain" and that is that in identifying a risk to which a defendant was required to respond, "it is not necessary for the plaintiff to show that the precise manner in which [their] injuries were sustained was reasonably foreseeable". The Court continued:

  "it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable [person] to foresee damage of a precise and particular character or upon [their] capacity to foresee the precise events leading to the damage complained of".

- [109] Similarly, in *Rosenberg v Percival*[36], Gummow J said:
  "A risk is real and foreseeable if it is not far-fetched or fanciful, even if it is extremely unlikely to occur. The precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable. It is sufficient if the kind or type of injury was foreseeable, even if the extent of the injury was greater than expected. Thus, in *Hughes v Lord Advocate* [[1963] AC 837], there was liability because injury by fire was foreseeable, even though the explosion that actually occurred was not."

- The court went on to set out a four-step process to undertake the process of properly categorising the risk. It was said:
  [110] Although the identification of the appropriate level of generality will not always be straightforward, there are four significant matters that must guide the reasoning process concerning the selection of the correct level of generality. **First**, and contrary to some views that have been expressed in the New South Wales Court of Appeal[37],

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35 (1961) 106 CLR 112 at 120-121.
36 (2001) 205 CLR 434 at 455 [64] (footnotes omitted).
37 See *Goode v Angland* (2017) 96 NSWLR 503 at 506 [5], 539 [177], 541 [185]; *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at 113 [38]-[39].

the "risk" with which s 5L is concerned will usually need to be assessed after a determination that there is prima facie liability for negligence. **Secondly**, the s 5L risk should be characterised at the same level of generality as the risk is characterised in the course of assessing whether the defendant has breached a duty of care. **Thirdly**, the generality at which the risk in s 5L is stated should include the same facts as established the risk for the purposes of the breach of duty which caused the harm to the plaintiff, but no more. **Fourthly**, and consequently, the characterisation of the risk does not need to descend to the precise detail of the mechanism by which an injury was suffered if that detail is unnecessary to establish a breach of duty."

- The majority went on to explain each of these four steps in the process in some detail – at [111]-[115].

- The majority went on to say:
  [116] For these reasons, it has correctly been observed that "an examination of the case law suggests that courts have consistently included the conduct alleged to be negligent as part of the risk description where that negligence involves commission rather than omission". To the extent to which any distinction can sensibly be drawn between negligence in the commission of an act and negligence by an omission, in neither case have courts characterised the risk by reference to something that the defendant could or should hypothetically have done. The focus should be upon the same essential circumstances which established the necessity for a reasonable person in the position of the defendant to take reasonable precautions in performance of a duty of care. The risk with which s 5L is concerned is thus the same risk as that with which s 5B is concerned.

- Somewhat gratuitously, the majority went on to consider some previous decisions which they considered to have **properly** applied their four-step process in the characterisation of risk under section 5L. They said:
  [117] The first example of the correct application of the four factors discussed above in the characterisation of risk under s 5L is the decision in *C G Maloney*[38]. In

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[38] [2006] NSWCA 136. See *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at 117-118 [61]-[63].

that case, the plaintiff overlooked a warning sign, slipped on floor polish which had been spilt by a cleaner, and fell on a hotel floor, striking her knee. The risk, within s 5L, for which the defendant would be "liable in negligence for harm suffered" by the plaintiff was not "a risk that a recently polished floor will be slippery", because no liability would arise from a statement of the risk at that level of generality. "A higher degree of intensity [was] required in stating the risk."[39] The risk, stated with the correct level of generality, and consistently with the essential circumstances in respect of which a person in the position of the defendant should reasonably have taken precautions, was the risk of falling from slipping on "polishing material on the floor which was not visible, and had not been removed in the buffing process"[40]. The proper characterisation of the risk did not, however, require any more precision or detail concerning the manner of the plaintiff's fall.

- The court then went on to consider the recent NSW Court of Appeal decision in *Menz* and said:

  [118] The second example is the decision of the Court of Appeal of the Supreme Court of New South Wales in *Menz v Wagga Wagga Show Society Inc*[41]. In that case, the appellant had been injured after falling from her horse while warming up before a competition at a show managed by the respondent. The fall occurred when the horse was "spooked" by very loud noises made by children, described as a "loud bang" like a gunshot. In the course of dismissing a ground of appeal concerned with the trial judge's rejection of any breach of duty, Leeming JA observed that "a horse could be spooked by a dog barking or a car backfiring"[42] and the presence of additional stewards and marshals, even to prevent harm by risks that they could control, was not a precaution that a reasonable person should have taken.

  [119] When the Court of Appeal in *Menz* went on to consider an exclusion of potential liability under s 5L, the risk was characterised at the same level of generality, involving the essential facts that would have established any breach of duty that

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39 [2006] NSWCA 136 at [173]-[174].
40 [2006] NSWCA 136 at [174].
41 (2020) 103 NSWLR 103.
42 (2020) 103 NSWLR 103 at 127 [112]. See also at 112 [33].

caused the harm to the plaintiff. Leeming JA, with whom Payne and White JJA agreed, concluded that the risk, which was obvious, was falling from a horse after it was "spooked by some stimulus"[43]. The proper characterisation of the risk did not require any further detail as to the manner in which the fall occurred. The Court of Appeal thus rejected the submission by the appellant that the risk should be characterised as including additional matters concerning the precise mechanism by which the injury was suffered, namely falling from a horse after it was "spooked" by children making very loud noises.

- As already been identified, in *Tapp*, the High Court went on to consider the circumstances in which the plaintiff was injured in the Open Campdraft competition. The plurality decided that a *"more accurate characterisation of the risk"* was that expressed by McCallum JA's reasons in the Court of Appeal where she had described the risk as *"the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the arena*".[44]

- In Queensland, we have already seen this approach adopted and applied in the Supreme Court by Crow J in *Dearden v Ryan & Anor* [2022] QSC 111. In that case (as discussed above), Crow J found that the correct identification of the relevant risk was the risk of suffering a burn injury from an uncontrolled fire lit by an intoxicated guest from petrol made available by the defendants. That decision is the subject on an appeal, and it will be interesting to see whether the Court of Appeal finds that His Honour categorised the risk too narrowly, and with too high a degree of specificity.

- Similarly, in *James v USM Events Pty Ltd* [2022] QSC 63, Her Honour Brown J found that the risk was more broadly categorised as the Plaintiff had contended – "the risk of somebody in the position of the plaintiff suffering serious harm or even death as a consequence of a collision between a para-athlete in a wheelchair and an able-bodied athlete attributable to the fact that those parties are on the course concurrently."

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[43] (2020) 103 NSWLR 103 at 121 [79].
[44] [2020] NSW 263 at [166].

Conclusion

- Having practiced in this area for a number of years (I'll decline to say how many!) before the *Civil Liability Acts* were introduced, it almost feels as though we are back to where we started from. In cases in which the defendant was aware or ought to have been well aware of the risk which manifested and in respect of which the Defendant failed to take a reasonable response, then subject to causation being established, the plaintiff will likely succeed. Other the other hand, in cases in which a plaintiff attempts to impute knowledge of a broadly defined risk in an artificial attempt to "cover the field", then the claim will likely fail.

- Even before the enactment of the *Civil Liability Acts*, the High Court had begun to tighten the common law in cases such as *Romeo v Northern Territory Conservation Commission* (1998) 72 ALJR 208 – a case in which an intoxicated teenager had fallen off a cliff after parking and then wandering near a clifftop in the defendant's controlled reserve. The High Court found that the duty of care to occupiers is to plaintiffs who are themselves taking reasonable care for their own safety. Just before the Civil Liability Acts had been introduced, the New South Wales Court of Appeal had handed down their decisions in the *"unholy trinity"* (as I like to call them) of *Lombardi v Holroyd City Council & Anor* [2002] NSWCA 252; *Burwood Council v Byrnes* [2002] NSWCA 343; *RTA v McGuiness* [2002] NSWCA 210 – cases involving road authorities where plaintiffs had tripped on cracks in footpaths, and all of which were dismissed on appeal. The Justices of the Court of Appeal focussed more on what a reasonable pedestrian would have done in having proper regard for their own safety in the circumstances in which they were injured. These cases followed that of *Richmond Valley Council v Standing* [2002] NSWCA 359 in which Justice Heydon (then as a Judge of the New South Wales Court of Appeal) had famously said:

  "Almost any injury that happens is an injury in respect of which there can be said to have been a foreseeable risk. In that sense, there was a foreseeable risk of injury here. But it was not a reasonably foreseeable risk of injury to pedestrians using reasonable care for their own safety".[45]

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[45] Richmond Valley Council v Standing [2002] NSWCA 359.

- Even with the *Civil Liability Acts* now in existence across many Australian States, whether or not a duty of care exists is normally determined on common law principles – except in perhaps cases against public authorities, those involving dangerous recreational activities, intoxication, or criminal conduct. The *Civil Liability Acts* have some impact on whether a duty has in fact been breached, and on the issue of causation – but in practical terms, given recent jurisprudence, it feels as though we're back to where we started from.

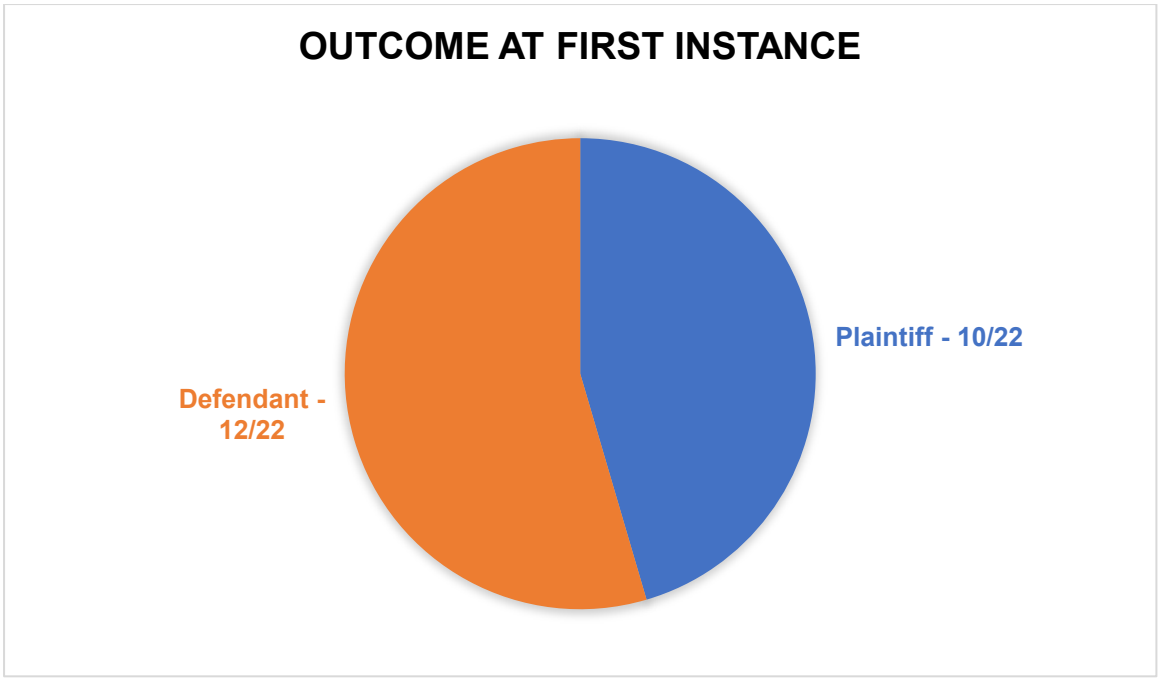
The Stats

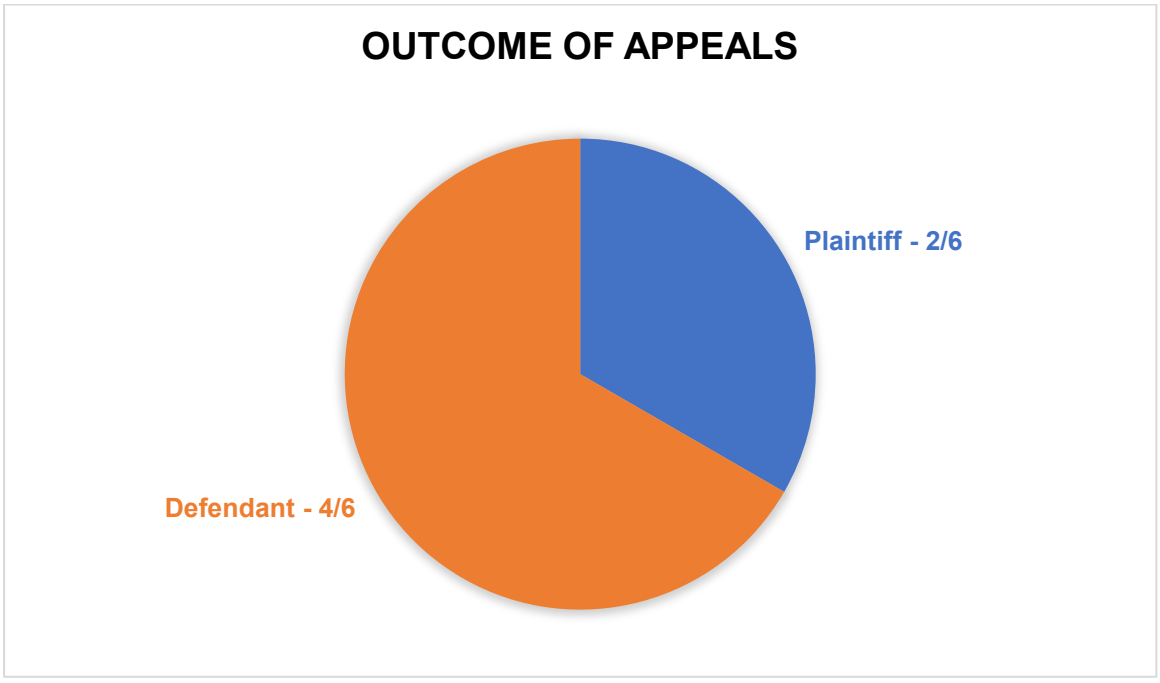
- The number of cases heard by Australian courts which meet my (rather loose) definition of a "public liability claim", have not been high in number – slightly higher than the previous year but a long way from the heady "days" of the 1990s and early 2000s when we would typically see 50 to 60 cases of this type heard each year.

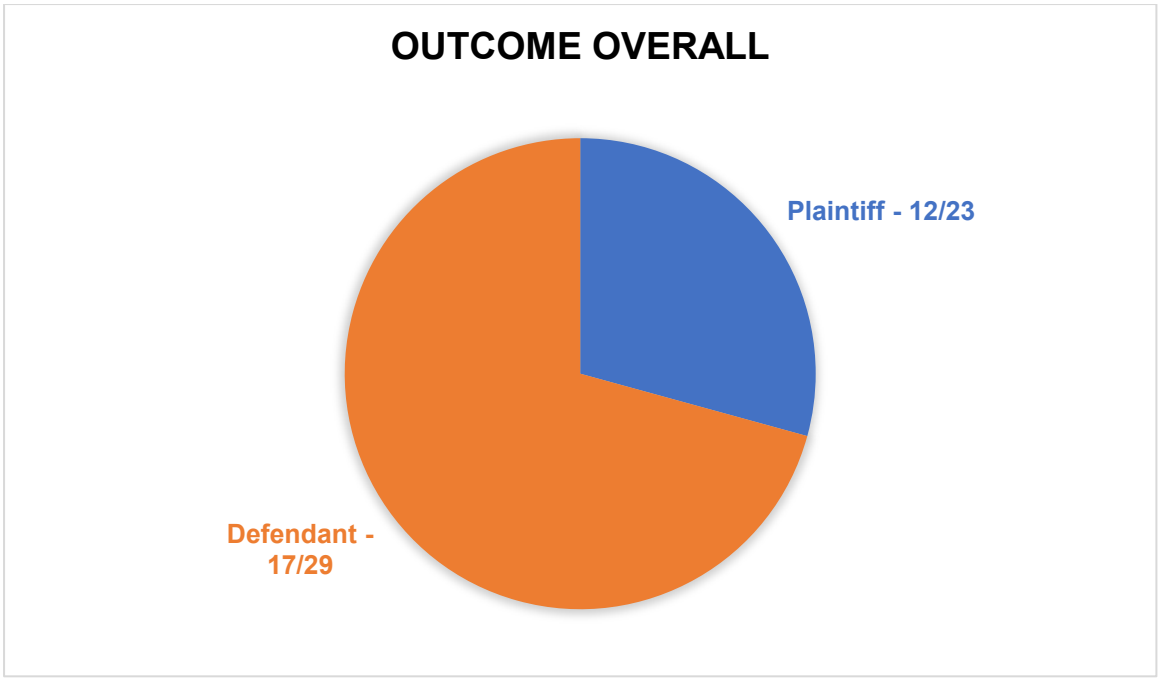
- Of the total 29 cases of this type heard by Australian courts, overall plaintiffs were successful in 12 out of 29, whilst defendants were successful in 17 out of 29. The result is much better for the defendants than is ordinarily the case.

- At first instance, the plaintiff was successful in 10 out of 22 trials, whilst the defendant was conversely successful in 12 out of 22. Appeal courts, similarly, were apparently quite sympathetic to defendants given that plaintiffs succeeded in only 2 out of 6 appeals and defendants enjoyed a much better strike rate – winning 4 out 6 appeals.

- Whilst the numbers might not be statistically significant, 2022 was undoubtedly a year for insurers in cases of this type. Typically, we see plaintiffs being slightly more successful than defendants in these cases on a historical basis – but the worm turns so it will be interesting to see the results of the 2023 calendar year.


OUTCOME AT FIRST INSTANCE
Plaintiff - 10/22
Defendant - 12/22


OUTCOME OF APPEALS
Plaintiff - 2/6
Defendant - 4/6


OUTCOME OVERALL
Plaintiff - 12/23
Defendant - 17/29