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Injury Liability Gazette

4th edition

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Contents

From the Insurance Team

It is with great pleasure on behalf of Carter Newell's Property and Injury Liability team that I introduce the 4th Injury Liability Gazette which provides a helpful summary of recent Queensland and New South Wales liability and personal injury decisions. Along with my fellow partners Rebecca Stevens and Stephen White, our Property and Injury Liability team have compiled this latest edition of the Gazette to provide practical information on recent cases relevant to insurance professionals.

We see in this edition of the Gazette quite a rare case before the Courts on the application of the *Damage by Aircraft Act 1999* (Cth) which should have relevance to both aviation hull and agri-risk insurers. This Gazette also includes two cases dealing with police liability in New South Wales around issues of imprisonment and assault. Personal injury claims surrounding dog attacks or stray dogs can give rise to interesting issues at law and case summaries for two NSW Court of Appeal judgments in *Simon v Condran* and *Sarkis v Morrison* are included. Finally, amongst other cases, we summarise recent judgments on the adequacy of cleaning regimes for supermarket slip and fall injuries.

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Case Note

Nemeth v Westfield Shopping Centre Co Management Pty Ltd [2013] NSWCA 298

Injured bookkeeper seeks reassessment of her lost earning capacity due to a broken ankle.

The facts

The appellant fell in a car park at a shopping center managed and owned by the respondents.

As a result of the fall, the appellant suffered a broken ankle and a secondary depressive illness. She sued the respondents for damages as a consequence of this fall.

At first instance, the respondents admitted liability though the issues of contributory negligence on the part of the appellant and the quantum of damages were in contest.

The trial judge concluded that there had been no contributory negligence by the appellant and made an award for damages totaling $78,290.

The appellant appealed the trial judge's decision.

Issues

The appellant challenged the trial judge's assessment of non-economic loss and his conclusion that her injury only represented 25% of the most extreme case where he had incorrectly determined the likely duration of the her ankle condition and failed to give adequate consideration to her depressive illness.

The appellant also challenged the trial judge's assessment of future economic loss and her need for commercial domestic assistance.

Decision

Duration of appellant's condition

At first instance the trial judge, accepting both the medical expert evidence of Dr Liaw (the appellant's treating orthopedic surgeon) and Dr Schutz (consultant orthopedic surgeon for the defendants), determined that the appellant's injuries would in the future '*improve to an extent*' where assistance would no longer be required. Accordingly, the trial judge awarded damages for the future period of five years only.

However, the appellant argued the medical expert evidence was inconsistent. Dr Schutz's opinion was that the appellant was likely to achieve a full recovery, where as Dr Liaw had concluded that the appellant '*was likely to have ongoing ankle pain*'. Because of this perceived inconsistency, the appellant argued that the trial judge erred in his consideration of her injuries and made a decision based on implied findings.

The Court of Appeal re-considered the opinions of both experts. It was found that they were not

inconsistent. Instead it was accepted that the trial judge had accepted Dr Liaw's opinion as to the presence of chronic ankle pain and the likelihood that the appellant will have '*ongoing ankle pain*'. However, Dr Liaw also acknowledged the possibility of recovery (without providing an opinion as to when this would occur). This was able to be reconciled with Dr Schutz's opinion that a full recovery was likely but that it may take '*a considerable period*'.

Overall, the Court of Appeal found that the trial judge had accepted Dr Schutz's opinion without making any finding as to precisely how long the period of recovery might be. Clearly, the trial judge accepted that the appellant's condition would '*improve to an extent*' where future domestic assistance was no longer required and he calculated this to be up to a period of five years. The Court of Appeal found that this was not the same as concluding that the appellant would be free of any ongoing ankle pain after five years.

The appellant's argument was dismissed.

Non-economic loss – psychological recovery

The appellant argued that the trial judge had concluded that her psychological condition was not current so as to be taken into account when assessing her non-economic loss where past tense was used in the following paragraph:

'*I therefore find the plaintiff suffered a serious aggravation of her psychological condition which required her medication to be doubled*.'

However, the Court of Appeal found that the trial judge had simply made a finding as to the psychological injury sustained at the time of the incident and had not made a finding that the condition no longer existed. The Court of Appeal did not accept that the trial judge had made the implied findings which the appellant contended were made and concluded that there was no error in his assessment of non-economic loss.

Economic loss

At the trial, the appellant argued that she was unable to return to '*retail*' based work given her inability to stand on her feet for long periods of time as a result of her injury.

However, the trial judge was not persuaded that the appellant's economic loss was due to her injuries sustained in the subject incident. He found this based on three reasons:

- At the time of the incident, the claimant had not worked in retail at all – rather her qualifications and experience were in administration and bookkeeping.
- She had established her own retail business a year later, involving extended periods of time on her feet. She worked in this position for 10 months and ceased due to unrelated financial reasons.
- When this retail business failed, she returned to office administration.

While she had not been able to obtain any office administration work following the failure of her business, no evidence was produced or argued by the appellant identifying the type of work or positions for which she was no longer suited for. Nor was any evidence led as to the likelihood that in circumstances where the appellant was unable to find office administration work, she might suffer financial loss because her ongoing injury would prevent her from obtaining alternative employment.

In the absence of such evidence, the Court of Appeal found that the trial judge was justified in concluding that the appellant had not established that her injury had resulted in past or future economic loss.

Future domestic assistance

The trial judge had allowed a limited award for future domestic loss given the appellant was receiving gratuitous domestic assistance from her husband and daughter. He rejected the appellant's claim for future commercial domestic assistance.

No evidence was led by the appellant to suggest that gratuitous services she had been receiving would not continue to be provided or if they were not provided, she would obtain commercial domestic assistance.

As such, the Count of Appeal upheld the trial judge's initial findings.

The appellant's appeal was dismissed.

Staff profile Insurance and Construction & Engineering

Michael Bath

Special Counsel

Michael Bath is a Special Counsel in Carter Newell's Financial Lines and Construction & Engineering Insurance teams. He leads our Sydney office and has over 12 years experience in insurance and commercial litigation.

Michael advises both local and international insurers on coverage issues across a wide range of insurance classes including professional indemnity, product liability, contract works/ construction risk, property and industrial special risks. He also provides advice on the suitability of insurance regimes and their interaction with contractual indemnities in property and construction transactions. He has acted in numerous complex commercial litigation across most Australian jurisdictions, as well as private arbitrations, particularly for construction, financial and allied health professionals.

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Case Note

Klein v SBD Services Pty Ltd [2013] QSC 134

Plaintiff injures lower back while working as an underground coal miner. The claim was reduced by 25% for contributory negligence and despite the fact the claimant could no longer work in mines, future economic loss was limited due to the pre-existing nature of the injury.

The facts

The plaintiff claimed he suffered an injury to his lumbar spine whist manually moving an object that weighed 180 kilograms in the course of his employment as an underground miner.

The defendant denied the plaintiff was required to move an object of that weight or that the plaintiff was injured as alleged but conceded that, if the plaintiff was injured while moving an object weighing 100 kilograms or more, it would be liable. If found liable, the defendant also alleged contributory negligence on the part of the plaintiff.

The plaintiff's version of events

On the day of the incident, the plaintiff claimed he and two other men were instructed to manually move a large, heavy piece of equipment along a mineshaft. They were told the piece of equipment had been moved to its current position by an earlier shift of workers and their task was to move it to its final destination.

There was some uncertainty as to the object the plaintiff was required to move. He described it as a large, L-shaped, metal object that was part of a larger piece of mining equipment.

While straining to move the object, the plaintiff claimed he suddenly felt severe pain in his lower back. The plaintiff was unable to continue with the work. He said that after the injury had occurred, he and his co-workers realised they had not completed a risk assessment of the task. One was then completed in which they identified the risk that caused the injury and outlined why the injury should not have happened. The plaintiff said he then went to report the injury to a supervisor, but could not locate one.

The plaintiff received several treatments from a chiropractor over the next few days. He returned to work on light duties. Upon his return, an incident report was completed but, contrary to usual practice, an investigation was not carried out.

The plaintiff was unable to call the two co-workers he allegedly worked with on the day of the incident as witnesses because he could not recall their names or describe them in a way to enable their identification,

and the defendant company inexplicably lost its employee records for the relevant period.

Decision

McMeekin J concluded that, despite problems with evidence, the plaintiff was injured while moving a heavy object at work.

Despite the uncertainty surrounding the object, his Honour accepted on balance the plaintiff's claim that the object he was required to move weighed in excess of 100 kilograms. Interestingly, his Honour saw the plaintiff's uncertainty about the object as a factor indicating the plaintiff's truthfulness, saying that, if the claim was fraudulent, the plaintiff could have easily pointed to any readily ascertainable heavy object. Instead, the plaintiff maintained the description of the unknown object from the time the initial report was made up to the trial.

In light of these findings and the fact the defendant conceded that a breach of a duty of care would be found if the plaintiff had been required to manually move an object weighing in excess of 100 kilograms, McMeekin J found in favour of the plaintiff.

Contributory negligence

The plaintiff was found to have failed to act as a reasonably prudent man in the circumstances because:

- He would have been aware of the fact that the object was extremely heavy (indeed, immediately prior to the plaintiff attempting to move the object, he saw his two co-workers struggle to move it a few centimeters).
- His experience in the mining industry should have alerted him to the fact that the situation involved the potential of injury.
- A preliminary safety assessment (that was required to be completed but was not) would have resulted in some methodology other than the one used being adopted.

After comparing the degree of departure from the standard of care of the reasonable man and the relative importance of the acts of the parties in causing the damage, McMeekin J reduced the claim by 25% for contributory negligence.

Quantum

The severity of the plaintiff's injury

Assessing specialists agreed the plaintiff was suffering from an internal disruption of the L5/S1 disc. They disagreed however, on when the injury was suffered. One suggested the injury was suffered in the incident.

Another suggested the incident exacerbated a lower back injury suffered some 12 years prior that had otherwise largely resolved.

It was the latter of the two opinions that was accepted. Despite the plaintiff maintaining a high level of fitness pre-incident, McMeekin J accepted evidence that the pre-existing injury meant there was a high chance the plaintiff would suffer a recurrence of symptoms.

There was also uncertainty about the severity of the injury suffered by the plaintiff, largely based on his conduct after the incident. The plaintiff was made redundant by the defendant one month after the incident as part of large scale reduction of their workforce. He quickly obtained employment with another mining company. To do so, he said he misled the doctor performing his pre-employment medical examination, saying he did not have a back problem, but inexplicably, passing the physical component of the examination. Also curious was the fact that he did not require any significant time off work because of what he said was a severe injury, nor did he receive any significant medical treatment, and that he was able to continue working in a mining role for some 18 months post-incident before his symptoms became so bad he had to resign.

In the end, McMeekin J thought the evidence supported the conclusion the plaintiff aggravated a pre-existing condition from which he had recovered well when attempting to manually move the heavy object whilst in the defendant's employ. Like the pre-existing injury, the plaintiff recovered well from the aggravation, which allowed him to pass the physical examination and continue working until symptoms developed again. Adopting the opinion of one of the examining specialists, his Honour thought the plaintiff was suffering a 5% whole person impairment, 3% of which was related to the pre-existing injury and 2% to the subject injury.

Given the heavy nature of the plaintiff's work at the time of the aggravation, and the fact that medical evidence suggested he would continue to suffer back symptoms, McMeekin J concluded the plaintiff's chances of continuing to work in the mining industry were virtually nil.

Past economic loss

The plaintiff's claim for past economic loss was adversely impacted by the fact of his somewhat inconsistent and varied work history and the chance of him obtaining permanent work in the mining industry after his symptoms flared up (but before the trial) was low. The plaintiff's claim under this head (which was calculated by multiplying his pre-injury earnings by the number of weeks since the injury) was reduced by post-injury earnings and 30% for vicissitudes.

Future economic loss

The plaintiff claimed over $1.2 million dollars under this head, based on his assertion that he would have worked in the mining industry until retirement. His Honour thought that this was an improbable assumption. He assessed damages under this head globally, keeping in mind the probability that the plaintiff's pre-existing injury would have meant he would have ended up in the same position he was now in regardless of the subject aggravation.

The plaintiff was awarded damages of $289,502.13, comprised of:

Pain, suffering and loss of amenities of life	$25,000.00
Interest on past general damages	$1,700.00
Past Economic Loss	$155,000.00
Interest on past economic loss	$15,011.00
Future Economic Loss	$150,000.00
Loss of superannuation benefits	$27,450.00
Special damages (paid by WorkCover)	$1,139.00
Special damages (paid by the Plaintiff)	$8,465.51
Interest on special damages	$1,756.00
Future medical expenses	$2,000.00
Total Damages	$387,521.51
Less 25% contribution	$96,880.38
Less refund to WorkCover	$1,139.00
Net Damages	$289,502.13

Carter Newell presentations

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CPD Program August / September 2014

20 August 2014

Brett Heath, Special Counsel presenting 'Indemnity clauses and insurance clauses':

- What they do, what they don't do, and what to look for when drafting and construing them.
- Significant recent decisions on the construction of these complete clauses.

20 August 2014

Stephen Hughes, Special Counsel presenting 'Case review and developments in psychological injury':

- Mental injury: an increasingly important area for workers compensation and common law.
- 'Management action': when is an employer protected?
- Examining recent decisions concerning employers' common law liability for psychiatric injury.

11 September

Nola Peace, Special Counsel and Brett Heath, Special Counsel presenting 'Settling litigation':

- Pre-settlement obligations: Professional Conduct Rules.
- *Civil Dispute Resolution Act 2010* (Cth); understanding the obligations.
- 'Without Prejudice' correspondence.
- Disposing of proceedings.

11 September

Mark Kenney, Special Counsel presenting 'Recent decisions on consequential loss and limits on liability':

- Distinction between an exclusion clause and a limit of liability.
- Recent decisions on consequential loss: what does it mean and how can it be excluded.
- Liquidated damages: How do they apply and are they a sole remedy?
- Other means of limiting or excluding loss in contracts.

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Case Note

P & M Quality Smallgoods Pty Ltd v Leap Seng [2013] NSWCA 167

Occupiers of a small-good factory found to hold a duty of care to provide a safe system of work for workers employed at the factory however no award was made where the injured worker could not prove that her current symptoms were as a result of the incident.

The facts

The plaintiff, an employee of a small-goods factory, suffered an injury when she was struck from behind by a trolley being pushed by a female co-worker. The trolley that struck the plaintiff was of a considerable size and height, and carrying thick Frankfurt sausages. The trolley impacted with the plaintiff's lower back and caused her chest to forcibly come into contact with the pallet jack she herself was pushing.

The plaintiff was employed by Kaybron No 24 Pty Ltd (**Kaybron**), a labour hire company. She had been deployed by Kaybron to P & M Quality Small Goods Pty Ltd (**Primo**), the owner and occupier of the plaintiff's workplace. All senior managers and supervisors at the site were employed by the Homebush Unit Trust (**Trust**).

The plaintiff claimed damages for her injuries from Primo and the Trust only.

At trial

At trial, Primo, by virtue of its relationship with the plaintiff and its position as occupier, was found to owe a duty of care analogous to that owed by an employer to provide workers such as the plaintiff with a safe system of work. This duty was breached as Primo had not:

- Provided separate traffic paths for trolleys and pedestrians within the premises.
- Provided trolleys that could be pulled instead of pushed, which in turn affected the ability of workers to see ahead.

Finally, Primo was held vicariously liable for the casual act of negligence of the co-worker who had caused the plaintiff's injury on the finding that Primo was the co-worker's employer.


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The Trust was also found to owe a duty of care to the plaintiff as it exercised the ultimate control over the premises as to the sequencing and system of work within the premises. The scope of the Trust's duty was thought to be similar to that owed by Primo to the plaintiff. On that basis, the judge also held that the Trust had breached its duty of care in failing to have in force a system of demarked traffic areas for trolleys and pedestrians.

Overall, the trial judge was satisfied that the risk of injury from being hit by a trolley was foreseeable and not insignificant, and that persons in the place of the defendants ought to have taken steps to avoid such a risk. Where they failed to do so, this amounted to breach of the respective duties owed by both defendants.

The trial judge ordered judgment for the plaintiff against Primo and the Trust in the sum of $470,536.

On appeal

Primo and the Trust appealed on the grounds that:

- The trial judge erred in finding the defendants owed a duty of care analogous to that of an employer;
- The trial judge erred in relying on an expert report that offended the '*basis rule*';
- The trial judge's findings on negligence were flawed because there was insufficient evidence to support the conclusions reached; and
- The co-worker was not employed by Primo and as such, the trial judge erred in not reducing damages pursuant to workers' compensation legislation.

Appeal decision

Scope of the duty of care owed by the defendants

The Court of Appeal held that Primo and the Trust were much more than occupiers. They were responsible for the premises, provided the equipment, created and administered the work systems, sequenced tasks, provided supervisors and exercised ultimate control over the meat processing and other activities within the premises, including control and discipline of persons working there. On that basis, the Court of Appeal thought it was open to the trial judge to hold that duty of care owed by the defendants was one akin to that exemplified in *TNT Australia Pty Ltd v Christie*[1] - where the occupier had a high level of control over the day to day actions of persons employed by another but working at their premises, and was found to owe a duty of care analogous to that of an employer.

Failure by the plaintiff's expert to inspect the premises

The plaintiff relied upon the report of an ergonomic expert to support the argument that Primo and the Trust should have had in force at the factory a system of demarcation or traffic control. This expert did not inspect the premises.

The defendants argued that the trial judge erred in relying on this expert report where it offended the '*basis rule*' - a rule which requires opinion evidence to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence.[2]

The Court of Appeal concluded that the rule was not applicable in this case. Despite the expert in question never visiting the work site, her conclusions were based on assumptions she made that were eventually borne out in the oral evidence of the plaintiff, rendering them more than unsubstantiated conjecture. The Court of Appeal was of the opinion that there was sufficient correlation between the assumptions made by the expert and the evidence at trial to permit the trial judge to admit the report into evidence.

Were the trail judge's conclusions on negligence flawed?

At trial, evidence was led by the defendants that there was a system in place to obviate the need for the plaintiff to move trolleys around the site. On the other hand, the plaintiff and the Primo employee both gave evidence that occasions arose on the factory floor where, despite the work policies in place, they were in fact required to do so.

Given the evidence of the plaintiff and the fact that her injury occurred while she was moving a trolley, the Court of Appeal concluded that there was a difference between what the defendants intended to occur in the workplace and what actually occurred. Thus, the defendants' evidence on the system and intended operation of the factory was not sufficient to counter the plaintiff's evidence on what actually happened.

With respect to the system of work, the trial judge also concluded that the defendant could have implemented a system whereby pedestrian and trolley traffic were separated so as to avoid the foreseeable risk of being injured. At the time of the incident, it was common practice for employees moving trolleys to simply shout out '*trolley*' intermittently as a warning of their approach to others. It was suggested by the plaintiff at trial that a system of marked laneways was a reasonable and practicable method of obviating the risk of being struck by a moving trolley.

The Court of Appeal concluded that it was open to the trial judge to find that the risk of being injured by a trolley pushed by a co-worker was reasonably foreseeable and not insignificant. Whether a system of laneways was implemented or some other system was only a matter of detail. Clearly, some sensible system of warning of the movement of trolleys was required but was absent. Therefore, the Court of Appeal did not alter the finding that the defendants had breached their duty of care owed with respect to the system of work within which the plaintiff and the workers at the factory were required to operate in.

Who employed the co-worker?

At trial, the judge concluded that the co-worker who caused the plaintiff's injuries was employed by Primo where there was evidence that Primo had a high level of control over the activities of that co-worker.

The Court of Appeal did not agree with this conclusion. Kaybron paid the co-worker's wages, collected taxes on her behalf and issued her with group certificates. The level of control that Primo had in the workplace was insufficient to displace the conclusion that the co-worker was Kaybron's employee. Further, both Primo and the Trust accepted in pre-trial interrogatories that Kaybron was the co-worker's employer.

The Court of Appeal's finding on this point rendered incorrect the trial judge's finding that a reduction of damages pursuant to workers' compensation legislation was not applicable because Kaybron was not her employer.

Given the negligible level of control that Kaybron had over their workers at the premises, the Court of Appeal determined that its degree of culpability was low and suggested, if the plaintiff had been successful, her damages against the defendants would have been reduced by 10%.

Conclusion

Ultimately, however, the plaintiff's claim failed on causation.

The trial judge accepted the evidence of certain treatment providers who examined the plaintiff over the years after the incident as evidence that the plaintiff's symptoms were the product of the incident.

However, the Court of Appeal did not accept this approach. They placed greater weight on contemporaneous records which indicated the plaintiff's injury as a result of the incident was minor and transient. Based on this evidence, the condition the plaintiff suffered at the time of trial was of a degenerative kind, the onset of which did not begin until 18 months after the incident.

On that basis it was held that the plaintiff had failed to show her current symptoms had been caused by the incident.

The Court of Appeal accepted the plaintiff did suffer a minor soft tissue injury as a result of the incident, but no damages were awarded with respect to this injury. This was because the injury resulted in less than 15% impairment of the most extreme case (the threshold for an award for non-economic loss pursuant to the *Civil Liability Act 2002* (NSW)) and in light of their findings as to causation.

Despite the Court of Appeal's findings about breach of duty of care, the appeal was upheld and the plaintiff's award in the lower court was set aside.

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[1] (2003) 65 NSWLR 1.

[2] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588.

Case Note

Williams v Riviera Marine (Int) Pty Ltd [2013] QDC 306

Employer found not liable for awkward manoeuvre performed by an employee because no further reasonable steps could have been taken to prevent the injury.

The facts

The plaintiff employee suffered a shoulder injury when exiting a narrow under-helm locker of a marine vessel (**locker**). The locker was narrow and diminutive in size and contained a 100mm lip at the bottom of the entrance. The plaintiff alleged that he had to exit the locker in an awkward manner by reaching up and over the lip whilst laying on his side and levering himself out of the locker, causing him to sustain an injury to his right shoulder.

Issues

- Whether the evidence provided by the plaintiff's occupational therapist was admissible given her limited expertise and incorrect understanding of the circumstances, giving rise to the plaintiff's injury.
- Whether the defendant owed a duty of care to the plaintiff to prevent any foreseeable risk of injury and whether the injury suffered was preventable.
- Whether the plaintiff's pre-existing and subsequent injury to his right shoulder had any bearing on his claim for damages.

Decision

The court held that the occupational therapist had the expertise to comment on the forces applied to the plaintiff's right shoulder in the awkward maneuver performed and her evidence was therefore allowed. However, because she misunderstood the mechanism of the claimant's injury, the defendant's orthopaedic opinion was preferred.

Turning to liability, the court was satisfied that the defendant did not have to foresee a risk that the plaintiff would dislocate his shoulder, only that some injury to the plaintiff's arm or shoulder could occur. The court found that a reasonable employer would contemplate some awkwardness in posture and movement as a worker is entering and exiting the narrow locker opening.

When considering preventability, the court concluded that there was no evidence led by the plaintiff of the steps that should have been taken by the defendant that had not already been taken to avoid an injury such as the one suffered by the plaintiff. Compounding on this was the fact that neither the plaintiff nor any other worker had previously suffered injury as a result of entering or exiting the locker.

For these reasons, the court could not find any evidence of breach on the part of the defendant and found in favour of the defendant.

When assessing quantum, the court accepted the opinion of the defendant's orthopaedic surgeon that the plaintiff's shoulder condition, exacerbated by the subject incident, had largely healed, and the claimant's ongoing complaints of his pain and discomfort was referable to his pre-existing condition. For these reasons, the court made no allowance for past or future economic loss and awarded nominal damages only. This became irrelevant due to the liability findings.

Case Note

Tilse v State of New South Wales [2013] NSWDC 265

Police liable for false imprisonment for excessive time of imprisonment even though the initial arrest was lawful.

The facts

The plaintiff brought an action for damages for the tort of false imprisonment. The plaintiff was arrested and held in custody for five hours and 43 minutes before being released on bail. The issue before the court was whether the arrest was necessary and whether the period the plaintiff was held in custody was reasonable.

Decision

The court was persuaded on the balance of probabilities that the arrest and imprisonment of the plaintiff was justified on the basis that the arresting police officer suspected on reasonable grounds, that the plaintiff had committed the offence of affray justifying an arrest, and it was necessary to arrest the plaintiff to prevent the harassment of or interference with witnesses. However, the court held that the period that the plaintiff was held in custody was excessive. The court stressed this was not the fault of the arresting officer and criticised the understaffing and resourcing of the police as the reason the plaintiff could not be dealt with more promptly.

The court thought the amount of time the plaintiff was kept in excessive custody amounted to a period of false imprisonment for which she was entitled to recover damages. The case law made it clear that the length of time is not of particular significance in assessing damages, rather a court will focus on the plaintiff's initial shock of being arrested. Here, the initial shock was because of a lawful arrest and, therefore, could not be part of the wrongful imprisonment. However, the court thought the plaintiff should be compensated in any event as she was kept away from her home and her daughters and from what she might normally do for an hour. The court awarded compensatory damages in the sum of $2,500. The court was not satisfied that aggravated damages or exemplary damages should be awarded as there was nothing the arresting officer or police did that in any way aggravated the damages. The cause of action arose because the police were under resourced and there was no particular conduct on part of any member of the police force that needed to be condemned.

Case Note

Randall v State of New South Wales [2013] NSWDC 277

Police found liable for assault and false imprisonment of party-goer.

The facts

The plaintiff brought an action for damages against the State of New South Wales for assault and false imprisonment committed by police officers. The plaintiff gave evidence he was walking home from a party with his brother in the early hours of the morning. The plaintiff saw police approach his brother and push him around. The plaintiff tried to record video footage of the altercation on his phone when a police officer approached him and pushed him in the chest. The plaintiff was then sprayed in the face with capsicum spray and arrested. He was taken to the police station and imprisoned in a cell. His arrest was not processed. After approximately 30 minutes in custody he was released without charge. The plaintiff later found the police had deleted all video footage from his phone.

Decision

The New South Wales District Court accepted the plaintiff's evidence and was satisfied on the balance of probabilities that the plaintiff had made out his case for the torts of assault and false imprisonment.

While the first assault on the plaintiff was only minor, the court thought the spraying of the capsicum spray into the plaintiff's face was more serious as it rendered him temporarily unable to see and was in disregard of his liberty and dignity. The court was satisfied the motive for the assault was self-interest (rather than rage) as the police wanted to get the plaintiff's mobile phone and remove any untoward footage. The court awarded $20,000 to the plaintiff for aggravated compensatory damages for the assault.

Although the plaintiff was only falsely imprisoned for 30 minutes the court said this would have left him demoralised, angry, upset and frightened as he was in the power and control of police and, in his mind, could be subject to another assault at any time. The court assessed the plaintiff's damages for false imprisonment, being aggravated damages, in the sum of $15,000.

The court also allowed a $30,000 award for exemplary damages. The court condemned the conduct of police not only in their actions against the plaintiff but also for attempting to cover up and hide the occurrence of the incident.

Case Note

Moor v Liverpool Catholic Club Ltd [2013] NSWDC 93

The occupier of an ice skating rink liable for ankle injury suffered by a patron who was wearing ice skates while he walked down internal stairs to access the rink.

The facts

The plaintiff lost his footing whilst descending a set of stairs at the defendant's premises in order to access an ice skating rink. He slipped and fell, fracturing his right ankle.

The plaintiff was wearing ice skates at the time of the incident which he had hired from the defendant.

The defendant was the owner and operator of the ice skating rink.

Mechanism of injury

After hiring and putting on the skates, the plaintiff descended a set of stairs to join his brother on the ice skating rink. The stairs were wet with moisture. He placed the blade of each skate at the back of the step but because the blades were longer then the tread of the steps, there was some overhang of the blade over the front nosing edge of the steps. When the plaintiff reached the last step, the blade on which he placed his weight, slipped forward on the wet and slippery step, causing the plaintiff to fall backwards and sustain injury.

The court preferred evidence of the plaintiff's expert civil engineer, Mr Burn, regarding the mechanics of the plaintiff's fall. Mr Burn observed a lack of consistency within the measurements of the treads and the risers on the flight of stairs. It was also observed that the plaintiff's skate blades were approximately 73 millimeters longer than the average step tread. As the length of the treads were shorter than the skate blades, a person descending the stairs in skates would have to place the ball of their foot in front of the nosing thereby increasing the risk of slipping and falling.

Overall, Mr Burn concluded that the accident could have been avoid by requiring skaters to put on their skates at the bottom of the stairs, placing signs saying that the skates should not be worn on the stairs and changing the access requirements to the rink in the form of a ramp.

Issues

- Whether the plaintiff's injury occurred as a materialization of an '*obvious risk*' within the meaning of ss 5F, 5G and 5L of the *Civil Liability Act 2002* (NSW) (**CLA**);[1]
- Whether the plaintiff's injury occurred as a materialisation of an inherent risk within the meaning of s 5I of the CLA;[2]
- Whether the plaintiff's injury was caused by the negligence of the defendant; and
- Whether the plaintiff was contributory negligent.

Decision

Obvious risk

The question of whether the activity of walking down stairs whilst wearing ice skates at an ice rink is an obvious risk requires an objective determination of whether the injured person's conduct involved a risk of harm that would have been obvious to a reasonable person.

It was accepted that there is an inherent risk of falling while descending down stairs. Such a risk is heightened when the surface or edge of the nosing is wet or where the treads, goings and risers of the steps are uneven.

The court considered these risks to be within the common knowledge of reasonable persons.

The court found that the plaintiff had followed the course others had taken in descending the stairs to the ice rink. He had used the stairs as others had done.

Ultimately, the court was not satisfied the plaintiff had actual or constructive knowledge walking down the stairs whilst wearing ice skates at the defendant's premises involved an obvious risk because:

- The plaintiff was not aware of the uneven dimensions of the stairs.
- The plaintiff did not know (or ought to have been aware) that the stairs were wet and therefore slippery.
- The plaintiff did not receive a warning of the risk of the state of the stairs and the sign requiring '*no skates beyond this point*' was not visible to the plaintiff prior to the incident.

The court did not consider the act of descending stairs in ice skates to get to the ice rink be a dangerous recreational activity; rather it was the step prior to engaging in the recreational activity of ice skating.

Inherent risk

Section 5I the CLA provides that there is no liability for materialisation of an inherent risk. An inherent risk is defined in this section as a risk of occurrence that cannot be avoided by the exercise of reasonable care and skill.

Section 5I does not operate where there is a duty to warn of the existence of a risk.

The court found that the risk of injury to the plaintiff in descending the stairs was not an inherent risk unavoidable by the exercise of reasonable skill and care because the defendant could have mitigated this risk by providing to patrons such as the plaintiff with warnings that the nosing edges of the stairs were slippery when wet and the dimensions of the stairs were uneven.

Negligence

As the occupier of the ice rink, the defendant owed the plaintiff, as a customer entering the premises, a general duty to take reasonable care to avoid a foreseeable risk of injury. The duty of an occupier of premises extends not only to the static condition of the premises, but also to activities conducted upon the premises. In these circumstances, this included the state of the stairs and the manner in which the stairs were used by patrons.

The court held that the defendant owed a duty of care to ensure the plaintiff was provided with a safe means of access to the ice skating rink.

The court was satisfied the defendant knew or ought to have known that its customers wore skates when using the stairs to access the ice rink. This was inferred from evidence of the defendant that its employee would periodically replace the non-slip edge nosing of the stairs damaged by the blades of ice skates worn by customers. The court was also satisfied the defendant knew or ought to have known there was a risk that a person using the stairs may slip and suffer injury, particular given the number of previous incidents occurring at the premises where patrons had suffered injuries from falling down the stairs, some wearing ice skates.

The court held there was a high probability that harm would occur if patrons walked down the stairs in skates and the risk to these patrons of falling down the stairs was not insignificant. The court concluded a reasonable person in the position of the defendant would have taken precautions to avoid this risk of harm. Such precautions could include the provision of a written and verbal warning to patrons informing them of the risk of slipping and falling on the stairs due to the likelihood of the step edges being wet. The court also thought it reasonable for the defendant to have prevented patrons from descending the stairs in their ice skates, and instead required them to put on their ice skates after descending the stairs.

The court considered the option of the defendant constructing a safe set of steps capable of being used safely by a person wearing ice skates involved an excessive burden on the defendant and was not reasonable in the circumstances.

The court was satisfied on the balance of probabilities that the plaintiff's injury could have been avoided if he had been informed of the need for precautions to be adopted in descending the stairs due to their dimensions and likely wetness. The court considered it unlikely the plaintiff would have sustained injury if the defendant had in place a system to ensure patrons did not put their ice skating boots on until they had descended the stairs.

The court concluded that the plaintiff's injury was caused by the negligence of the defendant.

Contributory negligence

There was no evidence to suggest that the plaintiff was rushing, that he bounded down the stairs, he was not looking where he was going or took more than one step at a time. This evidence, together with the fact that the stairs were wet with moisture, led the court to conclude that it was the presence of moisture on the nosing edge which cause the plaintiff to slip and fall rather than any failure of the plaintiff to take care for his own safety.

Accordingly, there was no finding of contributory negligence.

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[1] See ss 13, 14 and 19 of the *Civil Liability Act 2003* (Qld) for the reciprocal provision.

[2] See s 16 of the *Civil Liability Act 2003* (Qld) for the reciprocal provision.

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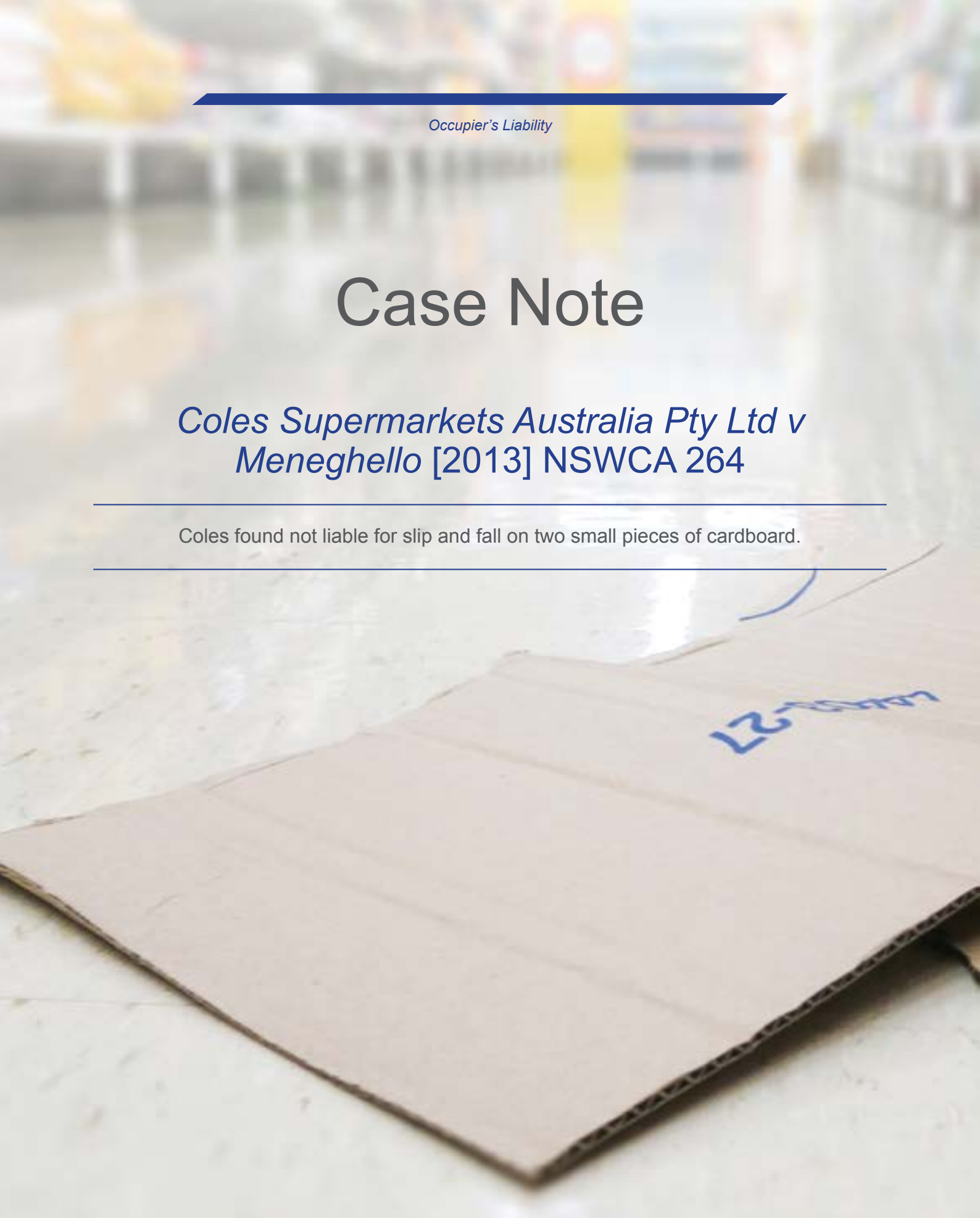
Case Note

Coles Supermarkets Australia Pty Ltd v Meneghello [2013] NSWCA 264

Coles found not liable for slip and fall on two small pieces of cardboard.



The facts

On 22 May 2010, the plaintiff fell at Coles Supermarket **(Coles)** at Neutral Bay in New South Wales. The plaintiff suffered soft tissue injuries when she fell on two small pieces of cardboard on the floor of the supermarket.

Primary judgment

The primary judge held that the defendant had been negligent in allowing two small pieces of cardboard to lie on the floor of the supermarket. He found that the plaintiff slipped on that cardboard and thereby suffered loss and damage.

The primary judge said that there were two reasons why the probabilities favoured a finding that the plaintiff slipped on the pieces of cardboard on the floor:

- Firstly, the plaintiff's evidence that there was cardboard on the floor at the relevant time.
- Secondly, the fact that she had otherwise carried out her shopping without incident made it probable that it was some foreign object that caused her to slip.

The judge determined that the presence of the pieces of cardboard on the floor resulted from activities of the staff of the defendant, Coles, when packing boxes and constituted a foreseeable slip hazard. He referred to the practice of re-stocking shelves from cardboard cartons and to the fact that fragments might easily fall from the cartons.

In relation to earning capacity, the judge found that the plaintiff left a job at her husband's firm because of injuries suffered in the fall. As to future employment possibilities, there were findings that the plaintiff had no secretarial training and no training in keyboard operation which became relevant in the appeal.

Appeal

Coles appealed the decision on the basis of two errors of the primary judge:

- First, an erroneous finding that pieces of cardboard on the floor caused the plaintiff to slip and fall; and
- Second, an erroneous finding that the cardboard on the floor resulted from activities of Coles' staff and Coles was negligent in failing to remove it.

Coles contended that the evidence did not permit either a finding that small pieces of cardboard lying on the floor presented a hazard likely to cause shoppers to slip, or a finding that the plaintiff in fact slipped on a piece of cardboard.

Coles also made a number of challenges in relation to quantum, the most pertinent being the finding that the claimant was not qualified to perform secretarial work or work using a keyboard.

Decision

The Court of Appeal found in favour of Coles.

The Court said that the plaintiff failed to establish at trial matters essential to a conclusion that the appellant was liable in negligence for such loss and damage as she suffered when she fell at the supermarket. She did not establish that she trod on a piece of cardboard on the floor. The evidence failed to establish that there was a sufficient causal connection between the plaintiff's fall and an alleged breach of Coles' duty of care.

The Court also found that the claimant was capable of office work and the primary judge's finding to the contrary was erroneous and inconsistent with the medical evidence.

Case Note

Rennie Kissun v Coles Supermarkets [2013] NSWDC 134

The court considered evidence regarding the adequacy of a cleaning system and inspections where the plaintiff slipped and fell at a supermarket.

The facts

The plaintiff alleged that she suffered personal injuries while at the defendant's premises at Castle Towers Shopping Centre in July 2011. The plaintiff said that she was walking down the freezer aisle when she slipped and fell on spilled water. After the fall, an employee of the defendant allegedly told the plaintiff that she had gone to get a warning sign to place on the floor to warn shoppers of the presence of the spill. The plaintiff then overheard the employee tell the store manager she went to get a sign as the floor was wet and was reprimanded by the store manager for breaching the defendant's policy regarding spills.

That version of events was disputed by the defendant.

An employee of the defendant, Karen Wellfare, gave evidence that she was working in an adjacent aisle prior to the incident when she noticed a spill of juice on the floor. She placed a shopping trolley over the juice spill and then walked to another area of the store to get a warning sign. Her route took her past the freezer aisle (where the incident occurred) which she observed to be dry. Ms Wellfare located the warning sign and started walking back to her original location, taking the same route past the freezer aisle. As she approached the freezer aisle, she saw the plaintiff fall. Ms Wellfare estimated it took her 40 seconds from the time she waked past the freezer aisle the first time until she observed the plaintiff's fall.

Ms Wellfare denied under cross-examination that she fabricated the first spillage and was in fact on her way to put the sign on the spillage where the plaintiff fell (as alleged by the plaintiff).

The court heard evidence regarding the defendant's inspection and cleaning system from the store manager. The defendant employed a cleaner who was to spot clean any hazards that arose during the day. The area was last cleaned at 2pm, which was about 3 hours prior to the incident. All employees were also trained to identify and clean spillages and were required to spot clean when hazards were identified.

Issues

The defendant did not dispute that the plaintiff slipped on water at its store and conceded that it owed the plaintiff a duty to take reasonable care to avoid foreseeable risk of injury. However, the defendant

argued that it had a reasonable cleaning system in place or alternatively, in the event of a breach, no reasonable system would have identified the hazard in any event. The issue before the court was therefore whether the defendant's cleaning system was adequate and reasonable in the circumstances and, if not, whether that was causative of the plaintiff's injury.

Decision

The court did not accept Ms Wellfare's evidence that she was attending to a different spill when the claimant fell. Rather, the court preferred the plaintiff's evidence of the conversation which occurred between the plaintiff and Ms Wellfare following the incident where Ms Wellfare conceded to the plaintiff that she had noticed the floor was wet and was getting a wet floor sign when the plaintiff fell. The court thought the words attributed to Ms Wellfare in that conversation were consistent with the plaintiff's evidence and were not contradicted by the defendant's incident report.

The court commented that had Ms Wellfare in fact been attending to another spill and had not observed any spillage in the freezer aisle when she had walked past 40 seconds earlier, it would have been a significant matter for the defendant to record in the incident report. However, as the incident report matched the version of events provided by the plaintiff, the court was satisfied that Ms Wellfare had observed water on the floor in the freezer aisle and left to obtain a warning sign to warn customers of its presence.

The court was not satisfied that the defendant's cleaning system adequately responded to the risk involved because the spillage upon which the plaintiff fell was not identified and cleaned in a timely fashion (based on an assessment of the probabilities pursuant to the principles of *Strong v Woolworths t/as Big W* 246 CLR 182). When the spillage was eventually identified, the defendant's own safety system was breached by Ms Wellfare, who left the scene to obtain a warning sign. The court was satisfied the defendant's breach was a necessary condition of the plaintiff's injury.

The plaintiff was awarded damages in the sum of $173,260.00 plus costs.

Case Note

Simon v Condran [2013] NSWCA 388

A woman claimed damages for a dog bite pursuant to negligence and a statutory duty under the *Companion Animals Act 1998* (NSW), and the common law defence to trespass of necessity was considered.

The facts

This is an appeal from a verdict for the respondent in the District Court.

On 11 November 2009, the plaintiff (appellant in the appeal) was bitten by her neighbour's dog when attempting to rescue her own dog on her neighbour's property. The defendant's dog could not pass through any of the boundary fencing. On the other hand, no fence inhibited the plaintiff's dog from straying onto the defendant's land. The dogs fought when the plaintiff's dog strayed underneath the defendant's house. The plaintiff was bitten on the hand when attempting to break up the dog fight by striking her own dog with her fists.

The trial

The primary judge found in favour of the defendant as the event arose due to the plaintiff's negligence in allowing her dog to wander unrestrained in her unfenced backyard without continuously watching. The primary judge rejected the defence of necessity as the plaintiff's conduct had contributed to the emergency which gave rise to the necessity as she was aware that nothing prevented her dog from going into the neighbouring yard and did not take steps to erect a barrier. His Honour's concluded that the plaintiff created a situation where there was a foreseeable risk of the plaintiff's dog running onto the defendant's land and coming into contact with the defendant's dog.

The primary judge assessed damages in the event he was wrong as to liability at $138,954. Neither party challenged the quantification of the damages on appeal.

Appeal

The plaintiff initially sued under s 25 of the *Companion Animals Act 1998* (NSW) (**Act**) and in negligence, but confined her appeal to the liability created by s 25 of the Act, which provides:

'(1) The owner of a dog is liable in damages in respect of:

(a) bodily injury to a person caused by the dog wounding or attacking that person, and

(b) damage to the personal property of a person (including clothing) caused by the dog in the course of attacking that person.

(2) This section does not apply in respect of:

(a) an attack by a dog occurring on any property or vehicle of which the owner of the dog is an occupier or on which the dog is ordinarily kept, but only if the person attacked was not lawfully on the property or vehicle and the dog was not a dangerous dog or restricted dog at the time of the attack, ...'

The defendant relied on s 25(2)(a) to establish that paragraph 1 only operates if the person attacked was '*lawfully*' on the property. The defendant argued that s 12A, introduced by the *Companion Animals Amendment Act 2006* (NSW), meant that the plaintiff could not lawfully be on the property as she did not take all reasonable precautions to keep her dog secured.

The plaintiff relied on the common law defence of necessity and s 22(2) on the basis that she was trying to seize her dog, in an effort to establish that she was lawfully on the defendant's land.

The principal issue at trial and on appeal was whether the plaintiff was negligent so that it could be said that her negligence created the occasion for her needing to travel onto her neighbour's land, thereby causing her a defence of necessity to fail.

Decision

The New South Wales Court of Appeal dismissed the appeal.

The Act recognises that the owners of all dogs have responsibilities, because dogs are capable of causing harm to persons and other animals.

The court determined that it would be inconsistent with the text and structure of the Act to hold the defendant liable by reason of s 25(1) as the Act must be read as a whole. The plaintiff failed to comply with her obligation under s 12A. The amended provision was required to be read with the unamended section as a combined statement.

The defendant would only be liable if the plaintiff was lawfully on her property. However, in this instance, the defendant's dog never left the secured enclosure and the plaintiff did not have permission to enter the defendant's land.

The alleged necessity said to justify the plaintiff's entry onto the neighbouring property was a direct contravention of s 12A of the Act. The '*necessity*' for the plaintiff to enter the defendant's land was created by failure to take all reasonable precautions to prevent her dog escaping her land. There is no defence of necessity as the plaintiff's own conduct brought about the emergency.

Despite the trial and appeal court sympathising with the plaintiff's conduct in rushing to the defence of her dog, her claim failed for that reason.

Case Note

Sarkis v Morrison [2013] NSWCA 281

A judgment against a dog owner for injuries suffered by a driver when the dog collided with his motorcycle was overturned on appeal.

The facts

This was an appeal of a trial decision in which the plaintiff (respondent in the appeal) succeeded in a claim for injuries sustained while riding his motorcycle along a country road when a dog owned by the appellant ran out of a driveway and collided with the motorcycle. The plaintiff fell from the bike and suffered severe injuries. The collision was witnessed by a motorist approaching from the opposite direction. According to the motorist, the dog did not attack the plaintiff, nor did the plaintiff have time to avoid the dog.

Trial

The plaintiff brought a claim against the appellant dog owner in negligence, but was unsuccessful on the basis that there was no lack of reasonable care on the part of the appellant dog owner in allowing the dog to run onto the road.

The plaintiff also claimed damages under s 25 of the *Companion Animal Act 1995* (NSW), which provides:

'(1) The owner of a dog is liable in damages in respect of:

(a) bodily injury to a person caused by the dog wounding or attacking that person, and

(b) damage to the personal property of a person (including clothing) caused by the dog in the course of attacking that person.'

The District Court applied earlier authority and held the dog owner was liable for damages because the dog was indirectly responsible for wounding the plaintiff. The District Court said the authority case - where a dog owner was liable for personal injury caused when the dog barked at a horse that threw its rider – allowed the words '*wounding*' and '*attacking*' to be read separately to the effect that a dog owner was liable for injuries caused by a dog, not the result of an attack on the plaintiff.

The defendant (the appellant dog owner) appealed this finding.

Appeal

In response to the appeal, the plaintiff argued that the words '*wounding*' and '*attacking*' were disjunctive and liability under the section could be established if a dog

wounded a person, even in the absence of an attack. The appellant, however, contended that the section sought to characterise the action of the dog rather than the consequences of its actions and as such, liability would not attach to all injuries caused by the dog but rather, only to injuries the result of an attack.

The Court of Appeal distinguished this case from the earlier authority under consideration because the dog in the earlier case displayed aggressive behaviour towards the horse ridden by the injured person, and not conduct attributable to the subject dog and the plaintiff or his motorbike.

In determining the correct interpretation of the section, the Court of Appeal considered its legislative history.

The original draft of the current section omitted the words '*or attacking*'. This was criticised in Parliamentary debate because it was thought liability under the section could only be founded in circumstances where the dog actually lacerated the skin of the person. This would exclude cases where a dog, in attacking a person, did not actually lacerate the skin but caused some other injury (like a back injury or broken bone the result of a fall). It seems that Parliament accepted this concern as the draft section was amended. In the view of the Court of Appeal, this created two bases of liability under the section, being either wounding or attacking.

In analysing the wording of the section as it now stands, the Court opined that '*wounding*' is a form of the verb *'to wound'*, which means *'to inflict a wound on a person'*. Given the position of the word in the sentence, it takes its meaning from its context and is used in the sense of an injury being caused by a dog acting in a certain way towards a person.

Decision

The Court of Appeal concluded the phrase '*caused by the dog wounding or attacking that person*' should be limited to an attack by the dog on the plaintiff - that is, conduct on the part of the dog involving an element of aggression directed towards the plaintiff. The section, they said, would not be enlivened where there was no aggressive or deliberate conduct by a dog directed at a plaintiff.

In this case, the dog in question ran blindly across the road without any apparent aggressive intent towards the plaintiff. As such, the Court of Appeal determined that the appellant dog owner should not be held liable for the injuries suffered by the plaintiff. The appeal was therefore successful, with the decision of the lower court set aside.

Case Note

Bootle v Barclay [2013] NSWCA 142

A claim for damage caused by spray drift was appealed in relation to claims in negligence and the application of the *Damage by Aircraft Act 1999* (Cth).

The facts

This was an appeal against a decision of the New South Wales District Court in which the plaintiffs were awarded damages for losses allegedly suffered to crops as a result of spray drift.

The parties

- Plaintiff / Respondent – the Barclays, the owners of a rural property (**Barclays**).
- 1st and 2nd Defendant / Appellant – Mr Bootle, the leasehold proprietor of the rural property adjacent the Barclays property and Bootle Bros Management P/L (BBM), the occupier and operator of Mr Bootle's farm (collectively, **the Bootles**).
- 3rd Defendant / Appellant – Macquarie Valley Agricultural Services P/L (**MVAS**), the operator of the aerial spraying business.
- 4th Defendant / Appellant – Mr Shapely, the pilot of the aircraft, employed by a small company owned and controlled with his wife and contracted exclusively to MVAS.

Trial

At trial, the Barclays sued the defendants for damage to their crops allegedly resulting from the aerial spray of herbicide drifting from the Bootles' property onto crops growing on the Barclays' property. The claim was based in negligence as well as provisions of the *Damage by Aircraft Act 1999* (Cth) (**DBAA**), which provides for the strict liability of a defendant where a plaintiff can show they have suffered loss or damage, the result of a thing that dropped or fell from an aircraft in flight.

The negligence claim was successful at trial. The plaintiffs alleged that the Bootles breach a non-delegable duty of care of the kind described by the High Court in *Burnie Port Authority v General Jones Pty Ltd*[1] (**Burnie**). The trial judge concluded the spraying of herbicide was sufficiently dangerous to warrant the imposition of a non-delegable duty of care of the Bootles, being the occupiers of the land being sprayed. In reaching this conclusion, the trial judge considered that the combined effect of the foreseeability of the risk and the inability of the Bootles to control the dangerous substance once it was airborne were such that a reasonable person ought to take precautions.

The Bootles were found to have breached the duty of care owed because, despite not physically being in control of the plane, the spraying was done at their behest and they could have directed MVAS or the pilot to not engage in spraying in the prevailing conditions on the day in question.

MVAS and the pilot were found to be under a duty to take reasonable care to not engage in aerial spraying when prevailing conditions put the Barclay's property at risk.

The trial judge also found the actions of MVAS and the pilot fell within the ambit of the DBAA and held they were strictly liable for the damage caused.

The defendants appealed these findings. In particular, the findings of negligence were appealed on the basis that insufficient reasons were given by the trial judge in reaching his conclusion.

Decision

Were the defendants negligent?

The Court of Appeal did not agree with the trial judge's finding that the Bootles had breached a non-delegable duty of care owed to the Barclays.

It was determined that the trial judge's finding that an activity is of a kind as to attract a non-delegable duty of care of kind in Burnie did not mean that the occupier was liable without proof of fault. His finding of breach seemed to the Court of Appeal to be heavily influenced by the finding that spraying herbicide was an act so inherently dangerous that it attracted the principle from Burnie. The trial judge's apparent conclusion that this was enough to justify the conclusion of breach of duty of care without requiring the plaintiff to prove that breach was determined to be incorrect.

An alternative argument that the Bootles were also negligent by failing to make MVAS and the pilot aware that there were crops susceptible to herbicide growing on the Barclays' property was rejected because of contradictory evidence from the pilot that he was aware of the Barclays' crops.

The Court of Appeal also found the trial judge's finding of negligence on the part of the pilot and MVAS were unsustainable because the evidence indicated there was no lack of reasonable care on their part. The pilot, who was aware of the Barclay's crops, said he made the decision to undertake the aerial spraying only after he had considered the prevailing conditions and concluded it was safe to do so. No fault could be found in his decision because there nothing to suggest that a reasonable person in his position would have concluded otherwise.

Each claim in negligence failed on appeal. The trial judge's decision on that basis was overturned. The Court of Appeal then turned its attention to the potential liability of the defendants under the DBAA.

Were the pilot and MVAS liable for damages by virtue of the DBAA?

MVAS challenged the trial judge's finding that the DBAA made it strictly liable for the Barclays' losses on the basis that it was not a constitutional corporation and was therefore outside the ambit of that Act. This contention was based on the proposition that there was insufficient evidence to justify the conclusion that a sufficient proportion of its overall activities were trading activities. This argument was rejected at trial because the evidence supported the conclusion that MVAS' hiring of aircraft for reward was a commercial activity and a significant part of its overall activities. It was not slight or incidental to a non-trading activity. MVAS therefore fell within both the definition of a constitutional corporation and the ambit of the DBAA. That decision was upheld by the Court of Appeal.

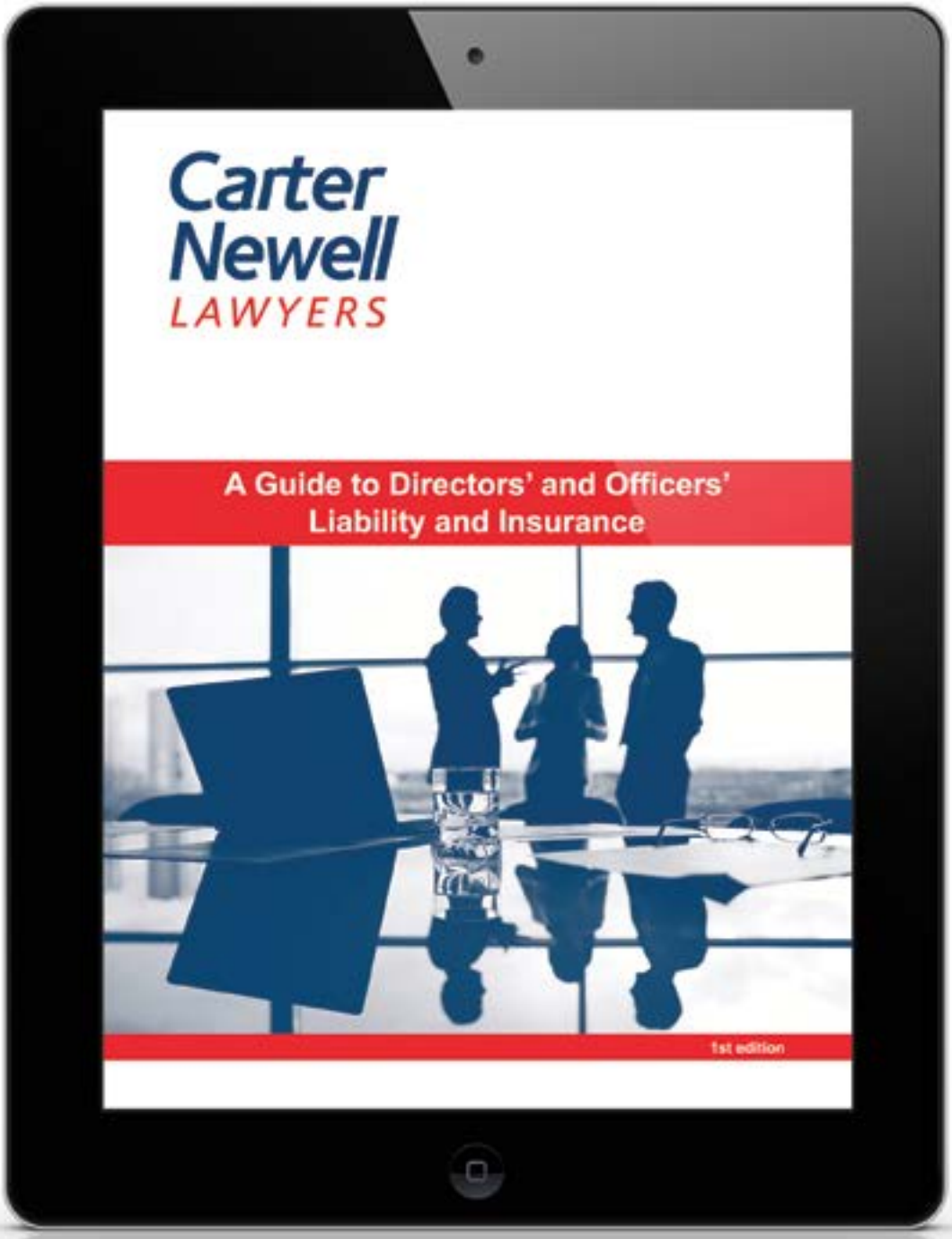
Turing to the pilot, the trial judge found him to be liable under the DBAA as a person who operated an aircraft from which something fell or was dropped causing loss or damage. Relevant to the trial judge in reaching this conclusion was the fact that the pilot was not an employee of the company that contracted his services exclusively to MVAS. Had he been an employee, in the trial judge's view, the DBAAwould have rendered his company liable rather than the pilot personally.

The trial judge's findings in this regard were based on his opinion that the pilot and his company were one and the same because the pilot was a director, shareholder and the sole income producer. This, it seemed to trial judge, meant he could not also be an employee. The Court of Appeal did not agree with this finding. Citing authority, the Court of Appeal concluded that it is possible, and was probable in this case, that a person in the position of the pilot could also be employed by the company he owns and directs. The Court of Appeal concluded that the trial judge had erred in finding that the pilot was not an employee of his company. As a consequence, the DBAA made the pilot's employer liable for his actions under the Act. The employer company was not joined as a party to the proceeding. As such, the pilot (and his company) avoided liability under the Act.

Conclusion

The trial judge's findings of negligence against the Bootles, MVAS and the pilot were all unsustainable, as was the finding of the strict liability of the pilot under the DBAA. MVAS however, could not avoid the application of the DBAA and was strictly liable for the loss caused to the Barclays' crops.

[1] (1994) 179 CLR 520.



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