

A late-night-fall trial **results in common sense win in Supreme Court**

A beach cliff fall resulting in paraplegia sparks legal action against a real estate agency for the lack of clear directions given to a holiday tenant.



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As solicitors for the REIQ Professional Indemnity Insurance Scheme (brokered by Aon Risk Services Australia Ltd, with QBE Australia as insurer), we were recently successful in defending a Supreme Court claim brought against an agency and obtaining an indemnity costs order against the unsuccessful plaintiff:

Morris v Redland City Council & Anor [2015] QSC 135

The judgment, delivered by Justice Martin, was a vindication of our assessment from the outset that the plaintiff's claim was hopeless and one which should never have been pursued.

Significantly, the decision examines the duties of care owed by property managers and public authorities. It also reflects the reluctance of the courts to impose liability on defendants in personal injury actions where the risk of injury constituted an obvious risk.

THE FACTS

The agency was engaged as the property manager of a holiday rental property situated on North Stradbroke Island. The property was situated on Mooloomba Road, which is a coastal road at Point Lookout. The plaintiff, Andrew Morris, rented the property on 5 February 2010 with eight friends for intended birthday celebrations.

The plaintiff alleged that when he collected the keys for the property from the agency's office that afternoon, he asked an employee of the agency where the stairs leading down to the beach were located in relation to the property. He asserted that the employee informed him that the stairs leading down to the beach were located across the road from the property.

At around 9pm, the plaintiff and two of his friends decided to walk to the beach. The plaintiff had consumed what he claimed to be four full-strength beers and four mid-strength beers prior to leaving the property.

The group walked across the road onto the coastal side of the road. They then walked up the road for a distance and, unable to locate the stairs, proceeded to walk in the opposite direction. They then proceeded along a boardwalk and then onto (according to the plaintiff's case) *"a well-worn track/path leading off the boardwalk"*. This track was said by the plaintiff to have caused the three men to believe that it led to steps to the beach.

After stopping to drink a stubbie of beer he had brought with him, the plaintiff thought that he could see some stairs. He got up and walked in the direction of where he thought the stairs were. In his evidence, the plaintiff asserted that he leaned against a tree to get a better line of view. Unfortunately, the tree snapped and the plaintiff lost his balance. He fell over the cliff onto the rocks on the beach below. Tragically, the plaintiff sustained very serious injuries and was rendered a paraplegic as a result of the fall.

THE PROCEEDINGS

The plaintiff commenced proceedings against the Redland City Council (the Council) and the agency, seeking damages in the vicinity of \$2.8 million plus interest and costs. The parties agreed the quantum of the claim prior to the commencement of trial, so the trial proceeded on liability issues only.

The claim against the agency did not concern what anyone from the agency said to him but what was *"not said"*. Specifically, the plaintiff alleged that the agency had a duty to provide directions *"more expansive than the description that was given to him"*, in regards to where the stairs were located. It was also the plaintiff's case that the agency ought to have warned him of the risks associated with the cliff, despite the fact that it was a long distance from the property and the steps.

The plaintiff alleged that the Council, in its capacity as the local government authority responsible for the area, had acted negligently in a number of respects. Specifically, the plaintiff alleged that it had failed to erect warning signs alerting the public of the existence of the cliff edge, failing to erect warning signs alerting the public not to walk through the grass/vegetation and failing to erect directional signage to pedestrian thoroughfares.

THE SUPREME COURT'S DECISION

At the commencement of the trial, the plaintiff elected to present no evidence in support of the claim against the agency. Consequently, Justice Martin awarded judgment in favour of the agency. The decision taken by the plaintiff's legal representatives at the beginning of the trial to abandon the case against the agency was evidently prompted by their realisation that the case against the agency was hopeless. This assessment was supported by Justice Martin, who held that the plaintiff's case against the agency was one *"which could not succeed on the current law"*.

Justice Martin ordered that the plaintiff pay the agency's legal costs on the indemnity basis (being the highest recoverable basis), because he agreed that the claim against the agency was *"unsustainable"* and *"hopeless"* and that the plaintiff, properly advised, should have known his claim against the agency had no chance of success.

In making this determination, His Honour also gave regard to the fact that we had made a Calderbank offer where we had offered, on the agency's behalf, for the plaintiff to discontinue the proceedings against the agency on the basis that our client would bear its own costs. This offer lapsed without response.

In regards to the claim brought against the council, the plaintiff led evidence pertaining to the existence of a well-worn path/track along the headland, and the lack of illumination offered by street lighting. The plaintiff's case hinged on his (and the friends') testimony that there was a well-worn track/path leading off the main pedestrian boardwalk, along the headland which they had followed that night.

To contradict this assertion, the council called a Ms Ritchie as a witness.

Ms Ritchie was the council's North Stradbroke Island coordinator. Ms Ritchie confirmed that there were no paths created by the council on the headland in the area traversed by the men. Ms Ritchie was adamant and refused to concede even the possibility of *"trodden-down, man-made paths"* or any paths created by the local wildlife. Further to this, the council offered evidence that there was street lighting which sufficiently illuminated the directional signs to the beach.

The plaintiff's claim against the council was dismissed. Justice Martin accepted the Council's evidence and held that *"there was nothing on the headland that suggested that the steps or any other entry to the beach could be found by walking through the bush area...there was no path"*.

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Further to this, His Honour held that *"a person wishing to get to the beach could have easily found the steps, at night, because the directional sign was illuminated"*.

It was held that the council had no obligation to erect warning signs to prevent people entering the bush on the headland. Justice Martin cited provisions of the *Civil Liability Act 2003* (Qld) regarding 'obvious risk', maintaining that the plaintiff's conduct, namely walking through thick bushland at night, whilst intoxicated, constituted an obvious risk and any reasonable person, in the position of the plaintiff, should have known that.

In regards to the plaintiff's level of intoxication at the time of the incident, expert evidence was provided at trial that his blood alcohol content would have been within range of .054 - .065. Justice Martin gave weight to this evidence and concluded that the plaintiff's intoxication was a significant factor in his fall and that, had he found in favour of the plaintiff, he would have reduced any award of damages by 50% by reference to the relevant provision of the *Civil Liability Act 2003* (Qld).

CONCLUSION

This decision represents a victory for common sense. However, it is important to note that the outcome of this case could have been vastly different for the agency had the plaintiff led evidence at trial confirming actual inaccuracies in the directions provided to him. As such, the cautionary point to be distilled from this decision is agents who are acting as managers of short term holiday rental properties should ensure their employees diligently follow any standard procedures in place when offering tenants directions or instructions.

