Occupier's liability revisited - **property owners ordered to pay $750,000 in damages**

A recent decision in the New South Wales Court of Appeal, *Schultz v McCormack* [2015] NSWCA 330, provides further commentary in relation to the duty of care owed by a property owner to ensure that entrants to a property are kept safe from hazards.

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By analogy, the decision has relevance to the real estate industry in that it provides a further reminder that property managers must thoroughly inspect all properties which they are retained to manage for potential hazards and safety issues, and take positive steps to warn occupants and entrants to those properties of the risks.

INTRODUCTION

Ms Schultz, the appellant, was a visitor to a property owned by Mr and Mrs McCormack, the respondents. The appellant was injured when she slipped and fell on a tiled floor, which was, in essence, the top step of the verandah of the property.

The incident occurred at about midnight, with the step becoming wet due to rain earlier in the evening. The respondents had owned the property since 1980 and in around 2004 to 2005, had tiled the front verandah. The respondents maintained that since tiling the verandah at the property they had not noticed anything in relation to the slipperiness of the verandah when they entered or exited the property. The respondents also maintained that there had been no other accidents on the tiles.

As a result of the incident, the appellant suffered a fracture of her right ankle and soft tissue injuries to her left shoulder, left hip and lower back. The appellant initially commenced proceedings in the District Court.

THE DECISION AT TRIAL

At trial, the appellant argued that the respondents ought to have warned her that the tiles on the verandah were unusually slippery when they became wet, in circumstances where the respondents knew, or ought to have known, that the tiles had become wet due to rain reaching them.

The respondents argued that the appellant was injured as a result of the materialisation of an obvious risk, and in the alternative, contributory negligence on the part of the appellant.

The appellant submitted expert evidence that identified a number of preventative measures that could have been taken to address the foreseeable risk of injury including, amongst other things, resurfacing the stairs with a more slip resistant material and extending the awning to ensure that the stairs did not become wet as a result of rain.

In relation to the extension of the awning, the trial judge held that this suggestion was unreasonable and that there was no evidence that would reasonably suggest that extending the awning would prevent the stairs from becoming wet due to the presence of rain.

The trial judge also excluded the suggestion of resurfacing the stairs with a more slip resistant material in circumstances where there was no evidence that the respondents knew or ought to have known that the stairs required the application of an anti-slip coating or strips on the nosing of the treads prior to the incident.

Accordingly, the trial judge found that the respondents had not breached their duty of care as occupiers. The trial judge held that the appellant ought to have known that the stairs she was about to descend could have been wet and slippery due to the earlier rainfall, as such matters were obvious to a reasonable person in the position of the appellant.

The trial judge concluded that the respondents did not have a duty to warn the appellant of the risks associated with stepping onto the wet stairs, as such risks ought to have been obvious to the appellant.

THE APPEAL

On appeal, the appellant argued that the trial judge:

1. had erred in characterising the risk of harm;
2. had erred in finding that the risk the appellant encountered was an "obvious risk"; and
3. should have found that the respondents were negligent.

The risk of harm

The trial judge identified the risk of harm as the *"risk of slipping on wet steps"* or the *"risk of slipping on wet tiles"*. The Court of Appeal stated that it was clear the trial judge was focused on whether there was an obvious risk of slipping on the wet steps and that, in the Court of Appeal's view, was a sufficient description of the risk of harm.

Obvious risk

The trial judge found that at the time of the incident, the appellant ought to have been able to see that the roof over the verandah *"did not have a significant overhang covering the steps"*, and accordingly, *"ought to have realised the roof might not have prevented rain falling onto, or being blown over, onto the steps"*. The Court of Appeal agreed with the appellant that it was unrealistic to attribute the above to either the appellant, or a reasonable person in her position.

The Court of Appeal added that the area where the appellant was standing immediately before the incident was dry and there was no evidence to suggest that the appellant was aware or ought to have been aware that the tiles had become wet due to rain reaching them.

The Court of Appeal concluded that the trial judge erred in finding that it would have been obvious to a reasonable person in the appellant's position that the wet state of the verandah posed a risk of slipping such that the respondents did not have a duty to warn the appellant of the associated risks.

The respondents' negligence

The trial judge rejected the opinion of the appellant's expert that the slip resistant values that were obtained when testing the tiles demonstrated that those tiles *"would generally be experienced as slippery when wet"*. The Court of Appeal considered that this was evidence from which a reasonable inference could be drawn that the respondents knew or ought to have known that the tiles were slippery when wet.

The respondents argued that the appellant's expert had provided no basis for their opinion that the respondents ought to have known that the tiles were slippery when wet and a home owner should not have to engage an expert to conduct tests on their property to determine the slip resistant qualities of certain surfaces. The respondents also submitted that the Court of Appeal could not make a finding of constructive knowledge given the evidence of the respondents of their experience of the tiles when wet.

The Court of Appeal held that the unchallenged expert evidence provided support for the proposition that the respondents, as occupants of a house with tiled surfaces that have been found to be slippery when wet, ought to have realised that this was the case given that the tiles had been in place for a period of five or six years before the incident.

Accordingly, the Court of Appeal held that the trial judge should have found that a reasonable person in the position of the respondents ought to have taken precautions against the risk of harm (the risk of slipping on wet steps or the risk of slipping on wet tiles), the most obvious of which was to warn the appellant that the tiles would have been *"abnormally slippery"* if the rain had blown onto them and they were wet. The Court of Appeal added that the respondents could have also placed mats on the verandah to provide a non-slip surface.

The Court of Appeal concluded that the respondents had failed to take these precautions and ought to have been found to have breached their duty of care to the appellant. The Court of Appeal allowed the appeal and ordered judgment for the appellant in the sum of $750,000 plus the costs of the appeal and trial to be paid by the respondents.

CONCLUSION

The decision demonstrates that an occupier will not be excused from liability for injury arising from a hazard, where the occupier ought to have known of the existence of the hazard. In the present case, it was considered that the respondents should have known that the tiles were slippery as a result of their occupation of the property for a period of five or six years after the tiles had been laid.

Whilst this case does not relate to a rental property, it serves as a timely reminder for all property managers to ensure that rental properties are regularly and thoroughly inspected for potential hazards and safety issues and positive steps are taken to warn occupants and entrants to the property of those issues.

Further, best practice dictates that property managers take steps to prevent access to areas which may pose a danger to entrants to a property. Simple measures such as cordoning off an affected area with hazard or barrier tape and the placement of warning signs, should be adopted in such circumstances. Photographs of such measures should also be taken and placed on file. If a property manager is in any doubt as to whether an identified issue constitutes a safety hazard, they should err on the side of caution and seek expert advice from a licensed tradesperson.

In addition, in respect to rental properties in which a safety hazard has been identified, written notice of the hazard should be provided to the tenants (and any contractors scheduled to visit the property) and placed on the property management file.