Carter Newell
LAWYERS

Injury Liability Gazette

5th edition

Carter Newell LAWYERS

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Contents

From the Partner

This fifth edition of the PIL Gazette, compiled by the Carter Newell Property & Injury Liability Team, outlines the latest decisions handed down around Australia in the latest cases of interest to insurers and their clients. The cases reviewed highlight the broad array of litigation risks now facing insurers and insureds alike. If there is a theme emerging from the cases it is that plaintiffs and their lawyers are becoming increasingly willing to test the boundaries of responsibility for negligence in novel factual scenarios.

This is particularly evident in the decisions of *Hoffman v Boland*, an unfortunate case involving an injury to a minor, and in *Rail Corporation New South Wales v King* where an intoxicated commuter was struck and seriously injured on a rail track. Increasingly it seems, these claims are reaching the appellate courts before definitive verdicts are being accepted by the litigants. While insurers and insureds are having some success in the defence of these claims, this means that achieving the desired outcome remains expensive and potentially risky.

Carter Newell's Property & Injury Liability Team, by Rebecca Stevens, Glenn Biggs and myself are pleased to keep you up to date with these developments.

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Case Note

Reitano v Shearer & Anor [2014] QSC 44

Where the plaintiff's credibility was challenged in light of evidence obtained from social media sources, casting doubt on the accuracy of her self-reporting and the consequent opinions of reporting medical experts.

The facts

The plaintiff was injured in a motor vehicle accident on 18 January 2008 when she was 17 years old. The plaintiff stated that her vehicle was stationary behind another vehicle in a line of vehicles at an intersection when her vehicle was hit from behind by a four wheel drive with a bull bar. The plaintiff's vehicle was propelled forward by the force of the collision.

The plaintiff's evidence in chief was in the form of a signed written statement which included the injuries she sustained, her consequent pain and suffering and their impact on her amenity of life and employment.

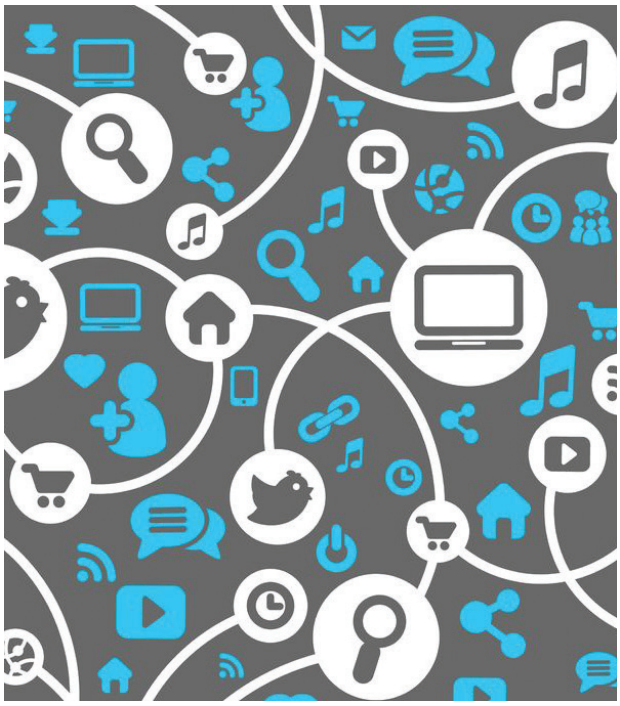
Symptoms from accident

The plaintiff stated that she continued to suffer from ongoing symptoms including thoracolumbar pain radiating into her chest area and a persistent burning pain in her thoracic spine to the front of her chest. The pain was said to be fairly constant but worsened when she was active or sat for long periods of time. The plaintiff stated that if she overexerted herself, her back muscles became sore and led to spasm.

Impact of career choices and lifestyle

The plaintiff stated that due to her injuries she was unable to pursue her career goal of completing a Bachelor of Journalism and becoming a foreign correspondent as she was no longer suitable for the work. She stated that, subsequent to the accident, she attempted to return to work but had difficulties performing her duties due to pain, only managing four or five hours a day. At the time of the trial, she was enrolled in a Master's degree in human resources. Her employment plan was to seek part-time work in human resources.

The plaintiff stated that her ability to participate in sport and socialise with friends also decreased due to the accident. Subsequently, her relationships suffered due to her being unable or unwilling to pursue her previous recreational interests. The plaintiff stated that she had to reduce the number of physical activities she participated in. Prior to the accident, she attended the gym and enjoyed kickboxing. As a result of a low level of activity, she suffered substantial weight gain and low self esteem.



Issues

The major issue in the case was the plaintiff's credibility. In cross examination, inconsistencies in the evidence were presented, which placed the plaintiff's credit in issue.

Although the plaintiff stated that she was scared to go out, it was plain from her evidence and other sources such as social media that the plaintiff attended music festivals, events at hotels and had served as a bridesmaid. The plaintiff admitted that she had not informed the examining doctors of these events. Further, the plaintiff made no mention to doctors of her alleged symptoms of severe spasms or numbness in her legs, or of severe bruising or stabbing sensations in her mid thoracic spine.

In cross examination, the plaintiff admitted to having a long term '*on/off*' relationship since the accident. It was pointed out that her application for university admission to journalism was recorded as a third preference. The plaintiff admitted that, when she blogged as a schoolgirl, she expressed her ambition to be a psychologist.

North J considered the plaintiff's credibility affected the weight to be given to the opinions of orthopaedic surgeons and others who had given evidence in the plaintiff's case concerning her physical condition. It was noted that the expert evidence obtained by the plaintiff relied largely on the plaintiff's self-reporting.

Decision

North J considered the plaintiff demonstrated an indifference to the significance of giving evidence under oath. Due to the findings concerning the plaintiff's credibility, North J was unable to accept the balance of the expert opinion from the plaintiff's doctors.

North J was not prepared to conclude that the plaintiff suffered from any significant psychiatric or psychological disturbance as a consequence of the accident. Therefore, findings of a psychiatrist that the plaintiff had become quite reclusive since the accident were held to be based on inaccurate reporting and were not accepted.

In relation to quantum, the court held that general damages should be assessed under 92 of the ISV table in *the Civil Liability Regulation 2003* at an ISV of 8 at a value of $8,600. In light of the plaintiff's credit, North J was not prepared to make any findings of any other spinal injury.

North J accepted that the plaintiff suffered from pain and suffering for some weeks following the accident and experienced restrictions that would have interfered at times with her capacity to work.

However, the court was not prepared to accept that the injuries interfered with her capacity to pursue a career as a journalist, as the plaintiff made no attempt to pursue such a career and it was considered to be more of a notional fancy on her part.

Past economic loss was assessed at an amount of $30,000 plus interest and superannuation. In regards to future economic loss, the court considered the plaintiff's 44.5 years until retirement age and assessed her loss at $75,000 plus superannuation. The court did not accept the plaintiff's claim for gratuitous services as it was largely based on the plaintiff's self reporting. In relation to special damages, the judge declined to make any award for chiropractic or massage therapy, however, assessed special damages at $12,500 including interest.

In total, the judge provided judgment for the plaintiff in the sum of $139,026.

While this was still a substantial sum, a large component of the plaintiff's claim was rejected in light of concerns regarding her credibility due to evidence obtained from her own social media activity.

Staff profile Construction & Engineering

Luke Preston

Partner

Luke has more than 26 years experience in commercial litigation, construction law and insolvency.

With broad experience in adjudication proceedings under Security of Payments legislation across Australia, Luke regularly acts for leading contractors, miners and industry consultants in payment disputes, expert determinations and arbitration arising under construction contracts.

Luke's practice includes substantial insurance recovery proceedings arising from construction and engineering related casualties, often involving technical issues arising under contractual specifications, scopes of work and Australian Standards.

Luke has acted also in construction industry-related liquidations and administrations, and is a past member of the Queensland Law Society's Practice and Procedure Committee.

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Case Note

Hoffman v Boland [2013] NSWCA 158

An infant sustained significant injuries when her grandmother, who was carrying her, tripped and fell down a flight of stairs.

The facts

Early one morning, upon hearing her six-month old baby granddaughter, Molly, crying in her cot, the baby's grandmother, Mrs. Hoffman, went to her room, picked her up and went to carry her downstairs. The stairs were of a '*U*' shape, with two right angle bends and '*winder'* step[1] at the second of these bends where the direction of the staircase takes a 90 degree turn to the left. One handrail ran along the left hand side of the stairs on descent.

As Mrs. Hoffman descended the stairs, she held the baby against her chest with her right arm and gripped the handrail with her left hand. As she reached the second left-hand turn in the staircase, the location of the '*winder step*', she inadvertently placed her foot on the narrowest part of the triangular step (that is, that part closest to the inside of the stairwell). As she went to move her left hand from the upper part to the handrail to the lower, her foot tipped over the edge of the step. She fell, causing serious and permanent injury to her granddaughter.

Molly's father sued Mrs. Hoffman, claiming damages for breach of duty. Mrs. Hoffman filed cross claims against the builder and the designer of the home.

At trial, Mrs. Hoffman was found liable in negligence and her cross claims against the builder and the designer were dismissed. She appealed this decision.

Issues

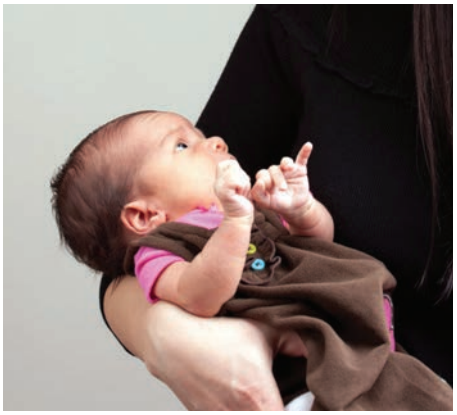
- The main issue the Court of Appeal was asked to consider was whether Mrs. Hoffman owed a duty of care to her six month old grandchild, and if so, whether that duty of was breached in the circumstances.
- Key to the reasoning of the court was the social utility of relatives providing domestic assistance to the family unit.

Decision

Did a duty of care exist and if so, was it breached?

The Court of Appeal reached different conclusions on the question of whether Mrs. Hoffman owed a legally enforceable duty of care to her granddaughter.

Basten JA concluded Mrs. Hoffman owed no greater duty of care than the infant's mother, who in turn owed no duty enforceable in tort in respect of the day-to-day care of her child. This could be contrasted with hypothetical cases where a family member could be found liable in tort for leading a child into harm by their actions. His Honour also noted that a duty did not arise simply because of the fact of the infant suffered injuries resulting from '*some isolated inadequacy in the level of domestic care provided in the home*'[2] which would require ongoing care extending into the child's adulthood.[3] His Honour concluded that where a grandmother assisted a child's mother by looking after her in the home whilst the mother rested, no legally enforceable duty existed in respect of this ordinary care. Given His Honour's conclusions about the existence of a duty of care, he did not go on to consider the question of whether the duty had been beached.



Sackville AJA suggested that the better view was that Mrs. Hoffman did owe her granddaughter a duty of care, the scope of which extended to taking reasonable care to not trip or fall while descending the stairs with the infant in her arms so as to create the risk of injury. His Honour did not express a concluded opinion on the question because he did not think that Mrs. Hoffman had breached the hypothetical duty of care. His Honour thought it fanciful to suggest that Mrs. Hoffman was negligent for electing to descend the stairs in the manner she did while carrying her granddaughter, for stepping on the narrow part of the tread or for momentarily releasing her grip on the balustrade.[4] He thought her actions were reasonable in the circumstances. In His Honour's opinion, any attempt to attribute a want of reasonable care to Mrs. Hoffman would involve the use of hindsight to search for a measure that might have prevented the infant's injuries.[5]

In light of Sackville AJA's finding on the question of breach, Barrett JA found it unnecessary to decide if a duty of care existed in the circumstances. He did, however, concluded that 'courts should be slow to characterise as negligent gratuitous care bestowed on a child by a person exercising parental functions in a family or domestic setting, whether or not the person is a biological parent'.[6]

The design of the staircase

Mrs. Hoffman alleged that the designers and builders of the staircase designed and constructed a staircase that they knew or ought to have known would pose a risk of injury. The deficiencies in design were said to be the presence of the winder, the use of a handrail that was not continuous and the absence of a handrail on the wall of the staircase.

The court acknowledged that the designers and builders of the staircase owed a duty only to take such care in the execution of their roles as is reasonable in the circumstances. The staircase in question was built in accordance with the relevant building standards and was of a design not uncommon in residential dwellings. Both the trial judge and the Court of Appeal concluded that the staircase designer and builder did not breach the duty of care they owed to the granddaughter.

Conclusion

The court of Appeal confirmed the existing law that a parent or relative does not owe a child a duty of care by virtue of the blood relationship but that one may arise in the circumstances of the case.

The Court was divided on the question of whether in this case Mrs. Hoffman owed her granddaughter a duty of care to prevent foreseeable injury when carrying her down the stairs. In any event, her conduct was not thought to be so lacking in the circumstances as to amount to a breach of a duty of care should a duty be found to exist.

……..

[1] A triangular shaped step employed in place of a landing to allow the staircase to bend at 90 degrees.

[2] *Hoffman v Boland* [2013] NSWCA 158, [35].

[3] Ibid [38].

[4] Ibid [146].

[5] Ibid [152].

[6] Ibid [43].

Case Note

Selby v Bankstown City Council [2013] NSWDC 84

Where a trip and fall incident on an uneven public footpath was defended on the basis that the risk of injury was obvious, or in the alternative, that the plaintiff contributed to the injury.

The facts

Barbara Selby, the 72 year old female plaintiff, alleged that on 16 April 2009 she tripped on the raised edge of a paver of a public footpath in Padstow, New South Wales. The plaintiff alleged that she was distracted by a number of bicycles that were laid down on the road and did not see the raised paver. The edge of the paver was raised approximately 3mm from the surface of the path.

The plaintiff used the footpath on a weekly basis. She admitted that, prior to her injury, she was aware the pavers in the footpath were '*very bad in parts*'.

She commenced proceedings against Bankstown City Council (**City Council**), alleging it was negligent in failing to adequately maintain the footpath, barricade the area to prevent pedestrian access and warn pedestrians of the uneven surface. The matter was heard by Justice Levy of the District Court of New South Wales.

Issues

The key issues in dispute were:

- Was the injury sustained by the plaintiff due to the materialisation of an obvious risk?
- Did the City Council breach its duty to the plaintiff, and if so, was a defence under s 45 of the *Civil Liability Act 2005* (NSW) (**CLA**) available?

  Section 45 states that a road authority is not liable in proceedings for civil liability for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.
- Was there any contributory negligence on part of the plaintiff?

Decision

Obvious risk

Levy J found that the risk associated with the raised paver was patent and within common knowledge pursuant to s 5F of the CLA. He held that a reasonable person in the position of the plaintiff would have looked at where they were placing their feet whilst walking and observed the protrusion which was plainly visible.

Further, the plaintiff had personal knowledge that the pavers were in poor condition. The fact that the plaintiff was distracted by the bicycles had no impact on her obligation to ensure that she avoided foreseeable harm arising from an obvious risk.

It was concluded that the plaintiff's injury arose from the materialisation of an obvious risk.

Breach of duty and s 45 defence

When determining whether the City Council had breached its duty by failing to take measures to remove or warn of the risk associated with the uneven footpath, His Honour took into account the following considerations:

- While the City Council was made aware a few years prior to this incident that some of the pavers in the nearby area were uneven and caused people to trip, the City Council did not have actual notice of the specific protrusion of the paver which caused the injury.
- The risk of the plaintiff tripping on the footpath was foreseeable and not insignificant.
- The probability of harm was very low given the rise was only 3mm.
- The burden of conducting inspections of the pavement in light of limited staffing, financial and material resources that were available to the City Council.
- The City Council was entitled to assume that people using the footpath would take reasonable care for their own safety.

His Honour concluded that absent any actual notice of the harm, it would be unreasonable to require the City Council to remove or minimise the risk of harm posed by a 3mm protrusion in a footpath. It was determined that the statutory immunity under s 45 of the CLA applied and the City Council was not liable for the plaintiff's injury.

Contributory negligence

While His Honour was not required to do so, given his conclusions on whether there had been a breach of duty, he also gave consideration to the issue of contributory negligence.

His Honour noted the plaintiff was aware that the pavers on the footpath were in poor condition, yet she did not look to see where she was placing her feet whilst negotiating the path. He held that, had the plaintiff kept a proper lookout, she would have been able to avoid the injury. In the circumstances, the plaintiff had clearly failed to take reasonable care of her safety.

He assessed the plaintiff's contributory negligence at 50% in the event her claim had succeeded.

Case Note

Fitzsimmons v Coles Supermarket Australia Pty Ltd [2013] NSWCA 271

Where a plaintiff failed at trial in a claim for damages arising out of a slip and fall at a supermarket but the decision was overturned on appeal, with a 50% discount for contributory negligence.

The facts

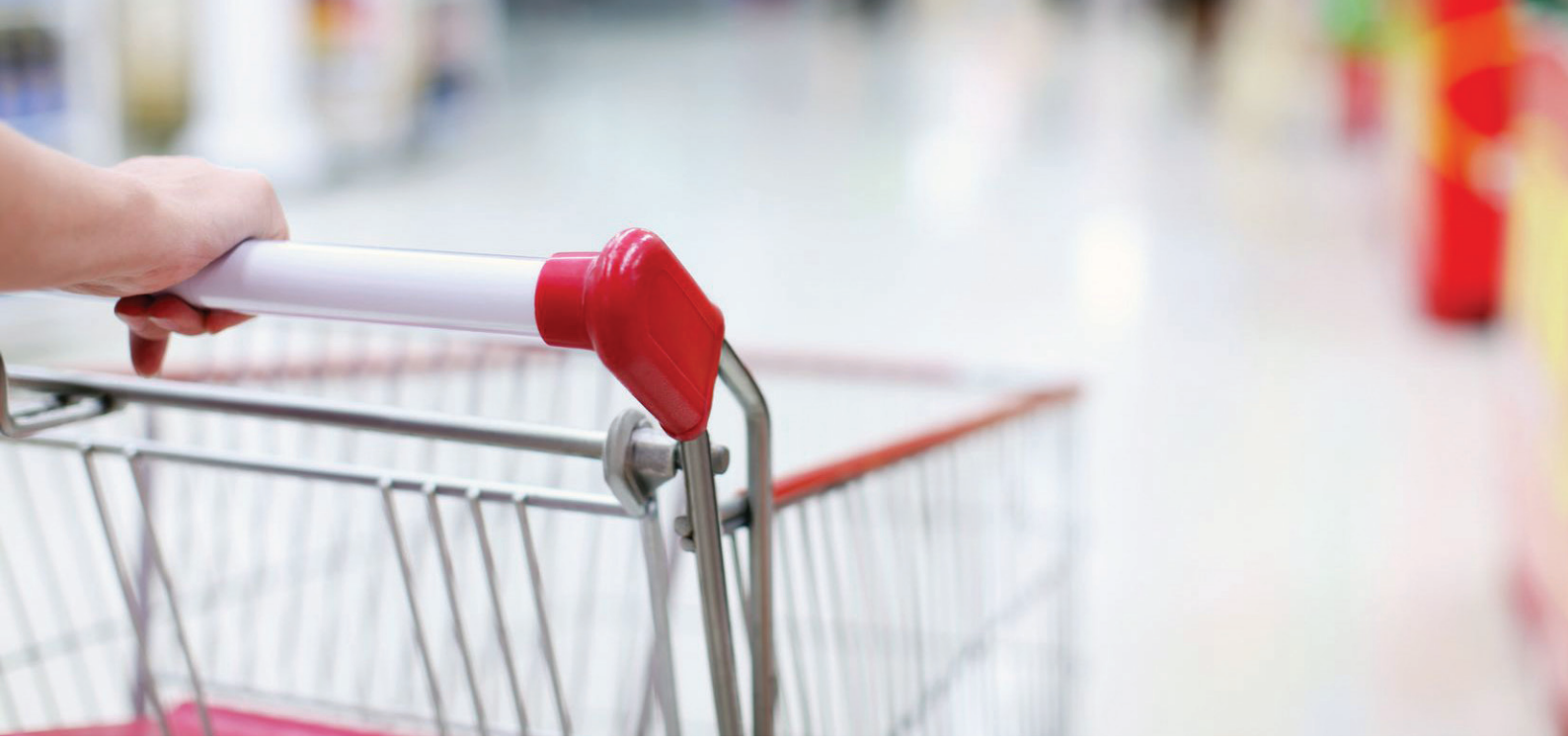
The plaintiff suffered personal injuries when she slipped and fell on a wet floor in a Coles supermarket. The plaintiff gave evidence that she was wearing thongs and was carrying her child on her hip at the time of the incident. She conceded that she was also in a hurry and was probably looking down the aisles as she walked past them rather than looking directly ahead of her. She said she failed to see anything on the floor nor did she observe the wet floor signs on the floor that were put in place by Coles personnel prior to the incident.

A customer service manager at Coles gave evidence that she noticed a patch of dirt on the floor and asked another Coles employee to clean it up. Three wet floor signs were erected in the area and a mop was used to clean the floor, however the mop left a residue of water on the floor. The team member was asked to get some paper towel to finish drying the floor. It was during this time that the plaintiff slipped on the floor. The court accepted that there were no Coles employees in the area when the plaintiff fell.

The trial judge dismissed the plaintiff's claim against Coles on the basis that she had failed to establish that Coles was in breach of its duty of care, with Coles having taken adequate precautions to warn customers of the slippery condition of the floor by erecting three signs. The trial judge concluded that, if Coles was liable, the plaintiff's damages would total $1,773. The plaintiff appealed the decision.

Issues

- Whether Coles owed the plaintiff a duty of care was not in issue. It was agreed that Coles was aware of the hazard, having caused the floor to become wet by attempting to mop up the dirt.
- The issue for determination was whether Coles had breached its duty by failing to adequately warn of the hazard and/or prevent customers from entering the mopped area.
- The court also considered whether there had been any contributory negligence on the plaintiff's part.



Decision

The three judges of the Court of Appeal delivered separate judgments in relation to liability. Emmett JA agreed with the trial judge, however McDougall J and Basten JA overturned the trial judge's decision and found that Coles had failed to discharge its duty of care. Despite three differing judgments, the Court ultimately agreed contributory negligence should be assessed at 50% and upheld the trial judge's assessment of quantum.

The majority concluded that the risk of slipping on the wet floor was a hazard which was foreseeable to Coles and that it had foreseen the risk which eventuated (demonstrated by Coles having displayed the signs). However, the majority found that the precaution Coles took, namely positioning the signs on the ground, was not adequate to warn customers to the presence of the risk, as the signs were placed at ground level and were not readily within the line of sight of a shopper looking up the aisles or at goods on display (as the plaintiff was doing).

The majority considered the exercise of reasonable care in these circumstances required that the customer service manager either stay beside the area of the wet floor to warn customers of the wet floor and direct them away from the area while the team member went to get paper towel, or else request another staff member to do so. The majority did not think this precaution was unreasonable in the circumstances as the team member was only expected to take a few minutes to obtain the paper towel, it would impose only a minimum burden on Coles and it would almost certainly have prevented the plaintiff's accident.

With respect to contributory negligence, the conclusion by Emmett JA that Coles had no liability left the plaintiff 100% responsible for her injuries. McDougall J concluded her responsibility was 50%. Although Coles failed to take adequate precautions to warn of the risk, McDougall J thought the failure of the plaintiff to look where she was going and observe the wet floor signs were equally causative of the incident. In these circumstances he apportioned liability 50/50.

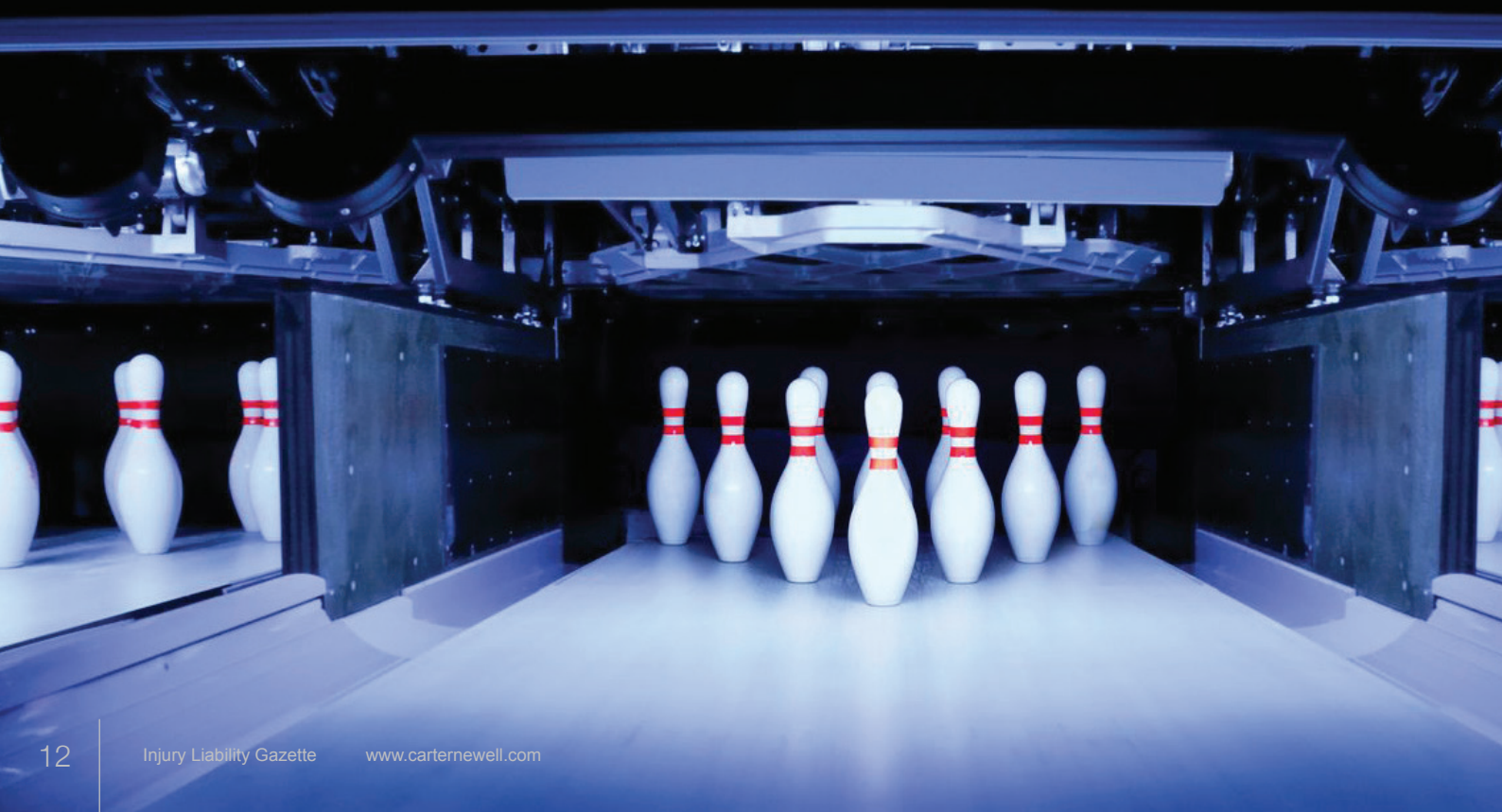
In Basten JA's view, the claimant's contribution was 25%. He did not consider the fact the plaintiff was wearing thongs, was carrying a child or hurrying demonstrated any failure to take reasonable care for her own safety, however her failure to notice the wet floor signs did constitute such a failure. In view of the differing opinions, the court found the appropriate figure for contributory negligence was 50% as that figure was between the conclusions reached by Emmett JA and Basten JA.

Special leave was sought by the plaintiff from the High Court but leave was refused on the basis that no question of general public importance was raised and the plaintiff had insufficient prospects of success.

Case Note

Windley v Gazaland Pty Ltd T/A Gladstone Ten Pin Bowl [2014] QDC 124

Where the defendant bowling alley was held to have breached their duty of care by failing to take measures to ensure that the foul line was clearly visible and the premises had better lighting for glow in the dark bowling. The plaintiff was found contributory negligent to the extent of 40% in light of her bowling experience and failing to take more care where she stepped.



The facts

The plaintiff slipped on a lane at the Gladstone Ten Pin Bowling Alley during '*glow in the dark*' bowling. Contributory negligence of 40% was assessed on the basis that the plaintiff had experience bowling and failed to take more care where she stepped. The plaintiff stepped over the foul line onto the slippery surface of the lane. Due to the state of the lighting, the foul line was not visible and the plaintiff fractured her femur as a result of the fall.

The plaintiff sought damages in the amount of $641,712.14 plus interest.

Issues

The plaintiff alleged that the defendant as occupier of the bowling alley, breached its duty by failing to:

- Provide safe premises.
- Ensure the foul line was clearly visible.
- Give any adequate warning to the plaintiff of the dangers of stepping over the foul line.

The plaintiff alternatively alleged that the defendant breached its duty under contract as the plaintiff paid an entrance fee to play bowls.

Decision

The court held the defendant was liable in negligence and breach of contract in respect of the incident. The court found the plaintiff contributed to the incident to the extent of 40%. The defendant's duty of care under contract was found to be concurrent and coextensive with in tortious of care, hence the claim could be reduced for contributory negligence.

Smith DCJ found the risk was not only foreseeable but it was significant. He said there was a real chance someone could fall over if the lights were dimmed and the foul line crossed. In those circumstances, a reasonable person in the defendant's position should have taken measures to ensure that the foul line was clearly visible during glow-in-the-dark bowling (e.g. use of a reflective or light colored strip) and/or better lighting.

While the plaintiff may have been aware of the general risk of slipping over on the lane, the court found the plaintiff had proved in the circumstances in which she found herself (the poor lighting, absence of clear demarcation and/or absence of warning) that the risk of slipping was not obvious in the circumstances because it was not clear where the landing finished and the bowling lane began.

The Court held that the plaintiff contributed to her own injuries to the extent of 40% in light of the plaintiff's experience in ten pin bowling and the fact she ought to have taken more care where she stepped. Having a '*sense of the lane*' was not enough for the plaintiff to look after her own safety.

The judge awarded the plaintiff $156,594.03 in total (after taking into account the reduction of 40% contributory negligence), assessed as follows:

- $18,000 in general damages (ISV of 15) based on a 10% whole person impairment which may increase to 15% if the plaintiff has a hip replacement in the future;
- $7,322.07 for out of pocket expenses plus interest;
- $91,280 for past economic loss plus interest and superannuation;
- $99,120.00 future economic loss plus interest and superannuation. Smith DCJ accepted the evidence of both doctors that the plaintiff was capable of performing sedentary work; and
- $17,799.65 for future out of pocket expenses, largely to account for the fact she will require a hip replacement in the future.

Case Note

Parker v City of Bankstown RSL Community Club Ltd [2014] NSWSC 772

Where a women fell down a step at a children's dance concert and the court considered whether the step presented a hazard or was an obvious risk.

The facts

The plaintiff was injured when she fell down a step at Bankstown RSL Club (**Club**) in 2011 while attending a dance concert for her children. The claimant brought claims against the Club and Glenda and Dennis Yee (**Yees**) for their alleged negligence in failing to illuminate or otherwise indicate the presence of the step. The Yees operated the dance school where the children attended. They held their concerts at the Club and had done so since 2001. Two of the children were performing at the Club on the night of the incident.

There were three tiers of seating in the auditorium of the Club. The tiers differentiated in height by 150 millimeters each so that the bottom tier was 300 millimeters lower than the upper tier.

The was seated at a table in the upper most section. While the dancers were performing, the house lights in the auditorium were dimmed, however strip lighting ran underneath the top edge of each tier to illuminate the step.

The gave evidence that she was walking from her section to the backstage area when she fell at the junction between the upper and middle tier. Her evidence was that she stepped forward into the middle section not noticing is was lower and expecting that her foot would land at the same level, but because there was a step she lost her balance and fell to the floor.

Issues

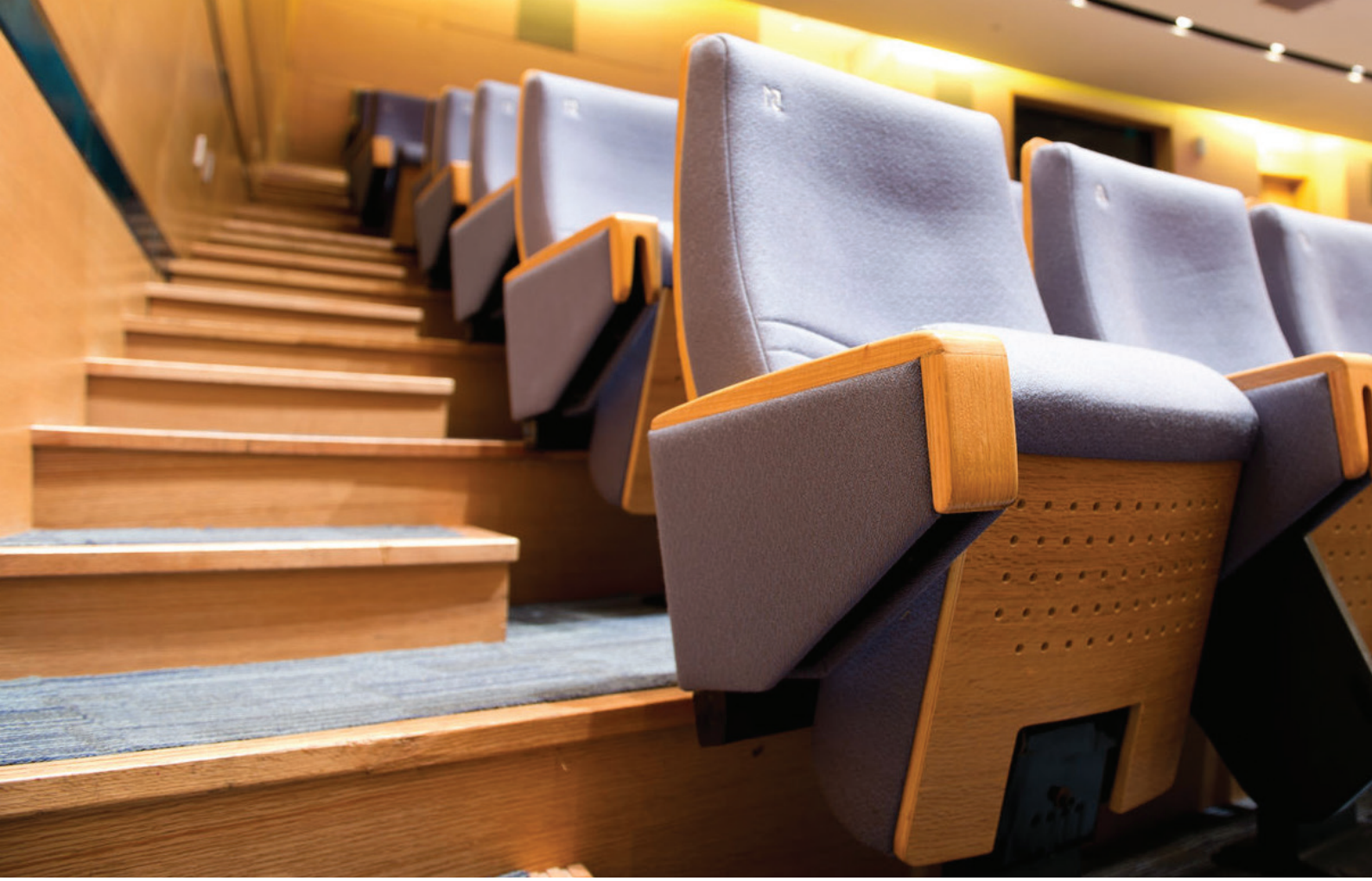
The principal issues in the proceeding were as follows:

- How the incident occurred.
- Whether the strip lighting was operating at the time of the incident.
- Whether the Club and the Yees were negligent.

Decision

How the incident occurred

The court was not willing to accept the evidence as to how the incident occurred. Rather, the court was satisfied that the was not looking where she was going when she fell. Had the been looking where she was



going, the court thought she would have seen the step and navigated it safely.

Strip lighting

The main issue of contention in the trial concerned the strip lighting and whether it was on at the time of the incident. The court did not accept the evidence that the strip lighting was not illuminated, instead preferring the '*overwhelming*' evidence of the Club's witnesses. The court also emphasised the fact that other people were able to walk through the auditorium during the performance without incident. The court was therefore satisfied, on the balance of probabilities, that the strip lighting was probably on throughout the auditorium at the time of the incident as the had not proved that it was not illuminated when she fell.

Was the Club negligent?

The court thought that the precautions taken by the Club, namely installing strip lighting below the edge of the step, was reasonably sufficient to avoid the risk of harm.

The also alleged that the step presented an unreasonable danger when the lights were dimmed as they could only be seen from one meter away. The court did not accept this argument and instead thought the steps presented an obvious risk.

Were the Yees negligent?

The Yees were also found to be occupiers of the premises as they sold tickets to entrants and had some control over the venue including control over the strip lighting. With respect to the allegation that the strip lighting was not on at the time of the incident, the court dismissed this allegation for the same reasons as against the Club.

With respect to the allegation that the steps were not sufficiently indicated, the court held the Yees were not responsible for the layout of the Club or the position of the tiers and any responsibility to indicate to patrons the presence of the step lay with the Club not the Yees.

Case Note

Streller v Albury City Council [2013] NSWCA 348

Where the New South Wales Court of Appeal held the Council did not breach its duty of care as using a rope swing was considered to be an obvious risk.

The facts

This is an appeal from a verdict for the respondent Council.

On 26 January 2008, the plaintiff (appellant in the appeal) attempted a back flip using a rope attached to a tree branch overhanging the Murray River. On the river is an area known as Noreuil Park foreshore, which includes Noreuil Park. The respondent Council had organised Australia Day events in the Noreuil Park foreshore area on that day. Tragically, in attempting to backflip into the river, the plaintiff suffered a C7 quadriplegia injury as a result of landing awkwardly and striking the riverbed. None of the activities or entertainment arranged by the Council took place outside Noreuil Park or the foreshore area.

The rope swing was detected by a routine Council inspection on Friday 25 January 2008. However, no one was available to remove it until Tuesday of the following week.

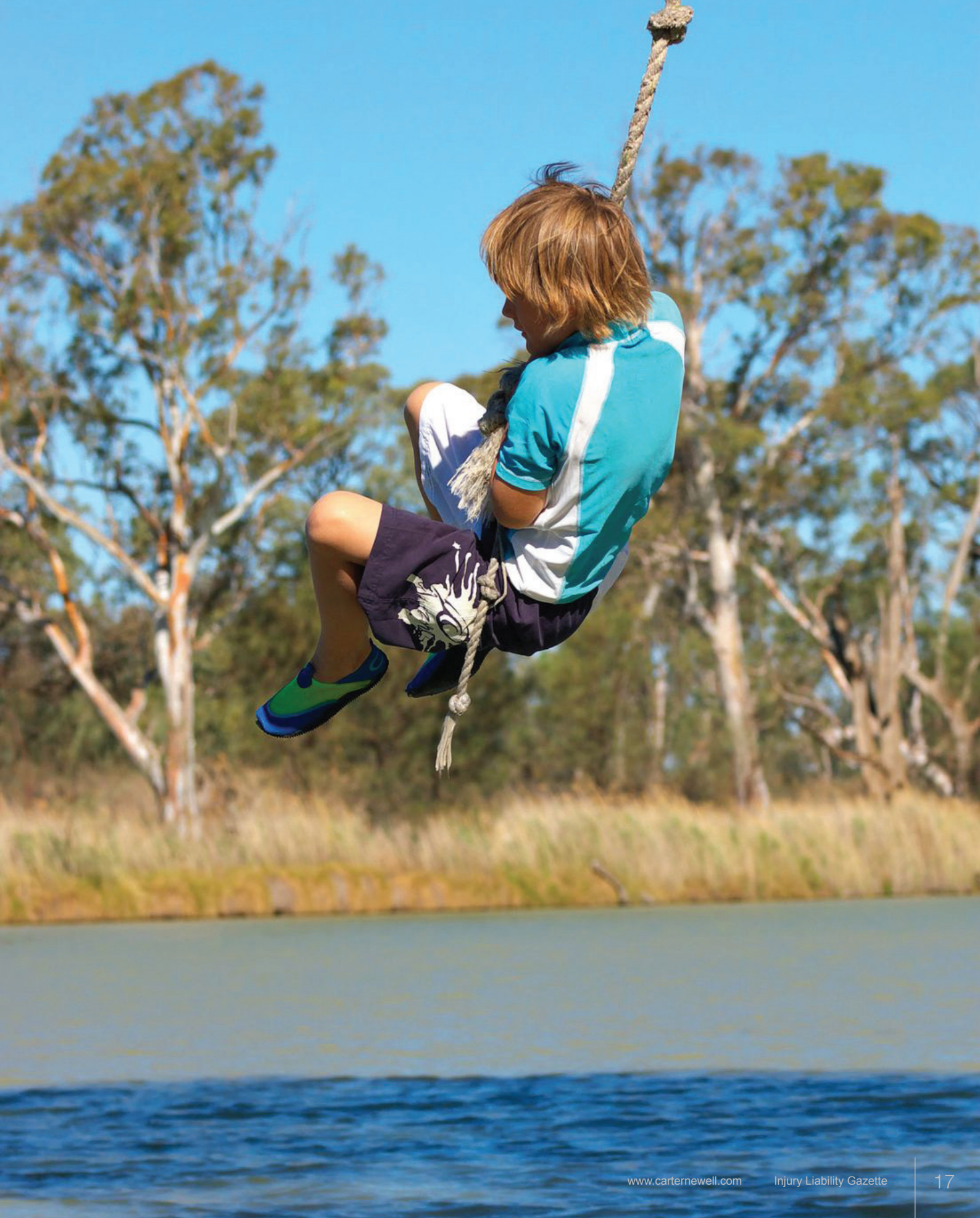
Primary judgment

The plaintiff alleged that the Council was the occupier, and had the care, control and management of Oddies Creek Park and Noreuil Park. Access to the riverbank was gained from land for which the Council was responsible. The primary judge determined that the Council had a duty of care to persons accessing the tree, irrespective of whether the tree was on land under its management or control.

The plaintiff's pleaded case was that the Council breached its duty to exercise reasonable care to:

- Remove the rope swing.
- Properly supervise the rope swing having not removed it.
- Ensure that the water near the rope swing was sufficiently deep.
- Warn that it was dangerous to dive into the water or to use the rope swing.

The primary judge held that a reasonable person in the Council's position would not have taken any of those four precautions and rejected the plaintiff's argument that there was an implied representation that it was



safe to use the rope or dive into the water.

Her Honour held that there was no duty to warn the plaintiff that it was dangerous to dive or jump into the water using the rope swing as the risk of harm from doing so was an obvious risk of a dangerous recreational activity. The risk of harm would have been obvious to a reasonable person in the plaintiff's position as the rope swing increased the area in which the plaintiff could land, the river varied in depths due to sand bars and the depth of penetration into the water depends upon the diver's weight. Therefore, the probability of the plaintiff suffering serious injury in attempting the back flip was more than trivial.

The primary judge took into account that the presence of a security guard would not always prevent access to the tree or rope and might encourage those who wished to dive or jump to move to some other location where they would not be prevented from doing so.

The risk of injury from diving or landing head first in water would be an obvious risk to an athletic 16 year old with the life experience of the plaintiff.

Appeal

The main question in the appeal was whether the primary judge erred in holding that the respondent Council was not liable to the plaintiff in negligence for the injuries he sustained. The question raised issues as to the content of the Council's duty of care, whether that duty was breached, and whether, in any event, the Council had a complete defence to the plaintiff's claim because of application of s 5L of the *Civil Liability Act 2002* (NSW) (**Act**), which provides:

> *'A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by that person.'*

The plaintiff challenged the primary judge's finding that the Council's duty of care did not extend to taking steps to guard against the risk of injury the rope swing presented. The plaintiff argued that the Council's duty to exercise reasonable care required that it either remove the rope swing or supervise it to prevent its use on Australia Day. The plaintiff submitted that the Council had encouraged the use of the rope swing by not removing it or preventing access to it, knowing that children in particular would be attracted to it.

Decision

The New South Wales Court of Appeal dismissed the appeal. The primary judge did not err in concluding that s 5L applied, affording the Council a defence to the plaintiffs claim.

The risk of injury from diving or landing head first in water would be an obvious risk to an athletic 16 year old with the life experience of the plaintiff. The risk of harm materialising in this instance is more than trivial. The circumstances did not exclude the risk of landing in an area where other jumpers or divers had not landed, or where there was shallow water.

There was no evidence of any conduct on the part of the Council which indicated to members of the public that the Council had placed the rope there, or that it had otherwise encouraged the rope's use. Further, the rope swing could not safely be accessed or removed by Council staff and required a qualified climbing arborist.

A reasonable person in the Council's position would not have taken the precaution of posting a guard as the evidence did not show that there were greater known hazards with the rope swing over any other rope swing or tree.

Carter Newell presentations

legalwise SEMINARS

CPD Program
March 2015

11 March

Special Counsel Nola Pearce presenting ethics in practice including ethics in negotiating transactions and settlements and at mediation, deciding whether the client's instructions pose an ethical dilemma, and when you need to take action, and what you should do.

18 March

Special Counsel Matt Couper presenting warranties, indemnities and disclosure in private M&A transactions including the role of warranties and indemnities in a sale agreement, the relationship between due diligence and warranties and common forms of qualifications and limitations to warranty and indemnity protection.

25 March

Special Counsel Stephen Hughes presenting an update on ancillary orders including the Fair Work Commission's powers to make costs and ancillary orders against parties and their representatives and recent decisions involving the exercise of the Commission's discretion.

27 March

Partner Tony Stumm presenting existing and emerging defences available to directors for breaches of *The Corporations Act* including business judgment rule, ss; 1317S and 1318 *'exculpatory'* defences and the AICD's report on the *'honest and reasonable director'* defence.

30 March

Special Counsel Brett Heath presenting warranties and indemnities in contracts including ensuring all relevant parties are included in the contract, personal liability issues for directors, legal implications of a contracting party being a corporate trustee or a director of a company and deeds of access and indemnity.

Queensland Law Society

QLS Annual Symposium

20 March

Human Resources Manager Belinda Parish chairing Core CPD sessions covering behaviour, performance and wellbeing in legal practice and mindfulness for lawyers.

20 March

Special Counsel Nola Pearce participating in symposium debate *'Legal practice was easier 30 years ago'* for the affirmative team.

21 March

Special Counsel Nola Pearce presenting an update to case law, legislation and practice direction including significant legal and practical changes for commercial litigators in 2014–15.

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Case Note

JK v State of New South Wales [2014] NSWSC 1084

Where the State of New South Wales sought indemnity or contribution from a teacher following the teacher's criminal misconduct towards a pupil.

The facts

The plaintiff was sexually assaulted by a teacher (referred to as **QR** in the proceedings) between 2002 and 2004. QR pleaded guilty to one count of indecent assault on school premises within school hours and 14 charges where the offences occurred off school premises outside of school hours. The claimant alleges she suffered psychiatric injury as a result of the sexual abuse.

The plaintiff commenced proceedings for damages for psychiatric injury against the State of New South Wales, its employees (the principal and the deputy principal) and QR. The plaintiff alleged the State of NSW was vicariously liable for the acts of QR and breached its duty of care by allowing or permitting QR to engage in the sexual assaults or by failing to stop it.

Judgment was entered by consent against the first three defendants in the sum of $525,000, of which $208,630 was for the plaintiff's costs and $316,370 was for damages. The State of NSW filed a cross claim against QR seeking indemnity and/or contribution for the judgment entered against the first three defendants, damages for breach of contract, interest and costs. In its cross-claim, the State of NSW argued that QR's conduct as pleaded by the plaintiff was criminal conduct in breach of his contract and conditions of employment, and was not within the scope, or for the purposes, of his employment with the State of NSW.

Issues

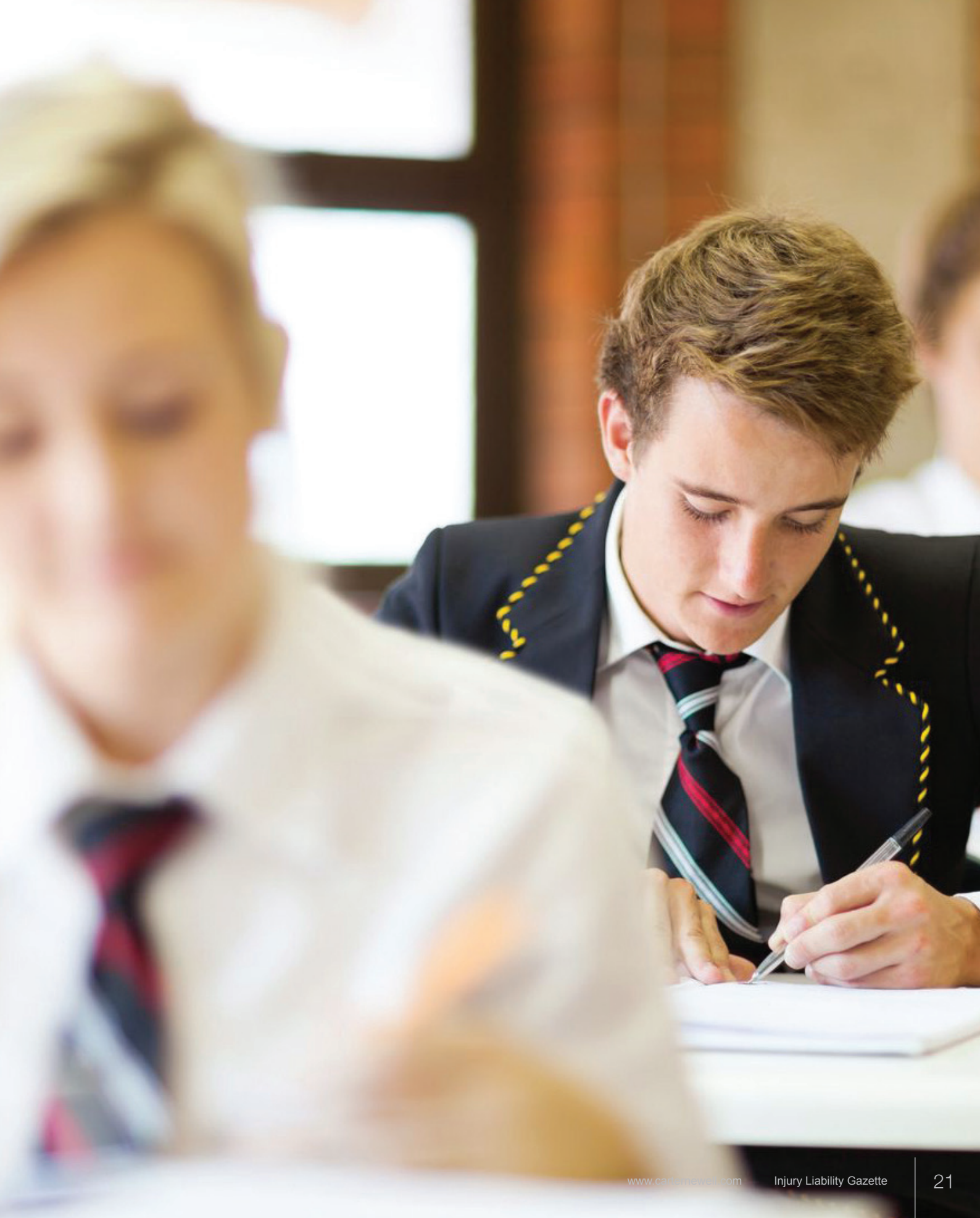
The court set out three main issues for determination:

- Whether the settlement was reasonable.
- Whether QR should indemnify the State of NSW.
- Whether there should be contribution by QR to the State of NSW.

Decision

Settlement

The court considered the general principals of negligence outlined in s 5B of the *Civil Liability Act*



2002 (NSW) and the evidence available at the time the compromise was reached.

Harrison AsJ was of the view that the settlement sum of $525,000 was reasonable when taking into account the plaintiff's age when the sexual assaults occurred and the medical evidence regarding the plaintiff's psychiatric injuries.

Indemnity

The claim for indemnity and contribution was considered with reference to s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

Harrison AsJ accepted that schools generally owe a non-delegable duty of care to its students.[1] However, that duty does not extend to cover criminal actions such as sexual assaults upon a student committed by a teacher.

Her Honour also referred to the High Court decision of *State of New South Wales v Lepore.*[2] In *Lepore*, the majority held that the liability of the school authority under its non-delegable duty does not extend to cover criminal actions such as the sexual assault against a pupil by an employee of the school. Her Honour therefore found that the State of NSW did not owe the plaintiff a non-delegable duty of care for the acts of QR.

Rather the issue for determination in this case was whether the school was vicariously liable for the sexual assault committed by its employee.

Her Honour referred to the different formulations used by the judges in *Lepore* to determine whether a school authority could be held vicariously liable for the acts of its employees. Her Honour concluded there was no clear majority view that could be drawn from *Lepore* and did not say which of the majority's formulations she preferred. Rather, she was unable to determine whether or not the State of NSW would have been found to have been vicariously liable for the acts of QR without the benefit of all the facts and circumstances having been elicited at trial.

Her Honour heard submissions from both the State of NSW and QR to determine whether a trial court could be satisfied on the balance of probabilities that there was an insufficient connection between QR's employment and wrongful acts. In its submissions, the State of NSW relied on s 5 of the *Employees Liability Act 1991* (NSW).[3] The State of NSW submitted that all but one of the criminal acts occurred outside of school hours and off school premises. Harrison AsJ was satisfied that the actions of QR were serious and wilful, he knew he was engaging in criminal conduct, that such conduct was in breach of the conditions of his contract of employment and did not occur in the course of or arise out of his employment. As such, Her Honour did not consider the State of NSW was liable for the actions of QR under the Act.

QR claimed that other teachers were aware that the plaintiff had '*a crush*' on him and he was told by the school not to have contact with her, however she was placed in a class taught by him. Even if this were the case, Her Honour thought this was a wholly different situation from the school being aware of sexual assaults taking place outside of school hours and off school premises. On the basis of these submissions, Her Honour concluded that she thought it likely that a court would accept the school authority was not aware that QR had committed sexual assaults upon the plaintiff. Therefore, it was likely to have been found that the State of NSW was not vicariously liable for QR's actions. As such, Her Honour ordered QR to indemnify the State of NSW.

Contribution

The State of NSW submitted that, based on QR's conduct, no culpability should be attributed to the State and it was just and equitable that liability should be wholly attributable to QR. After considering QR's submissions, Her Honour was of the opinion that nearly all of the fault could be attributed to the actions of QR and it was just and equitable that he be ordered to pay 90% of the judgment sum. This amounted to $472,500 plus interest. Her Honour also ordered QR to pay the State of NSW's costs.

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[1] *The Commonwealth of Australia v Introvigne* [1982] HC 40.

[2] [2003] HCA 4.

[3] Section 5 provides that the Act does not apply to a tort committed by an employee if the conduct was serious or wilful misconduct or did not occur in the course of and did not arise out of the employment of the employee.

Staff profile Insurance

Ryan Stehlik

Senior Associate

Ryan Stehlik is a Senior Associate in the property & injury liability team where he acts for Australian insurers, London underwriters, brokers, claims handlers and corporate insureds. He conducts pre-court disputes under PIPA and litigation in the District and Supreme Courts.

Ryan has extensive experience in managing a broad range of claims but has a keen interest in hotelier and large property recovery claims.

Ryan has established relationships across the hotelier industry and provides commercially driven advice involving general hotelier risks, assaults and major event liability risks. Ryan also manages significant property litigation and is currently managing a multi-million dollar recovery on behalf of the underwriters of a hotel damaged by fire caused by faulty electrical equipment.

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Case Note

Rail Corporation New South Wales v King [2014] NSWCA 207

Appeal against RailCorp after Mr King fell from a train station platform onto train tracks and was struck by a train, sustaining severe injuries.

The facts

At about 3am on 2 September 2006, Mr Shane King (**Mr King**) was intoxicated and fell onto the train tracks at Mortdale Railway Station in Sydney. About 30 seconds after the fall, Mr King was struck and run over by a train, causing severe injuries including the amputation of his left leg.

Mr King made a claim for damages against Rail Corporation New South Wales (**RailCorp**), the government body responsible for operating the train. Damages were agreed in the amount of $1.3 million, and the matter went to trial on the questions of the liability of RailCorp in negligence and the contributory negligence of Mr King. The trial judge found RailCorp negligent and assessed contributory negligence at 50%.

RailCorp appealed to the New South Wales Court of Appeal on the finding of negligence, for both vicarious liability for the driver's actions and it's direct breach of duty.

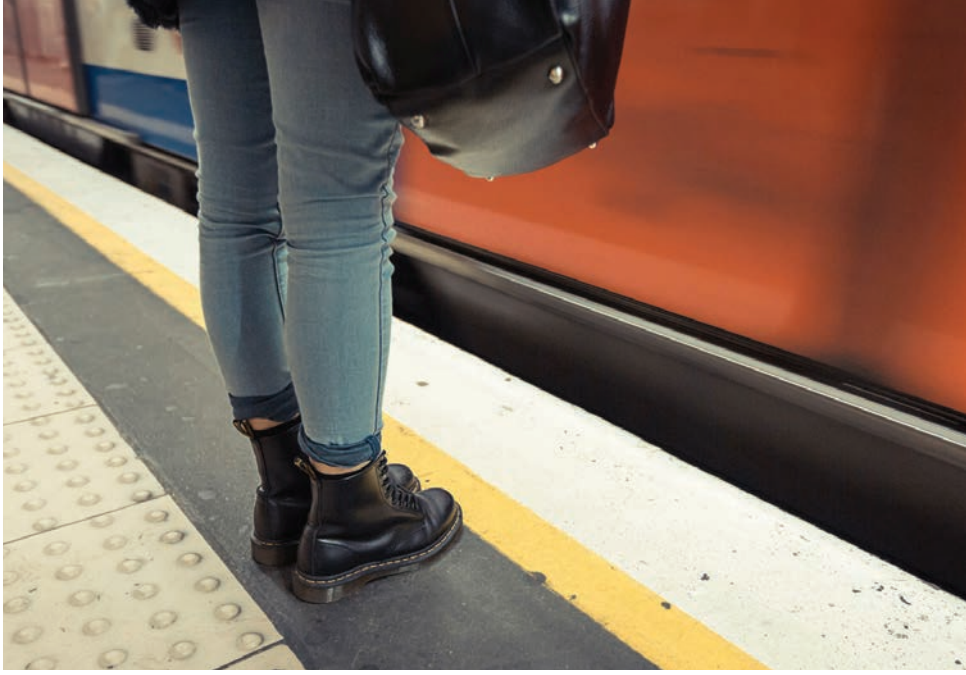
Issues

- Was the train driver negligent in not applying the emergency brakes in due time?
- Was RailCorp negligent by not issuing clear instructions to its drivers about the action to take when an object was seen on the track and the driver was not able to determine whether or not it was a person?

Decision

Train Driver's Negligence

The primary case against RailCorp was based on vicarious liability for the negligence of the train driver. The main issue was whether the train driver was negligent in not immediately applying the emergency brakes when he detected an object on the tracks.



It was undisputed that the train driver did take steps to avoid the collision. The train driver noticed an object on the tracks but he thought it was rubbish so did not immediately apply the emergency brakes. He was concentrating on the end of the platform, the point on which he was required to stop the train. When he saw the object move, and realised it was a person, he then applied the emergency brakes and sounded the horn.

Expert evidence established that having regard to the speed that the train was travelling, the driver's line of sight and the mechanical time to apply the emergency brakes, the driver was left with a period of three seconds within which to react to apply the brakes in order to avoid the accident.

The trial judge had originally concluded that the driver had two seconds to observe the object. However, this did not include a period required to detect and identify the danger ahead. Expert evidence was led that 1.15 seconds should be enough for reasonable perception response time, not including time to detect, observe and identify the object ahead. In all, this left the driver with only 1.85 seconds to observe something on the track ahead and identify it as a danger.

Even if the driver had reacted within a reasonable time, it would not have been sufficient time to avoid the collision. Therefore, if there was a breach of duty, it was not causative of the accident.

The trial judge had also found that the driver's breach of duty lay in the driver not engaging the emergency brakes immediately when he saw something on the track. He did not require that the driver identify the object on the track as a person.

The driver's evidence was that he encountered rubbish on the track on a daily basis. When he first observed the object it was indistinct and looked like rubbish in the shadow of the platform. He did not identify this object as a person until it moved. The driver had not otherwise been instructed as to what he should do if he saw rubbish on the line.

The Court of Appeal found that, absent any instructions requiring the driver to apply the emergency brakes whenever there was anything on the track which was not clearly identifiable, a finding of negligence against the driver was to set a standard of care well above that which was reasonable.

The Court of Appeal held that the evidence did not support a finding of negligence on the part of the driver, and therefore a finding of vicarious liability against RailCorp.

RailCorp's negligence

The trial judge found that RailCorp breached its duty of care by not issuing clear instructions to its drivers about the action to take when an object was seen on the track, and the driver was not able to distinguish whether or not it was a person.

The Acting General Manager for RailCorp gave evidence that drivers were not given such instructions because of safety concerns to commuters already on the train, adverse impact to service availability and increased repair maintenance costs. Weighing these considerations against the frequency with which drivers observed objects on the line together with the high volume of passengers using the Sydney Metropolitan railway, meant that instructing drivers to apply emergency braking as soon as anything is seen on the line would create an unacceptable risk to those already on the train.

That evidence was not challenged by Mr King.

The Court of Appeal held that there was no firm evidential basis to find that there was a systemic breach of duty by RailCorp in failing to provide such instructions.

The trial judge's decision was set aside and RailCorp's appeal allowed.

Case Note

Suncorp Staff Pty Ltd v Larkin [2013] QCA 281

Where a worker suffered an injury from bumping his knee on a cupboard handle and the employer appealed his success at trial.

The facts

This is an appeal of a verdict for the plaintiff (respondent in the appeal) in the District Court.

The plaintiff was employed in the defendant's (appellant in the appeal) call centre when, on 15 April 2008, he bumped his right knee on the metal handle of a cupboard under a workbench. He alleged that he sustained a soft tissue injury to his knee, complex regional syndrome and psychological injuries as a result of the incident.

The plaintiff alleged that the defendant exposed the plaintiff to a risk of injury of which the defendant knew or ought to have known.

Primary judgment

The plaintiff focused his claim on the extent to which the protrusion of the handle from the front of the cupboard was likely to give rise to a risk that the worker may have inadvertently struck the handle and been injured. The trial judge accepted that the plaintiff had to bend a fair way forward with his knee before he could possibly hit the handle. The incident occurred after the plaintiff finished a private telephone call, with no evidence that the plaintiff had ever used the bench for work purposes.

The primary judge accepted expert evidence from an ergonomist and safety consultant that the door handles were a clear impact hazard for the knees.

There was evidence that there had been no prior incidents of this type. However, despite this, the trial judge concluded that the risk of injury was '*obvious*', following the High Court authority of *Webb v South Australia* (1982) 56 ALJR 912 that the absence of any accidents over a period of time did not mean the construction in issue presented no risk of injury.

The primary judge concluded that, where the risk could have been eliminated without undue difficulty or expense, the reasonable person's response would be to eliminate it. The primary judge was satisfied that there was more than a slight chance the plaintiff could suffer injury from coming in contact with the handle on the cupboard and the defendant breached its duty of care by having those particular handles on the cupboard.

Issues

The appeal focused on two findings of fact by the trial judge – that there was more than a slight chance that a worker could be injured by contact with one of the door handles, and that a reasonable employer in the position of the appellant would have replaced the door handles.

The appellant argued that it did not breach its duty of care as any risk of any injury was slight, as was the potential injury arising out of such injury. It was further argued that the trial judge incorrectly classed evidence of the presence of 300 other cabinets in the call centre as irrelevant because the presence of the other handles was evidence of the reasonableness of the defendant's failure to perceive any risk associated with the subject handles under the workbench.

Further, the appellant argued that a reasonable employer in the position of the defendant would not have foreseen the risk of injury as no one had hurt themselves on the handles over a number of years.

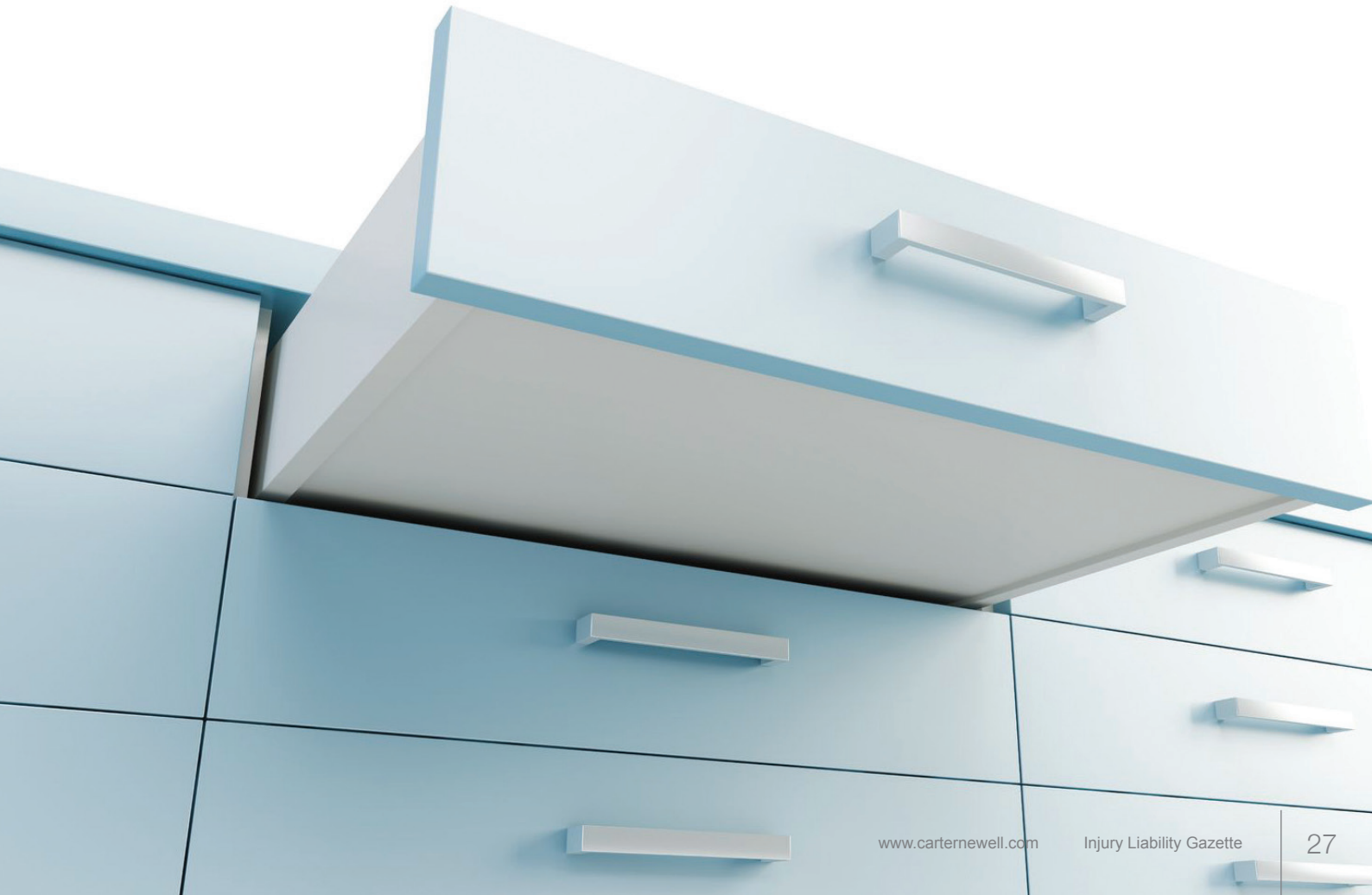
Decision

The Court of Appeal allowed the appeal and set aside the orders for the plaintiff.

It was accepted that the presence of other cupboards with the same handles without any prior incidents was pertinent to the question whether a reasonable employer in the position of the appellant should have foreseen the risk of injury and, if it had known of such risk, whether it would have altered the handles or taken other action in response to the risk.

It was noted that it was necessary to avoid the advantage of hindsight and to look forward to give due weight and consideration to the magnitude of the risk and the degree of the probability of its occurrence (espousing the principles of *Vairy v Wyong Shire Council* (2005) 223 CLR 422).

On appeal, it was found that the plaintiff had failed to show that the appellant was acting unreasonably in failing to remove the handles or take any other remedial action.



Case Note

Kemp Meats Pty Ltd v Tompkins [2014] QCA 125

Where a defendant appealed a trial judge's failure to apply a discount for contributory negligence by a worker at a meat factory who sustained an injury while not wearing gloves.

The facts

This appeal relates to a claim for personal injuries sustained by Keith Tompkins (**plaintiff**) in the course of his employment as a slaughterman at Kemp Meats Pty Ltd (**employer**). The plaintiff injured his left thumb when he was using a knife to gut a pig suspended from a chain and the knife slipped. The injury restricted his ability to grip.

The medical evidence indicated the plaintiff would no longer be able to work efficiently as a slaughterman or butcher, which involved gripping and holding objects with his left hand. Following the injury, he was employed as a delivery driver with an alternate employer for a few months, which he subsequently ceased as a result of his injury. He then started working as a storeman.

The plaintiff alleged the employer was negligent as its work method did not compel slaughtermen to wear '*cut-resistant*' gloves. The employer admitted liability, but argued that the plaintiff's failure to wear the gloves constituted negligence which contributed to his injury.

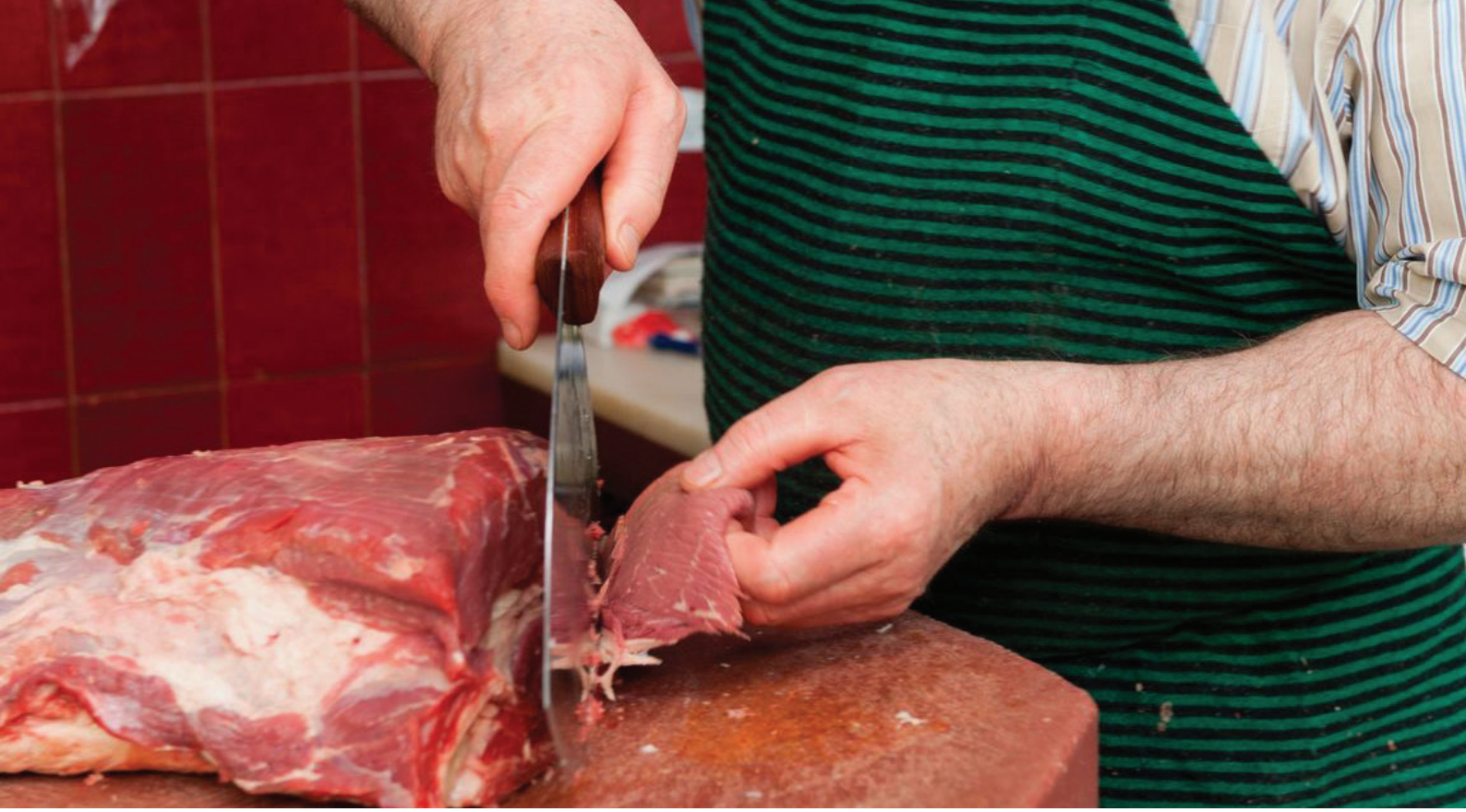
The District Court gave a judgment in favour of the plaintiff in the sum of $337,113.55. The employer appealed to the Court of Appeal on issues of liability and quantum.

Issues

The main issue on appeal was whether the trial judge had erred in making no finding of contributory negligence on part of the plaintiff. The employer argued that s 305H of the *Workers Compensation and Rehabilitation Act 2003* (Qld) (**Act**) applied to the case. Section 305H states:

> *'(1) A court may make a finding of negligence if the worker relevantly -*
>
> *…*
>
> *(b) failed at the material time to use, so far as was practicable, protective clothing and equipment provided…by the worker's employer, in a way which had been properly instructed to use them; or*
>
> *(c) failed at the material time to use, so far as was practicable, anything provided that was designed to reduce the worker's exposure to risk of injury'*

The employer also argued that that the trial judge had failed to give adequate consideration to medical evidence when considering an award for future economic loss.



Decision

The trial judge found the slaughtermen at Kemp Meats did not use the gloves because they considered the gloves affected their ability to grip, which impeded the cutting process. During a meeting, the employer had discussed the use of gloves with its workers. However, when the employees opposed the proposal, the employer backed down and allowed workers to continue not to wear them.

The employer alleged that the plaintiff (who was trained in matters of workplace health and safety and had been working in the meat industry for more than 27 years) was aware that wearing gloves could reduce the risk of injury from knife cuts. It was argued the plaintiff knew the gloves were available but refused to wear gloves because he was afraid of developing carpal tunnel syndrome, thereby triggering s 305H of the Act.

The court did not accept that the plaintiff only opposed wearing gloves because of his personal concern of developing carpal tunnel syndrome, and instead found that he shared other employees' concerns with respect to impact of the gloves on their capacity to grip. It was found that, as the employer had accepted the employees' refusal to wear the gloves, no '*proper instruction*' to use the gloves had been provided. Further, the court accepted that only two sets of wearable gloves were made available to 13 slaughterman. As such, the court found the employer did not '*provide*' the gloves for the purposes of s 305H (b) or (c).

The appeal therefore failed on issues of liability.

The employer did, however, successfully argue that the trial judge had failed to give adequate consideration to medical evidence which indicated that the plaintiff would not have been able to maintain his employment as a delivery driver regardless of the incident due to a pre-existing shoulder injury. The plaintiff had 22 years until he reached retirement age. The trial judge had awarded lost income (being the difference between his weekly earnings as a storeman and what he would have earned as a delivery driver) for a period of 15 years (until the age of 60).

The court on appeal instead found that the plaintiff would have only been able to maintain his delivery job for another four years due to his pre-existing condition, and awarded loss of earnings for those four years only, in addition to a global award of $75,000 for his reduced earning capacity and the disadvantage he may face in the open labour market.

The damages award was therefore reduced to $201,863.55.

Case Note

Carr v O'Donnell Griffin; Carr v Wagga Mini Mix and Pre-Concrete Pty Limited [2013] NSWCA 840

Where the NSW Court of Appeal considered the apportionment of liability in labor hire situation.

The facts

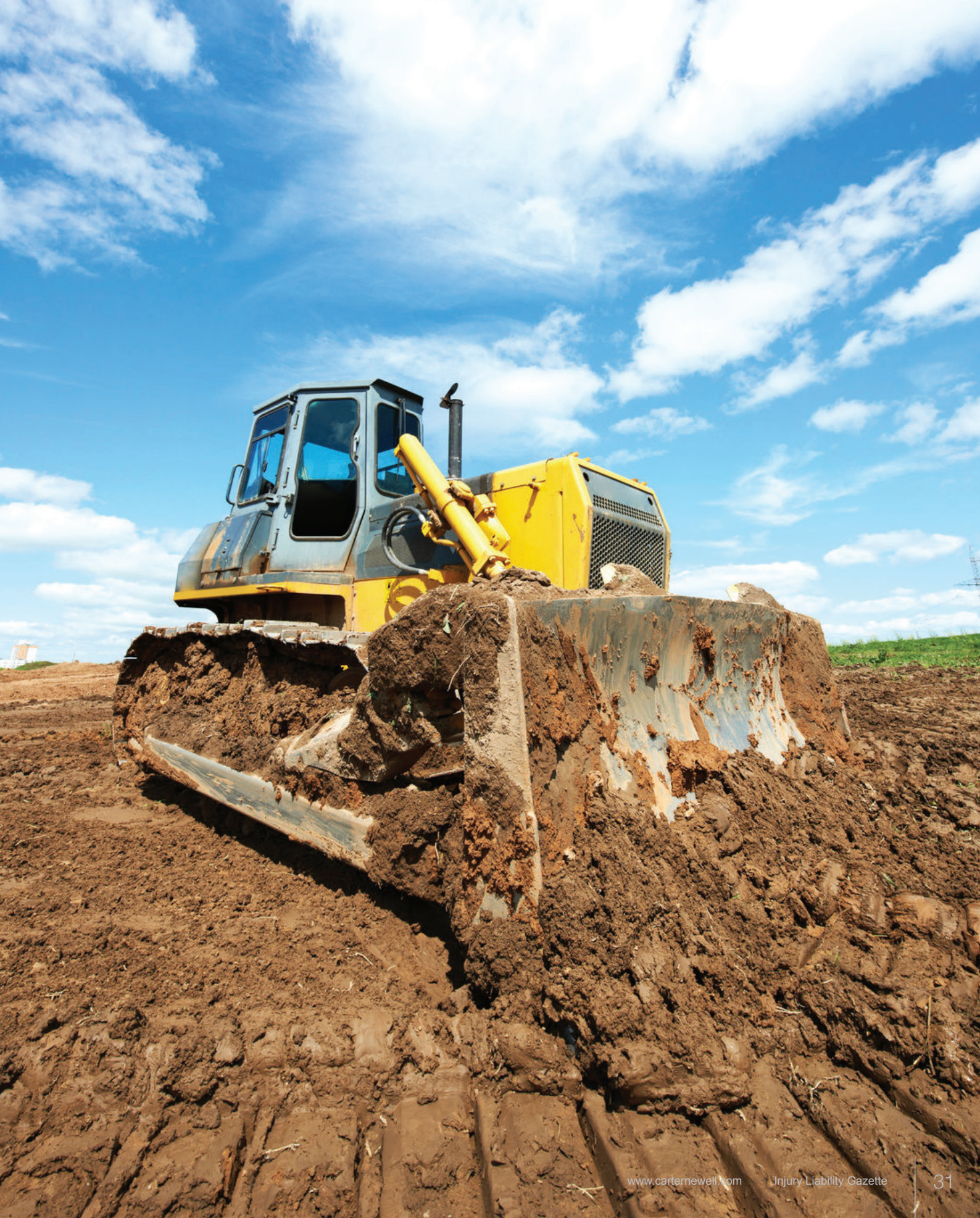
The plaintiff was employed by Wagga Mini Mix and Pre-Concrete Pty Limited (**Wagga Mini Mix**) as a plant/operator/optic fiber specialist. Australian Rail Track Corporation contracted O'Donnell Griffin to upgrade the railway track along the Sydney to Melbourne railway line. O'Donnell Griffin subcontracted with Wagga Mini Mix to supply workers and equipment.

On the day of the incident, the plaintiff was required to spread a pile of ballast over an area. This task involved the plaintiff scraping off the top layer of ballast with a bulldozer and pushing it forward to spread the ballast. The plaintiff would then reverse the bulldozer back over the pile to push forward the next layer. To reverse the bulldozer the plaintiff had to move out of his seat and twist to the right as his vision through the back windows was obscured. There were no spotters present to watch out for hazards.

The plaintiff performed this task four times and the ballast pile was reduced to approximately 1.2 metres. As he reversed backwards again, the bulldozer came to an immediate halt and spun to the right, causing the plaintiff to be thrown off his seat onto the floor of the bulldozer. When the plaintiff inspected the area he saw a metal post in the ground, formed by a doubled up piece of railway track which had been welded back to back and had been cut off leaving a 30 centimeter post exposed. The metal post had been covered by the ballast and was not visible to the plaintiff prior to the accident. The post became exposed after the bulldozer had passed over it, pushing the next layer of ballast ahead of it.

Issues

It was not in dispute that the defendants owed the plaintiff a duty of care. The issue before the court was whether there was an alternative course of conduct open to the defendants which could have avoided or reduced the consequences of injury to the plaintiff.



Decision

O'Donnell Griffin

It was found that O'Donnell Griffin controlled the workplace and the system of work because the site of the incident was under its occupation and it employed the site supervisor.

It was common practice for there to be a spotter during dozer operations however no spotter was used on the day of the incident. Although the plaintiff conceded the spotter would not have been able to see the post if one had been there, the court held that because there were other posts in the area it was likely the spotter should have known of the possibility of there being a post or some other dangerous object covered by the ballast. The court found that the failure to have a spotter was a breach of O'Donnell Griffin's duty of care.

The court also found that the failure to perform a risk assessment or to supervise and train the workers not to create posts out of the railway pieces was a breach of this party's duty of care.

Wagga Mini Mix

Wagga Mini Mix owed the plaintiff an overriding and non-delegable duty as his employer which required it to provide a safe system of work to address any foreseeable risk of injury. The plaintiff submitted that the duty was breached because Wagga Mini Mix failed to enquire or investigate whether the plaintiff's tasks given by O'Donnell Griffith were inherently safe.

The court agreed with the plaintiff and said that the supervisor of Wagga Mini Mix should have conducted a site inspection to ensure it was safe and to provide a worker as a spotter if O'Donnell Griffin failed to do so.

Contributory negligence

The defendants argued for a reduction in the claim for contributory negligence however the court accepted the plaintiff's evidence that he could not see the ballast while driving the dozer and so no reduction was made.

Apportionment

The court considered a number of authorities which commented on the issue of apportionment in labor hire situations. Ultimately the court determined that while O'Donnell Griffin had day-to-day conduct of the site and supervision of the plaintiff, Wagga Mini Mix did not conduct an inspection or assessment of the system of work or work site where it was sending its employees. It also failed to send a spotter to assist the plaintiff on the day of the incident.

Accordingly the court apportioned liability 25% to Wagga Mini Mix and 75% to O'Donnell Griffin.

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