HOLMANWEBB LAWYERS

REVIEW OF RECENT CIVIL LIABILITY ACT CASES

18 JUNE 2015

NICHOLAS GORDON | SENIOR ASSOCIATE
nicholas.gordon@holmanwebb.com.au | (02) 9390 8445

VAHINI CHETTY | ASSOCIATE
vahini.chetty@holmanwebb.com.au | (02) 9390 8447

Melbourne
Level 17
200 Queen Street
Melbourne VIC 3000
T: +61 3 9691 1200
F: +61 2 9642 3183

Sydney
Level 17 Angel Place
123 Pitt Street
Sydney NSW 2000
T: +61 2 9390 8000
F: +61 2 9390 8390

Brisbane
Level 13
175 Eagle Street
Brisbane QLD 4000
T: +61 7 3235 0100
F: +61 7 3235 0111

LIVERPOOL CATHOLIC CLUB LIMITED V MOOR [2014] NSWCA 394

Background

On 14 January 2009 the Plaintiff attended an ice rink located in a sporting complex occupied by the Defendant. Whilst he was wearing skating boots he began to descend a flight of stairs which provided access to that ice rink. As he did so, he slipped and fell backwards and suffered a severe fracture injury to his right ankle.

The head of the flight of stairs was about 2 metres higher than the ice rink. The blades of the skating boots were longer than the tread of the steps. The stairs were moist. The treads and risers of the stairs were of variable dimensions. There was a warning sign headed "No Responsibility" located inside the entrance to the sporting complex, however the Plaintiff did not recall seeing any warning signage.

The Plaintiff accepted that the ice rink could be accessed by walking down the stairs in ordinary footwear and then putting skating boots on at the bottom of the stairs which contained chairs.

The Defendant relied on Sections 5F and 5H of the *Civil Liability Act* 2002. Pursuant to Section 5F of the Act:

> *"For the purposes of this Division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person …*"

Pursuant to Section 5H of the Act:

> "*A person (the Defendant) does not owe a duty of care to another person (the Plaintiff) to warn of an obvious risk to the Plaintiff …*"

The trial judge, Levy DCJ, considered that the risk in question was not only that of slipping or falling when descending the stairs whilst wearing ice skating boots, but also involved the uneven dimensions of the stairs and the fact that they were wet. The trial judge found that the risk of harm was not obvious for the purposes of the Act, and found the Defendant negligent in failing to take the following reasonable precautions against the risk of injury from slipping or falling when descending the wet stairs whilst wearing skates:

- Providing a safe set of steps of even dimensions with treads wide enough to accommodate the length of ice-skating boot blades.

- Warning patrons that ice skating boots should only be warn after descending the subject stairs.

- Adequately warning patrons to adopt a “duck walking” method of walking down the stairs.”

Decision

In relation to the trial judge’s finding that the Defendant should have provided a safe set of steps of even dimensions with treads wide enough to accommodate the length of ice-skating boot blades, Meagher JA, who wrote the leading decision on behalf of the unanimous Court, found that the evidence did not justify a conclusion that the uneven dimensions of the stairs contributed in any material respect to the Plaintiff slipping and falling.

Meagher JA then considered whether the trial judge erred in finding that Sections 5F and 5H of the Act did not apply in this case. Meagher JA confirmed that the test was a “forward-looking inquiry” as to whether the risk of harm which eventuated would have been obvious to the hypothetical reasonable person in the circumstances of the Plaintiff, and that the Plaintiff’s actual knowledge was irrelevant.

Meagher JA found that the risk of harm which materialised was that of slipping and falling whilst descending the stairs in skate boots. Meagher JA stated that the evidence disclosed that there was an ever-present risk of falling because of over-stepping or losing balance whilst descending the stairs, and the fact that the Plaintiff was wearing ice-skating boots. In Meagher JA’s opinion the difficulties in descending the stairs in those boots would have been readily apparent to a reasonable person in the Plaintiff’s position.

In the circumstances Meagher JA found that the risk was obvious such that under the Act the Defendant did not owe a duty of care to the Plaintiff to warn him of that obvious risk. The Defendant’s appeal therefore succeeded.

Whilst not ultimately determinative, the Court found that the trial judge was correct to find that the activity of descending the stairs was not a dangerous recreational activity, which had been pleaded by the Defendant under Section 5L of the Act (a defendant is not liable in negligence for harm suffered by the materialisation of an obvious risk of a dangerous recreational activity), as the Plaintiff was merely walking down the stairs and was not ice-skating at the time.

Analysis

The decision is a very useful decision when considering the obvious risk provisions of the Act. Despite the obvious risk provisions being enacted in 2002, interestingly there have been very few cases where Defendants have successfully relied on the obvious risk defence in cases that don't also involve a dangerous recreational activity. Defendants should also consider whether the circumstances can warrant reliance on the obvious risk defence.

The finding in relation to dangerous recreational activity, whilst not determinative of the appeal, appears to be a common sense finding as it was never the intention of that provision to apply to ordinary activities such as walking down steps.

METAXOULIS v MCDONALD'S AUSTRALIA LTD [2015] NSWCA 95

Background

On 31 July 2010 the Plaintiff went to the assistance of a child stuck on playground equipment at a McDonald's restaurant. After releasing the boy and handing him to his parents, the Plaintiff fell off the equipment and sustained injuries to his left wrist and a minor rib injury.

The trial judge, Gibb DCJ, found in favour of the Defendant on the basis that the Plaintiff had failed to establish any negligence on the part of McDonald's. The trial judge nonetheless assessed hypothetical damages at $78,911.95.

Decision

Basten JA, who wrote the leading decision on behalf of the unanimous Court, criticised the Plaintiff's solicitors for failing to identify the real issues in the pleadings. For this reason Basten JA took the unusual step of making the important factual finding that it was more probable than not that the small child entered the back area behind the play equipment through an open gate, as he could not have opened the gate himself and there was no other means of unassisted access. Basten JA also found that whilst the pleadings and the way the trial proceeded were not ideal, that allegation had been run at trial so the Defendant had not been denied procedural fairness.

Basten JA identified the primary issue in relation to liability as whether or not the Defendant was liable in negligence for the Plaintiff's injury for failing to prevent unauthorised entry to the back area of the playground. Basten JA stated that there could be no real dispute that the Defendant owed a duty of care to take reasonable care not to provide equipment which was inherently dangerous for children who were likely to use it.

The main issue was whether or not the Defendant breached its clear duty of care according to s5B of the *Civil Liability Act*. Section 5B states that:

> "*(1) A person is not negligent in failing to take precautions against a risk of harm unless:*
>
> *(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and*
>
> *(b) the risk was not insignificant, and*
>
> *(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.*
>
> *(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):*
>
> *(a) the probability that the harm would occur if care were not taken,*
>
> *(b) the likely seriousness of the harm,*
>
> *(c) the burden of taking precautions to avoid the risk of harm,*
>
> *(d) the social utility of the activity that creates the risk of harm.*"

After reviewing the components of s5B, Basten JA concluded that the Defendant had breached its duty of care, as the risk was foreseeable and a reasonable person in Defendant's position would have taken simple precautions such as the use of spring loaded hinges to ensure the gate closed automatically after being opened, a key lock on the gate hatch, or forbidding entry to unauthorised persons.

The Court was also satisfied that causation was established under s5D of the Act, which requires that the negligence was a necessary condition of the occurrence of the harm and that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused, as the above precautions would have almost certainly prevented the small child accessing the area and preventing the Plaintiff's accident.

The Court also took it upon itself to completely reassess the notional damages awarded by the trial judge. The only head of damage which was not reassessed was the finding of non-economic loss damages at 26% of a most extreme case, with Basten J noting that this was a discretionary finding which required a mistake on the facts for Appellant intervention.

In relation to the award for future economic loss the Court accepted that a precise calculation was neither possible nor appropriate, and awarded a cushion of $75,000 on the basis that the Plaintiff's ability to work full-time had been hampered by his left wrist impairment, which was an increase to the trial judge's award. The Court also found the trial judge's award for future domestic care inadequate, and made an allowance of $30,000 after applying a 40% discount for the Plaintiff's pre-existing injuries

and taking into account the normal aging process (the Plaintiff was 41 at the date of trial). The Court reassessed the Plaintiff's damages to $179,000, a significant increase from the trial judge's assessment.

Analysis

The decision is a good illustration that the *Civil Liability Act* is the first basis on which any claims for negligence must be assessed. The Court will systematically go through the relevant provisions of the Act in determining whether or not negligence had been established.

The decision also confirms that Appellate Courts are prepared, on occasions, to reassess damages awarded, particularly in circumstances like this case where the trial judge only awarded hypothetical damages. Through decisions such as this one it has now well established that it is quite appropriate to award economic loss buffers or cushions. The 40% discount for vicissitudes for future commercial care, based on the uncertainty of the future, was also interesting as a lower percentage is normally adopted.

RAIL CORPORATION NSW v KING **[2014] NSWCA 2007**

Background

At about 3:00 am on 2 September 2006 the Plaintiff, who had been drinking, fell onto rail tracks at Mortdale Station in Sydney. About 30 seconds after his fall the Plaintiff was hit by a train and suffered severe injuries to his left leg which was lying across one rail track.

The parties agreed on damages at $1.3 M, and the matter proceeded to trial on the questions of liability and any contributory negligence.

The evidence demonstrated that the train's emergency brakes were applied 6.21 seconds before the point of impact, when the train was 59 metres from the point of impact, travelling at 11.9 metres per second. The experts were also able to calculate that in order to have avoided the accident, the train driver would have had to have applied the emergency brake 102 - 105 metres from where the Plaintiff was laying.

It was also determined that the driver should have observed what is now known to be the Plaintiff 141 metres away. This meant that the driver had approximately 3 seconds after observing the Plaintiff to apply the emergency brake in order to avoid the accident. It was determined that it would have taken the driver approximately 1.15 seconds for the brakes to fully engage, which meant that the driver only had 1.85 seconds to observe something on the track ahead and identify it as a danger, and apply the emergency brake.

The driver conceded that he didn't immediately react as he first thought it was rubbish on the track. The Defendant had conceded that no directions to immediately apply the brakes as soon as something was observed on the tracks were given to its drivers, due to safety concerns, adverse impact to service availability, and increased repair and maintenance costs.

The Plaintiff relied on the case of *Public Transport Commission (NSW) v Perry* [1977] HCA 32, which involved a collision between a train and a woman who had fallen onto the tracks as a result of an epileptic fit. In that case the Plaintiff succeeded.

The Defendant also relied on the intoxication provisions of the *Civil Liability Act*.

The trial judge, Davies J, found that the train driver should have applied the emergency brakes as soon as he observed something on the tracks, due to the risk of serious injury or death and noting that the risk of injury to passengers on the train was minimal as there were not many passengers that late at night. The trial judge also made a specific finding that the train driver was in breach of his duty by not responding to the object "*no more than 2 seconds*" after it was observed.

The trial judge went on to find that the Defendant breached its duty of care by not issuing clear instructions to its drivers about the action they should take in circumstances where an object was seen on the track and the driver was not able to discern whether or not it was a human being. In the trial

judge's opinion, the only reasonable response to the risk that an object was a human being was for the emergency braking to be applied immediately.

The trial judge found that pursuant to s49 of the Act "*the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person*" (as affirmed in *Thomas William Vale v Timothy David Eggins* [2006] NSWCA 348*),* and that s50 of the Act (no damages unless the injury would have occurred anyway, and a presumption of contributory negligence of at least 25%) is specifically excluded in s3B as motor accidents are excluded and train accidents are defined as motor vehicle accidents under the *Transport Administration Act* 2002.

The trial judge found for the Plaintiff but with a 50% deduction for contributory negligence due to his intoxication.

Decision

Basten JA, who wrote the leading judgment on behalf of the unanimous Court, criticised the Plaintiff's pleadings, particularly the allegations alleging direct liability of the Defendant, for not being formulated with precision or supported by expert evidence.

After noting the driver's evidence and the fact that the trial judge did not reject his explanation that he was not able to tell that the object was a person immediately because he thought it was rubbish and it was somewhat obscured, Basten JA considered that a finding of negligence on the part of the driver was "*to set a standard of care well above that which was reasonable*".

Basten JA noted that it was accepted that the train driver only had approximately 1.85 seconds after the Plaintiff first came into direct line of sight in order to apply the emergency braking. Accordingly, Basten JA determined that there was a fundamental error in the trial judge's findings as he had allowed the driver 2 seconds in which to reasonably respond without breaching his duty of care, in circumstances where 2 seconds would have been too long to have avoided the accident. Therefore on the trial judge's own finding the breach of duty was not causative in the relevant sense because a reaction at a reasonable time would not have prevented the accident.

In relation to whether or not there was any direct breach by the Defendant, Basten JA noted that there were valid reasons why no instructions to immediately apply the emergency brake were given to its drivers, particularly that passengers who are standing could be injured as a result of falling over or down the internal stairs. In the circumstances, noting that there was no firm evidential basis for any finding

against the Defendant, Basten JA found that the finding as to the direct breach by the Defendant could not be sustained.

Basten JA also found that the trial judge erred in relying on the *Perry* case as that was initially a trial before a jury, who made the findings of fact, and because it was decided prior to the introduction of the *Civil Liability Act*.

Based on the above findings the Court did not have to reconsider the intoxication defences or contributory negligence. However, Basten JA did state that it was "*perhaps surprising*" that the Plaintiff had appealed against the finding of 50% contributory negligence.

Analysis

This case, which appears to be a common sense decision, emphasises the necessity for pleadings, in particular in relation to the scope of relevant duties of care and allegations of negligence, to be formulated with precision.

The decision confirms the primacy of the *Civil Liability Act* in determining questions of negligence, which in this case meant completely disregarding a pre-*Civil Liability Act* case, albeit one with very similar circumstances. The decision also reinforced that causation pursuant to s5D of the *Civil Liability Act* is always a necessary element of establishing negligence.

Although not ultimately determinative, the trial judge did provide a timely reminder that under s49 of the Act "*the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person*".

LORRIMAR v SERCO SODEXO DEFENCE SERVICES PTY LTD [2014] NSWCA 371

Background

The Plaintiff, a member of the Royal Australian Air Force, was employed as a cook by the Department of Defence and was working at the Sergeants' mess. The Department of Defence had contracted with the Defendant to provide services in the kitchens at the Williamtown Base, which included laying down the work instructions to be followed by those cleaning the kitchens. The instructions included a direction that the tables had to be washed with detergent and rinsed with hot water.

On 10 May 2009 an equipment failure caused the hot water system to stop working. By 14 May 2009, as there was still no hot water supply, the Plaintiff elected to heat water over the stove then poured it

onto a stainless steel bench to rinse it. Some of the water he poured onto the bench for that purpose ran off the bench and into his boot causing a severe burn.

The Plaintiff's case was that the Defendant breached its duty of care because it exposed him to a foreseeable and not insignificant risk of harm, which could have been avoided by either not using the mess until hot water was available from a hot water tap, or by altering the work instructions to not have required him to heat water on the stove in circumstances where he could not gauge its temperature.

During examination-in-chief the Plaintiff stated that he heated up water "*to clean and sanitise an area where there had been food preparation … I needed to release saturated fat and clean*". During cross-examination, the Plaintiff reported that he had already wetted and scoured the benches before commencing the process of pouring the hot water. The trial judge, Curtis DCJ, observed that the Plaintiff had not mentioned during examination-in-chief that he had scoured the bench before he poured the hot water. The trial judge ultimately rejected the Plaintiff's evidence about scouring the bench with water and detergent and stated that, had he done so, it would no longer have been necessary to pour boiling water to release the saturated fat and sanitise the area.

The Plaintiff had given evidence that he had brought the water "*close to boiling*". However, the trial judge found that in fact the Plaintiff did deliberately boil the water, which was not in accordance with the instructions which merely required that the water should be hot.

The Defendant argued that its duty to take reasonable care was framed in terms that it was entitled to expect persons such as the Plaintiff to take reasonable care for their own safety, and that it could not foresee that an experienced cook would not be capable of undertaking that task safely, in particular by determining the temperature of water before pouring it onto the stainless steel bench.

The trial judge agreed with the Plaintiff's submissions, and based on his findings that the Plaintiff had gone over and above that which was required by the instructions, and that it was not unreasonable for the Defendant to have relied on a trained cook with around 19 years' experience, the trial judge found in favour of the Defendant.

Decision

The primary bases of the Plaintiff's Appeal were that he had been denied procedural fairness as it had not been put to the Plaintiff that he had deliberately devised his own system of work by boiling the water to both clean rinse off the grease in one step, and that the trial judge did not make specific findings in relation to identifying the risk of harm, foreseeability, whether or not the risk of harm was not insignificant, and causation.

McColl JA, who wrote the leading decision on behalf of the unanimous Court of Appeal, noted that having apparently concluded that the Defendant owed the Plaintiff a duty of care, the trial judge did not take the necessary next step in determining its scope (see *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42).

McColl JA found that the trial judge had failed to correctly consider and apply ss5B, 5C and 5D of the *Civil Liability Act*. Sections 5B and 5D have been discussed earlier in this paper. Section 5C of the Act states that:

> "*In proceedings relating to liability for negligence:*
>
> *(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and*
>
> *(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and*
>
> *(c) the subsequent taking of an action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk."*

Specifically, McColl JA found that the trial judge had not engaged with the first issue posed by s5B(1) of the Act, namely whether there was a risk of harm to begin with. In the circumstances, McColl JA stated that the trial judge could not determine what a reasonable response to that risk would be, and did not get into the issue of causation at all.

McColl JA found that the trial judge's conclusion that the Plaintiff deliberately boiled the water was not open on the evidence. McColl JA further stated that the Plaintiff should not be penalised for not having been asked certain questions in examination in chief. In the circumstances McColl JA agreed with the Plaintiff's submission that he had not been afforded a fair trial due to an "injustice", and accordingly a new trial was ordered.

Analysis

This decision further reinforces that in claims of negligence the first issue to be addressed by the judge at first instance is to identify the risk of harm pursuant to s5B(1). It is only once the risk of harm has been identified that the balance of s5B must be considered in order to determine what a reasonable response to that risk would be.

The decision also confirms that Appellate Courts will be open to ordering a new trial where it finds that the parties were not afforded a fair trial due to an injustice.

Leaving aside any issues concerning whether the Plaintiff was afforded a fair trial, it is somewhat surprising that a seemingly simple case with relatively minor issues has proceeded this far. There appears to be some force to the Defendant's argument that an experienced cook should have known of the dangers of boiling or nearly boiling water, and at the very least there should be a significant reduction for contributory negligence.

PERISHER BLUE PTY LIMITED V NAIR-SMITH **[2015] NSWCA 90**

Background

Dr Nair-Smith attended the Perisher Blue Ski Resort on 18 July 2003 with some family and friends. Upon boarding a moving chair forming part of the ski lift she was struck in the groin area from behind by the arm rest of the chair. She claims that Perisher was guilty of negligence in and about the operation of the chairlift and that the negligence of the ski lift operator caused the injuries she sustained.

Boarding the chairlift required a particular degree of alignment. Skiers were required to line up at a boarding point and align themselves along a transverse line marked under the snow with their skis pointing in the uphill direction that the chair would follow. This line was known as "*the load line*". The empty chairs would approach the skiers from behind and collect them at the load line. Proper loading required all those sharing a chair to be close together enough to fit in the chair. It also required skiers to be aligned in a manner that would allow the chair to safely collect them.

Dr Nair-Smith's primary case was that the ski lift operator, Mr Lofberg, noticed the safety bar of the subject chair was down very soon before the chair approached her and her companions and that in his hurry to raise the bar he lunged towards the chair, pulled up the bar and in so doing pulled the arm rest out of alignment. Dr Nair-Smith's secondary case was that in the alternative, in seeing the safety bar was in a downward position, she and her companions panicked upon the approach of the chair and this caused them to jostle out of position.

The ski lift operator, Mr Lofberg, stated that although the safety bar was initially in place, he lifted it in time for Dr Nair-Smith and her friends to board.

At first instance the Trial Judge found in favour of Dr Nair-Smith and awarded her damages in the sum of $1,368,700.

The Trial Judge found that Perisher had breached its duty to Dr Nair-Smith by failing to take the precaution of having a lift operator near or close to the loading point observing at the very latest the state of the chair as it exited the bullwheel. The failure to take this precaution meant that Mr Lofberg was unable to raise the bar in a timely manner which gave rise to panic and jostling amongst the respondent and her companions which caused her to be out of alignment with the chair and resulted in the subject damage.

Perisher appealed the Trial Judge's decision.

Decision

Mr & Mrs Nowland, Dr Nair-Smith and Mr Lofberg all gave conflicting accounts as to how far Mr Lofberg was standing from the loading point at the point that Dr Nair-Smith noted that the arm of the chairlift was in a downward position.

Based on expert evidence provided at first instance the Court of Appeal concluded that it was highly unlikely that Mr Lofberg could have applied sufficient force in sufficient time to cause the chair to misaligned when he lunged to lift the safety bar.

With respect to the section 5B duty of care, the Court identified the risk in this case to be a combination of the bar being down, Mr Lofberg's late response to it and Dr Nair-Smith and her companions' reaction to that response. They found that Perisher had control over the first two factors but only limited control over the third.

Given the characteristics of the chairlift and the vulnerability of skiers waiting to board it there was both a foreseeable and not insignificant risk that physical injury may result from skiers' reactions whatever form they may take.

The Court of Appeal concluded that it was readily accepted that the Appellant was under a duty of care to exercise reasonable care and skill in the provision of its lifting services to avoid harm to skiers using those service

In considering whether Perisher breached its duty of care, the Court of Appeal stated that reasonable care in this instance did not require that a lift operator give undivided attention to ensuring the chairs were in a safe condition for loading but that he had to be vigilant to make sure that the chair lifts were in a safe condition especially given the short distance between the load point and the bullwheel (1.8 metres), the time it took for the chair to cover that distance (0.78 seconds) and the vulnerable position of the waiting skiers.

The Court of Appeal was not persuaded that Mr Lofberg's delayed realisation of the chair's condition materially affected the point at which he was able to raise the bar. However, they were prepared to accept that the psychological effect of Mr Lofberg's delayed response may have been significant and that was a pertinent consideration when the relevant risk was the people may injure themselves through their reaction to how a lift operator responded to a down-bar situation. The Court therefore found that reasonable care required Mr Lofberg to direct his attention to the condition of the chair earlier than he in fact did and his failure to do so constituted a breach of Perisher's duty of care.

With respect to causation, the Court of Appeal noted that in their oral evidence given at trial, Dr Nair-Smith and her companions were adamant they had not at any stage moved out of alignment, despite having panicked when they realised the bar of the chair was in a downward position. The Court of Appeal found that the Primary Judge's finding was therefore contrary to the Respondent's primary case and the evidence of each of the witnesses.

In considering the question of causation, the Court relied on the judgment of their Honours Dixon, Fullagar and Kitto JJ in *Luxton v Vines* [1952] HCA 19; 85 CLR 352 at 358:

> "*In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture … But if circumstances are proved in which it is reasonable to*

> *find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise*."

The Court of Appeal accepted that it may well be that Dr Nair-Smith and her companions' apprehension gave rise to a level of panic. However, the problem Dr Nair-Smith faced was that she bore the onus of proving that the apprehension was a product of Mr Lofberg's delayed observation of the down-bar situation and that this apprehension caused her to move out alignment - that being the breach of duty that was alleged and that the Primary Judge found. Dr Nair-Smith needed to prove that but for the inattention and delayed reaction of Mr Lofberg, she would not have moved out of alignment.

None of the explanations proffered by the witnesses were considered to have been more probable than any of the others and the Court of Appeal found that the various explanations did no more than suggest competing inferences of equal degrees of probability so that the choice among them was no more than speculation.

On this basis, Dr Nair-Smith's case in negligence failed on causation.

Analysis

Although a duty and breach was established, Dr Nair-Smith did not succeed as there was no direct proof available of how her injury had been caused. Nor was there any explanation proffered which was, on the balance of probabilities, more likely than the alternatives.

The probability that Dr Nair-Smith was injured due to her own contributory negligence by standing out of alignment to the loading line, was equal to the probability that her injuries had been caused by Mr Lofberg raising the bar too late or by Dr Nair-Smith and her companions panicking and jostling out of alignment.

On the evidence provided by Dr Nair-Smith she did not even move out of alignment prior to attempting to board the chair. Had she been able to adduce evidence as to how she came to move out of alignment with the chair, the result may have been different.

COUNCIL OF THE CITY OF SYDNEY V HUNTER [2014] NSW CA 449

Background

Mr Hunter brought proceedings against the Council of the City of Sydney after claiming to have suffered an injury to his right knee and an aggravation of prior right hip and lower back injuries on 25 November 2011 when he tripped over the roots of a Moreton Bay Fig tree growing onto the footpath of Catherine Street, Glebe.

The Council was responsible for the control and management of the footpath and as such Mr Hunter alleged that the Council owed him a duty of care as pedestrian using that footpath and that they had breached this duty in failing to maintain the footpath properly, failing to repair the root damage to the footpath, failing to remove two roots from the footpath, failing to remove and relay the bitumen surface of the footpath at the site of the root damage and failing to bar pedestrian access at the site of tree root damage to the footpath.

Mr Hunter stated he was intending to visit the premises of Officeworks located on the corner of Ross Street and Parramatta Road, a short distance from the footpath in question on the date of incident. He stated that on the day in question he took a different route to Officeworks than that which he usually walked along. Notably, although he conceded having lived in Glebe for a period of around eight years, Mr Hunter stated that the date of incident was the first day upon which he had taken the route in question.

The Court was informed that Mr Hunter chose the route in question on the date of incident as there were cars parked on the portion of the street that formed the alternate route. He gave evidence that as he turned right into Catherine Street towards the tree roots he could see them ahead of him but did not take steps to avoid them because “there was just a whole lot, there was [sic] lots of them that … had ripped up the footpath”. He stated he had to manoeuvre over the top of them and he “just hit one of them and went over”. Following his fall Mr Hunter stated felt pain, got up, turned around and went home”. Over the next few days he informed the Court that swelling developed on his knee and he consulted a local doctor.

The Trial Judge found that it would have been reasonably foreseeable to the Council that a pedestrian taking reasonable care for his own safety may trip on the tree root in question thereby suffering injury and that the risk was not insignificant and the chance of someone sustaining a serious injury by tripping and falling on a hard, uneven surface was also not insignificant.

At first instance, in the District Court of New South Wales, a verdict was reach in favour of Mr Hunter in the sum of $97,800. The City of Sydney Council subsequently appealed this decision.

Decision

On examination of the medical evidence before them, the Court of Appeal found that Mr Hunter did not in fact consult his doctor for a knee injury until 2 February 2012. There was no mention on the alleged date of incident in any of the medical records of Mr Hunter becoming injured. However, an entry in a patient health summary dated 2 February 2012 stated that he had attended for a knee injury which occurred as follows:

> "*Injury occurred five days ago when climbing over back fence and landed heavily, could have possible hairline fracture on the medial aspect of tibia, pain on walking, very tender over one particular area, plan strapping of knee.*"

The Court of Appeal found that the evidence indicated that a pedestrian taking reasonable care for his or herself would have no difficulty in walking along the path passing through the small park at Catherine Street and avoiding the tree roots. Furthermore, the Court of Appeal found there was no breach of duty on the part of the Council in failing to repair the bitumen path damaged by the tree roots in circumstances where it was clearly open for pedestrians to pass by without treading on the roots and disrupted bitumen.

Finally, the Court of Appeal concluded that in all of the circumstances the Trial Judge clearly erred in concluding that assuming he fell on 25 November 2011, Mr Hunter suffered any injury on that occasion. It was clear to the Court from the medical records that the injury for which Mr Hunter was treated from February 2012 onwards did not occur until late January 2012 and there was no causal connection

whatsoever between any fall that Mr Hunter may have suffered on 25 November 2011 and the condition of his right knee after January 2012.

Analysis

The NSW Court of Appeal decision stresses the importance of focusing on the details of medical evidence before the Court - particularly dates of injury and injury sustained.

A plaintiff's medical records will often either make or break a case in terms of breach of duty and causation.

Key to any matter is ensuring the evidence is consistent with the case put before proceeding to trial.

KALOLANE PTY LIMITED V HUNGRY JACKS PTY LIMITED [2015] NSWDC 82

Background

Kevin Maher was injured when he fell from the back of a truck onto the premises of Hungry Jacks at Muswellbrook. At the time Mr Maher was making deliveries by truck to Hungry Jacks. The truck belonged to his employer who sought recovery from Hungry Jacks for the compensation it had paid to Mr Maher.

Mr Maher alleged that after almost completing his delivery and moving the final set of boxes to the rear of the truck, he intended to descend from the truck and in the course of moving backwards at the rear of the truck Mr Maher fell causing injury. He struck his head on an object and in the fall his ear was cut, he

felt pain in his left wrist and left side. He eventually got himself up and said he completed unloading the truck although he stated he did not walk into the restaurant again after the fall.

It was alleged that the fall was caused by grease that had collected on the underside of Mr Maher's boots whilst walking through Hungry Jack's during the course of his deliveries. Mr Maher gave evidence that

> "*Just inside the main doorway it was very greasy and there was water on the ground before you walked in and you could see the colour of the floor was greasy when you walked on it, it was very slippery.*"

Mr Duke, the Restaurant Manager, gave evidence that each night the floor of the restaurant was cleaned with hot water and degreaser, scrubbed with a very heavy duty scrubbing brush and the water was "squeegeed" out of the restaurant and that the rear concrete was cleaned with a high pressure hose early every second morning. The Court heard that the restaurant floor had been high pressure hosed the morning before Mr Maher's alleged injuries were sustained.

Decision

The Court found that the evidence of grease alone was insufficient to establish that the restaurant's cleaning process was inadequate.

Bearing in mind Section 5B of the *Civil Liability Act* 2002 the duty was relevantly to take reasonable care to ensure the surfaces people walked on were safe to walk on, specifically where people were required to carry heavy or dangerous objects. It did not extend to ensuring that at all times that there was no grease on any part of the floor or concrete or ensuring that a person who walked on the floor or concrete might not have some foreign matter attached to their footwear which could at some other location or on some other surface render their footwear unsafe.

The Court stated that to impose a duty to guard against the possibility that someone might walk on some foreign matter, be it substantial or microscopic, on the premises and then proceed to some other premises which might contain especially slippery flooring or flooring prone to become especially slippery when in contact with footwear with certain foreign objects attached, was to impose too high a duty.

Furthermore, the Court found that if slipperiness was felt by a person when walking on concrete one would reasonably suppose that any risk would be lessened by the simple step of that person wiping the sole of their shoe on the concrete or other convenient surface or with a rag to rid the sole of the foreign

material rather than by imposing upon the occupier the obligation to guard against future contact of an indefinite variety of foreign surfaces.

In view of those matters, the Court was not persuaded that the risk of a slip in the back of the truck due to the foreign matter on the sole of the boot was other than insignificant and it was concluded that there was no breach of duty of care.

With respect to causation, the Court noted that Mr Maher did not give any evidence of rubbing the soles of his boots on the concrete as he walked or on the kerb or otherwise removing the foreign matter when he allegedly noted it was slippery.

The Court found that Mr Maher was readily able to remove the foreign substance of which he was aware from the soles of his boots but that he failed to provide any evidence he had done so. Accordingly, they found his boots could not have been slippery

In the Court's view, it was equally likely that Mr Maher fell as a result of slippery boots as it was that he had taken a misstep beyond the rear of the truck.

On the question of negligence, the Court found in favour of Hungry Jacks

Analysis

Cleaning the floor once a night with a scrubbing brush and degreaser was sufficient in this instance as the question of risk was that of a slippery or foreign substance attaching to footwear and causing injury at another location.

This is different from the duty of occupiers to clean at a minimum of 20 minute rotations established in *Strong v Woolworths Ltd [2012] HCA 5* to guard against injuries at their own premises.

FABRE V LUI **[2015] NSWCA 157**

Background

Ms Fabre brought proceedings against Ms Lui after the range-hood at the premises she occupied as a tenant fell from the wall causing her injury on 18 December 2010.

Ms Lui was the landlord of the premises at the time of the incident.

Ms Fabre argued that Ms Liu was negligent in engaging a tradesman to install the equipment without verifying that the tradesman was properly qualified to so install the range-hood.

Expert evidence of a consulting engineer adduced at trial was that the range-hood had not been properly mounted and that it had been affixed to the plasterboard wall behind the stove with only two screws when, in accordance with the manufacturer's recommendations, at least four screws were required.

At the time the range-hood was installed, Ms Lui was the occupier of the premises. She informed the Court that in December 2007 her stove range-hood stopped working, apparently as a result of an electrical storm which had affected a number of her appliances. Given that it was the festive period, it was difficult to find tradesmen to do the job and she engaged the tradesman in question from a local paper and paid him $250 in cash to install the range-hood.

In early 2008 she moved out of the property and engaged an agent to find tenants to manage the property. Ms Liu, her husband and her son were the third group of tenants to lease the premises.

At first instance, the District Court of New South Wales dismissed the case against Ms Lui, finding that she had in fact exercised reasonable skill in selecting the handyman.

Ms Fabre appealed the decision.

Decision

The Court of Appeal agreed with the trial judge's decision. Their Honours Basten, Macfarlan and Meagher JJA were of the view that the duty was to be determined on the basis of an ordinary householder.

Their Honours conclusion was as follows:

1. Although the work needed to be done carefully in order to avoid injury, the work was of a minor kind. It was in the nature of an "odd job" or "small repair", those being tasks that a handyman could ,according to the ordinary usage and Macquarie Dictionary definition of the word, be expected to do.

2. The contractor held himself out as a tradesman or handyman/tradesman in the Respondent's local newspaper, that being a source from which one could reasonably expect to identify such a contractor.

3. The Respondent was not asked by either party about her conversations with the contractor however it can readily be inferred that he indicated to her his readiness and willingness to do the work, including obtaining the relevant replacement range-hood. This

clearly carried with it an implicit representation by him of his ability to complete the work to an acceptable standard.

4. The implicit representation was further supported when the handyman arrived in possession of what was apparently a suitable replacement range-hood and he removed the existing range-hood and installed the new one without any difficulty apparent to the Respondent.

Finally, the Court stated that a reasonable person in Ms Fabre's position would not necessarily have considered that because the range-hood had not fallen during the three year period, it would not do so thereafter, particularly if handled as it might be in the course of general use of stove top and during cleaning. However, it was found that there was no breach of duty and the appeal was dismissed with costs.

Analysis

Whilst the Court did not elaborate on this, the duty owed by Ms Lui is likely to have been of a different scope had she been the landlord, rather than the occupier of the premises at the time the range-hood was replaced.

Presenters: **Nicholas Gordon | Senior Associate | nicholas.gordon@holmanwebb.com.au**
Vahini Chetty | Associate | vahini.chetty@holmanwebb.com.au