benchtv
a benchmark production

Précis Paper

Occupier's Liability, Duty and Causation

A discussion of the recent NSW Court of Appeal decision in *Sutherland Shire Council v Safar* [2017] NSWCA 203.

Discussion Includes

- The facts
- Court of Appeal decision
- Obligation to warn
- Causation
- Impact of *Neindorf v Junkovic* [2005] HCA 75
- Key takeaways

Précis Paper

Occupier's Liability, Duty and Causation

.

1. In this edition of BenchTV, Hugh Marshall SC (Barrister – Jack Shand Chambers, Sydney) and Corinne Deall (Solicitor – A R Conolly and Company Lawyers) discuss the recent decision of *Sutherland Shire Council v Safar* [2017] NSWCA 203 which dealt with the issue of occupiers liability and the consequences of a breach of duty

The facts

2. In 2015, Mrs. Safar took her daughter to a dance eisteddfod at the Sutherland Entertainment Centre. On this particular day it was raining extremely heavily and therefore there were mainly people, roughly 200 or so, entering the auditorium of the Entertainment Centre with wet clothes, wet umbrellas, wet shoes, and so on.

3. The auditorium floor was made with parquetry tiles and was 30 or so years old. Mrs. Safar entered the auditorium and noticed on entry that the floor was wet. After roughly two hours there was a break in performance and everybody started to file out of the two doors, Mrs. Safar was amongst those exiting the auditorium.

4. As she went through the doors, still on the parquetry floor, she slipped and fractured her ankle in three places. As she was lying there, she could see the droplets on the floor and could see her heel mark through them.

5. When this case was being investigated, two experts, one for the Plaintiff and one for the Defendant, were both asked to determine the slipperiness of the parquetry floor, and both agreed it was very slippery when wet.

6. The Plaintiff's case at trial was that the occupier of the premises and council had a duty to Mrs. Safar in keeping with the principle established in *Australian Safeway Stores Pty Ltd v Zaluzma* [1987] HCA 7; (1987) 162 CLR 479.

7. It was argued that the council should have provided bins for the umbrellas and that there should have been signs up telling people to put their umbrellas in those bins. The Entertainment Centre also had a cloakroom, but they had stacked council records in there instead of using it for its intended purpose.

8. The Plaintiff also suggested that in keeping with common practice in major centres around Sydney that they should have had a bagging system for the umbrellas and should have put

mats down. It was also argued that there should have been a system in place whereby the two cleaners that were on duty should have mopped up these droplets of water in the entrance ways to the auditorium.

9. At first instance, Judge Levy held initially that the council was liable in breach of its duty of care. The damages suffered by Mrs. Safar were caused within the meaning of section 5D(1) of the *Civil Liability Act 2002* (NSW) by one or more of the breaches of the duty of care by the council, and he assessed damages accordingly. The council then appealed to the New South Wales Court of Appeal.

Court of Appeal decision

10. On appeal, the council raised two primary issues, but several others developed in the course of discussion within the Court of Appeal. The two main issues involved were:
    1) What were the reasonable precautions required of the defendant, the occupier, in the context of the particular facts so that it could comply with its duty of care?
    2) The second argument flowed from the first, dealing with causation – did the harm or damage follow from a breach of duty?

11. In both the trial and the Court of Appeal the council ran the argument that doing nothing was sufficient in the circumstances. The council ran the argument that it was an obvious risk, in response to the Plaintiff pleading failure to warn.

12. Council gave evidence at trial that a Mr. Brien had put a garbage bin out and put a little umbrella in there, meaning to illustrate to patrons that they should put their umbrellas in this garbage bin. Unfortunately the garbage bin was nowhere near the entrances, and there was no signage to say 'please put your umbrella in this garbage bin'.

13. Council were looking to argue that this was a case where it was quite reasonable to have done nothing, but this was rejected for a variety of reasons. Prominent amongst these reasons was the council knew the floor was slippery when wet as five people in the preceding three years had slipped over when the floor was wet, therefore the council was on fairly significant notice.

Obligation to warn

14. Mrs. Safar stated that on her entrance to the auditorium she had seen drops of water coming from umbrellas and overcoats being carried in. In cross-examination she conceded that water on a hard surface may make it slippery. With that concession, the trial judge found

there was no duty to warn of this obvious risk because the Plaintiff was aware of the risk. The Court of Appeal took a different resolution to this.

15. Justice Macfarlan determined that the resolution of this question involved a two-step process:
    1) Was there water on the parquetry floor?
    2) Was the parquetry floor likely to be slippery when wet?

16. Whilst Macfarlan J found that the Plaintiff had accepted the answer to the second part, he disagreed with the inference found by the trial judge that Mrs. Safar was aware, or ought to have been aware, that there was water on the floor when she exited the auditorium.

17. Macfarlan J reasoned that a lapse of time between when she entered the auditorium and became aware of the floor was wet, did not mean her awareness continued for some two hours later when she attempted to exit. He reasoned it could have been mopped up, or could have even evaporated in that time. He thought the concept of obvious risk had to be tempered by the acceptance of what he called the realities of everyday experience.

18. Following the decision in *Ratewave Pty Limited v BJ Illingby* [2017] NSWCA 103, what was considered an obvious risk to a reasonable person in the position of the plaintiff must take into account all of the realities of everyday activities. It must also take into account the unreality of persons remaining focused on observing risk that, although detectable on careful examination, are not likely to be present in their minds as they engage in activities which have brought them to the premises.

19. In *Safar*, Harrison J in the Court of Appeal held that the trial judge had erred in making a finding that the floor being wet must have been obvious to the plaintiff. All three judges took the view that the decision concerning obvious risk was peripheral to their ultimate decision, which was that whilst there may have been no duty to warn, there was a duty to do other things which have been breached, and those breaches were causes of damage.

20. The duty the council did have was to take reasonable precautions to mitigate the risk of someone falling. Simply having an unmarked bin was not sufficient, and using the cloakroom inappropriately was not sufficient. There was a determination in the Court of Appeal that the cleaners had not been used at all. The trial judge made no specific findings about this, but the Court of Appeal held that the cleaners could have been used to mop up after the crowd of 200 or so people had walked in.

21. The Court did find, however, that it would have been unreasonable to put mats down on the whole area of the auditorium because it would have been expensive, etc. It became apparent

in argument that it was not as simple as just putting mats down at the entrance to the auditorium, they really would have had to put mats throughout the whole auditorium.

22. Witnesses were also important in this case. A woman named Mrs. McCarthy who was manning a booth three or four metres away from where the Plaintiff fell was able to describe in detail what had happened. McCarthy had said that there was nothing the council had done to mitigate damage and discharge of their choosing.

23. Each of the judges in the Court of Appeal found it was insufficient to do nothing, or as little, as the council did. Macfarlan J found the council was in breach by not providing bins for umbrellas, nor ensuring they were conveniently located near the entrances to the auditorium. He argued that the bins should have been marked, and there should have been a coat check facility. The council should have required the presence of an usher to ensure the precautions were taken, and should have provided for the bagging of umbrellas.

24. Justice White agreed with Justice Macfarlan, but introduced the requirement that council should have mopped up before the commencement of the eisteddfod. Justice Harrison, however, limited his breaches to the provision of bins for umbrellas, the provision of a bagging machine and the provision of a cloakroom.

Causation

25. Each of the judges approached the issue of causation under s 5D(1) of the *Civil Liability Act 2002* (NSW) in a fairly conventional manner. Macfarlan J said that he considered that the Appellant's negligence was a necessary condition of the accident, and applying the balance of probabilities from *Strong v Woolworths Ltd* (2012) 246 CLR 182, injury would have been avoided if precautions were taken. *Strong v Woolworths Ltd* (2012) 246 CLR 182 was a very persuasive precedent that enabled the Court to cite that the test in s 5D(1) of the CLA had been established.

26. White J held that it is impossible to say with any certainty what the position would have been had the adequate precautions been taken. In his view, it was more probable than not that had the adequate precautions been taken, there would not have been water on the floor allowing opportunity for someone to slip.

27. Harrison J held that the determination of causation was a factual determination. He referred to *Hudson Investment Group Limited v Atanaskovic* [2014] NSWCA 255 which established that the effect of s 5D(1)(a) is that factual causation is to be determined by the 'but for' test. The 'but for' test means that but for the negligent act or omission, the harm would not have occurred.

28. This test requires the Court to determine whether, if the defendant had not breached its duty of care, the harm complained of would not have been prevented. The defendant's negligent act or omission is necessary to complete a set of conditions jointly sufficient to account for the occurrence of the harm. If this is achieved, the test of factual causation will be satisfied.

Impact of *Neindrof v Junkovic* [2005] HCA 75

29. Counsel for the Plaintiff referred to the case of *Neindorf v Junkovic* [2005] HCA 75 to argue the importance of the occupier taking steps to prevent accidents such as this. Gleeson CJ held that ordinary dwelling houses contain many hazards which would give rise to a real risk of injuries, and most households do not attempt to eliminate or warn against those hazards.

30. Under paragraph [8] of the judgement, Gleeson CJ stated 'the expression 'reasonable response in the circumstances' raises a question of normative judgement which had to grapple with all of the practical problems that the law would earlier have attempted to solve… The fundamental problem remains the extent to which it is reasonable to require occupiers to protect entrants from a risk of injury associated with the condition of the premises'.

31. Reasonableness is not a question of law, it is a question which courts have historically committed to a jury to be determined as a question of fact. The cost of remedying or trying to mitigate the risk should be proportionate to the risk itself.

32. Kirby J in his judgement in the *Neindorf* case provided that what is reasonable to expect of a householder living in their domestic premises behind a closed gate that excludes the world at large is different from what might be reasonably expected of those who invite the public to enter for desired economic advantage to the occupier.

33. Therefore, it might well have been reasonable if Mrs. Safar had slipped on the wet porch of her neighbour's property, for the neighbour to have done nothing or next to nothing. However, for a commercial enterprise such as the Sutherland Shire Entertainment Centre which caters for thousands of patrons, puts it in an entirely different category.

34. If one accepts the conjoint expert evidence that parquetry flooring when wet poses a high risk of slipping and hence injury, and the experience of council having had 5 similar incidents in the past three years, the risk of injury was real. The Entertainment Centre's insurers dismissed these previous cases as nuisance cases and these five people did not appear to have taken any further proceedings.

35. Given the weather, it was only to be expected that people would drip water onto the parquetry flooring creating that exceptional risk or harm. Common sense should have dictated to the council that doing nothing was not a reasonable option, they ought to have done more than they did.

36. The appeal was ultimately dismissed. Judge Levy's judgement from the initial trial stood, and the Plaintiff received a verdict. This verdict was for several hundred thousand dollars. However, Marshall estimates that the cost of the trial would have been four or five hundred thousand dollars, and perhaps another hundred thousand or more for the Court of Appeal, making it a very expensive process for the council for a matter than could have been settled much earlier on, at a much lower cost.

Key takeaways

37. In cases such as this, practitioners must look at each set of facts as they appear. What was important in this case was the very detailed proofs of evidence that had been taken by a number of witnesses, not only to the condition of the floor, but to the accident itself, and the way in which the council approached the discharge of its duty of care.

38. There are always problems with causation in common law trials, but traditionally after the decision in *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506, the High Court had said causation should be approached in a robust manner. This was the view of the Court of Appeal in this case on causation; they approached causation with a common sense approach. Marshall advises the issue of causation should not be approached by practitioners with fear and trepidation, but more robustly.

39. The primary factual material was incredibly well researched and well presented. Obtaining the Defendant's records about previous slip and fall cases certainly enabled serious cross-examination of two of the council's witnesses who may have made a difference to the ultimate verdict. Practitioners should engage in the discovery process, not only vigorously but diligently to ensure your client has the best chance of success.

40. From a defendant's perspective, insurers should assume that most plaintiff lawyers will do their preparation and will do it diligently, therefore decisions about whether to proceed with cases such as this should be carefully thought out. Litigation can be risky business, and sometimes the risks and the consequences do not fall where you want them to fall.

BIOGRAPHY

Hugh Marshall SC

Barrister – Jack Shand Chambers, Sydney

Hugh Marshall SC was called to the Bar in 1983 and appointed Senior Counsel in 2003. He has an extensive common law practice. He was an officer in the Army Reserve Legal Corps for more than 20 years and appeared in many Courts Martial and Appeals. He has also appeared frequently in the Court of Arbitration for Sport. Mr Marshall has held appointments as a NSW District Court and Supreme Court Arbitrator, has been a member of the NSW Bar Council, and has served on professional conduct committees for more than 15 years.

Corinne Deall

Solicitor – A R Conolly and Company Lawyers

Corinne is a solicitor of A R Conolly and Company Lawyers with advocacy experience in the NSW Civil and Administrative Tribunal. She graduated with a Bachelor of laws with Honours and a Bachelor of Arts – Psychology from Macquarie University. Corinne is passionate about commercial litigation and is particularly interested in insurance.

BIBLIOGRAPHY

Focus Case

Sutherland Shire Council v Safar [2017] NSWCA 203

Benchmark Link

Sutherland Shire Council v Safar [2017] NSWCA 203

Judgment Link

Sutherland Shire Council v Safar [2017] NSWCA 203

Cases

Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7; (1987) 162 CLR 479

Ratewave Pty Limited v BJ Illingby [2017] NSWCA 103

Strong v Woolworths Ltd (2012) 246 CLR 182

Hudson Investment Group Limited v Atanaskovic [2014] NSWCA 255

Adeels Palace Pty Ltd v Moubarak [2009] HCA 48

Neindorf v Junkovic [2005] HCA 75

March v (E & M) Stramare Pty Ltd (1991) 171 CLR 506

Legislation

Civil Liability Act 2002 (NSW) s 5D(1)