RECENT DECISIONS

The young and the old, the attentive and inattentive, the hurried and unhurried

Abdul Raad v V M & KTP Holdings Pty Limited as Trustee for VM & KTP Nguyen Family Trust [2017] NSWCA 190 (1 August 2017)

Link to decision

Summary

A recent decision by the NSW Court of Appeal, the Court describes a wide range of people to whom an occupier of premises owes a duty to exercise reasonable care to ensure their safety.

It is clear that while people who enter or are on the premises of a third party must exercise reasonable care for their own safety, the occupier will need to anticipate their circumstances in order to assess what actions might be required to ensure that the premises are safe for their use.

Background

Abdul Raad was injured when he slipped and fell on a wet tiled outdoor area at a shopping village that was occupied by the defendant on 13 June 2011.

He subsequently brought a claim seeking damages in respect of his injury on the basis that the defendant as the occupier had failed to take reasonable care for his safety.

At trial, Mr Raad received an award of damages ($75,547) that was then reduced by 10% on account of his contributory negligence.

Mr Raad brought an appeal against the decision on the basis that the award was inadequate in several respects and the defendant filed a cross-appeal contending that the primary judge had erred by finding that it had breached its duty as the occupier of the premises.

The area where Mr Raad slipped and fell was an uncovered tiled area in the shopping centre that provided access from a car park to the shops.

Decision

On the day in question, the area was wet because it had been raining and on Mr Raad's evidence it was still raining when he slipped and fell.

The expert evidence that was called at the hearing indicated that water tended to accumulate on the tiles in patches as the area had little camber to allow the water to run off. The trial judge found that Mr Raad was running at the time when he slipped, having already taken a number of steps on the wet tiles.

The expert evidence led the Court to infer that there were a number of tiles on which the non-slip coating had worn so as to be non-existent.

The trial judge found that the occupier breached its duty of care as occupier by failing to ensure that the tiles were treated with a slip resistant surface that was renewed from time to time or in the alternative, by not ensuring that the tiles were replaced with tiles with a pronounced surface texture given that there was no adequate cross-fall to enable water run off to occur.

The trial judge was satisfied that the area was not so large that the cost of replacing the tiles would be unreasonably high in order to take such steps in response to the risk.

The fact that an individual was running across a tiled area while it was raining will immediately raise a question as to the liability of the occupier in circumstances where there was a slip and fall.

In the present case, the Court of Appeal observed that an occupier's duty of care is appropriately framed by reference to 'users exercising reasonable care for their own safety', however, this does not foreclose the possibility of a breach of duty occurring where there is a finding of contributory negligence on the part of the user.

The expert evidence established that there was a not insignificant risk that a person proceeding hurriedly over the untreated tiles in wet conditions might slip and fall. The Court determined that the risk was of such magnitude that a reasonable person in the occupier's position would have responded to it by significantly reducing the risk of slippage by, for example, applying a non-slip product to the tiles.

The Court considered that in the circumstances, the occupier should have anticipated that all manner of people would be using the tiled area and that some might traverse the area at above a normal walking pace at times when it was raining.

The Court observed that the tile area provided access between the shopping village and the car park, so that it could be expected that all manner of people would be using it including 'the young and the old, the attentive and inattentive and hurried and unhurried'.

In a similar case recently decided by the Court it was held that: "it was reasonably to be expected that users of [the] means of access would include those who were distracted or inattentive or even less than careful" *Ratewave Pty Ltd v B J Billing* [2017] NSWCA 103.

The court readily distinguished the present case from other cases involving pedestrians who had tripped and fallen as a result of imperfections in a footpath or driveway because the imperfection was readily foreseeable or discernible.

In the present case, the position was different because the slipperiness of the tiles that resulted from the lack of a non-slip coating (as distinct from their wetness) would not have been obvious to Mr Raad or to a reasonable person in his position before he attempted to traverse them.

On the question of contributory negligence, the court observed that the obligation of the occupier is to be measured against the duty on the part of the user to exercise reasonable care themselves. The weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment.

Mr Raad's contributory negligence was because he ran over a tiled area upon which water was pooling from the rain when a more cautious approach was required to properly take care for his own safety. The assessment of the percentage deduction for contributory negligence involves apportioning responsibility for the accident and making an evaluative judgment. In the present case, the percentage as determined by the primary judge was considered to fall within the range of percentages that were open to him.

The court rejected Mr Raad's appeal (in respect of the matters for which he claimed that the damages were inadequate) and dismissed the cross-appeal relating to the occupier's breach of duty of care owed to Mr Raad.

Implications

The class of people to whom an occupier owes a duty of care must be carefully considered in each case to determine who might reasonably be expected to use the area or premises and whether a breach of duty then follows.

This will be particularly relevant in considering claims by workers against third parties where they enter upon third party premises and suffer injury by trip, slip or fall possibly by being distracted by pressing business or hurrying about and not exercising reasonable care for their own safety.

For more information, please contact:

John Hick
Partner
T: 02 8257 5720
M: 0417 264 707
john.hick@turkslegal.com.au