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Shopping centre owner scoots through liability arguments

Whitton v Dexus Funds Management Limited [2019] NSWDC

Roger Walter, Jane Yoo & Scott Breihl | October 2019 | General Insurance

Background

Ms Whitton was 71 when she was injured in 2016 in a collision with a mobility scooter that was estimated to be travelling significantly above walking pace. Ms Whitton did not see the scooter, which struck her as she was returning to a main thoroughfare from an amenities corridor of the Deepwater Plaza Shopping Centre at Woy Woy.

Ms Whitton chose not to sue the scooter driver, Ms Connolly, but instead brought an action directly against the shopping centre.

The collision was recorded on CCTV and it occurred on a shop corner. It was in effect a blind corner because of hoarding that had been erected around fitout works. The hoarding and a pillar obscured Ms Whitton's vision of the oncoming scooter.

Ms Whitton relied on the evidence of a safety management expert who testified that mirrors, barriers and signage would have avoided the risk of a collision.

It was not in dispute that there are no specific laws or regulations in New South Wales relating to the presence of mobility scooters in shopping centres or the speed at which they can travel in centres, other than that they are generally speed limited to 10 kph. It was also accepted that shopping centres cannot exclude people with disabilities from travelling in electric wheelchairs or mobility scooters.

Decision

Having regard to the CCTV, his Honour Judge Dicker concluded that Ms Connolly, who had impaired vision, should have seen Ms Whitton and taken appropriate action to slow down the scooter and avoid hitting her with it. Despite this finding of fault, the case required his Honour to determine whether the centre operator was liable.

Crucially, the centre operator had no record of previous incidents of this sort and there was no evidence or no satisfactory evidence:

(a) that Ms Connolly had been observed driving the scooter at excessive speed in the shopping centre, either on the day or on earlier occasions;

(b) that the centre operator was aware or should have been aware of other significant similar mobility scooter collisions in other shopping centres, particularly in the area of a blind corner;

(c) that signs warning of blind corners or mirrors were used at the exits of amenities corridors or other similar blind corners within other shopping centres (including on or near hoardings) as opposed to at the exits of shopping centre car parks;

(d) that barricades were used at or near blind corners with hoardings within shopping centres;

(e) about the frequency of mobility scooter accidents in other shopping centres prior to the subject accident.

Judge Dicker found that there was no breach of duty by the centre operator and that in respect of the suggested safety measures, causation would also not have been established in any event.

His Honour found that even if the centre operator had conducted a risk assessment relating to mobility scooters, it would not have implemented the precautions

recommended by Ms Whitton's safety management expert, Mr Dubos.

It was also held that Ms Connolly would not have seen nor paid attention to any signage regarding scooter speed limits. Ms Connolly had been rushing to visit her ill father.

His Honour considered sections 5B and 5C of the *Civil Liability Act 2002 (NSW)* (**CLA**) on the issue of breach of duty of care, finding that while the risk of being struck by a mobility scooter in a shopping centre was foreseeable:

- the plaintiff failed to establish that the risk of harm was not insignificant – his Honour observed in this regard that it is important to answer the question of whether the risk of harm was "not insignificant" and not whether the risk of harm was "not significant": *Bruce v Apex Software Pty Ltd* [2018] NSWCA 330 at [26];
- a reasonable person in the position of the centre operator would not have taken the precautions recommended by Mr Dubos;
- the probability of harm occurring if care was not taken was very low, as it was not probable that a mobility scooter travelling at relatively high speed would not have slowed down in an effort to avoid colliding with a pedestrian;
- a collision between a patron and a mobility scooter may involve serious harm being caused to the patron;
- the burden of taking precautions to avoid the risk of harm at the location of the accident was not significant – however as it involved a blind corner it would impose a significant, unreasonable and costly burden on shop owners and centres to place signs and/or mirrors at all exits or entrances with blind corners or where a patron's vision was obscured;
- the social utility of mobility scooter drivers being able to get around shopping centres is important;
- the risks associated with a blind corner are obvious; and
- when considering these factors as a whole, a reasonable person in the position of the centre operator would not have taken the precautions recommended by Mr Dubos, as the risk was obvious, there was no history of a significant number of mobility scooter accidents of the same nature, there are potentially many other blind corners in shopping centres and it would not have been apparent that the mobility scooter driver would not have slowed down or taken steps to avoid the collision.

Implications

Section 5C(a) of the CLA specifies that 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. This provision was integral to his Honour's finding that measures (mirrors, barriers and signs) proposed by Mr Dubos in relation to the hazards of the blind corner did not warrant a finding of a breach of duty.

This case demonstrates the intricate balancing of liability issues required by Part 1A of the CLA, especially in cases involving risks that might have only recently emerged, such as with mobility scooters.

While a particular accident might have been easily avoided by an occupier in retrospect, and while analysis of causation will always be retrospective, the perspective to be taken in any determination of breach of duty must always be prospective and the central questions must always be whether the measures proposed for alleviating the risk of harm:

(a) ought reasonably have been adopted; and

(b) probably would have been effective.

Quite apart from the law of negligence, central to this case were the risks posed to shopping centre patrons (and to pedestrians generally) by mobility scooters under the control of persons with a disability. His Honour Judge Dicker recommended that consideration be given to:

1. having a medical test requirement for drivers of mobility scooters to ensure they have the physical ability and vision necessary to safely to control a scooter;
2. requiring the drivers of mobility scooters to be insured; and

3. limiting disability scooter speed to 3 kph in shopping centres and other indoor locations (including the requirement to select that speed mode on a speed-limiting device when in a shopping centre or other public indoor location).

His Honour's recommendations might be aimed at reducing risks to pedestrians but the impact on the vulnerable people dependent on mobility scooters makes regulation a delicate balance. That might be too hard to tackle.

In any event, occupiers and insurers of commercial spaces will need to remain aware of the risks and consider whether their response is adequate.

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