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Council liable for trip and fall where knowledge of risk not obvious

Gosford City Council v Needs [2003] NSWCA 144

In *Gosford City Council v Needs*, the New South Wales Court of Appeal unanimously dismissed (with costs) the defendant's application for leave to appeal from a decision awarding the plaintiff damages for personal injuries suffered when she fell over the lower crossbar of a bus shelter which was under the defendant's control.

The Facts

The plaintiff had been walking along a footpath when she fell over the crossbar, which was used to brace the vertical metal framework of a bus shelter. The framework ordinarily contained white-coloured opaque glass. However, vandals had removed this, creating an open gap across the width of the footpath, except for the barrier created by the crossbar. The other side of the bus shelter was made of opaque glass, which only extended halfway across the footpath.

After the vandalism, pedestrians could step over the bar and walk directly past the bus shelter without having to detour. There was no indication that the bar constituted a barrier, but it was painted green and was quite obvious to anyone who noticed it. Unfortunately, the plaintiff did not notice it and was injured when she fell.

There was evidence of a prior accident where an elderly woman suffered injury in similar circumstances. Significantly, a nearby resident had reported this accident to the defendant.

The missing frame was replaced, but vandals kicked it out once more. The resident again telephoned the defendant to report the danger at least six weeks before the accident involving the plaintiff. However, no action was taken.

The Decision

Ipp J referred to comments in *Brodie v Singleton Shire Council*[1] that plaintiffs are required to take reasonable care for their own safety by avoiding obvious hazards.[2] He then said:

'In my opinion, the hazard constituted by this bar cannot be compared to the imperfections in the road surface discussed by their Honours in *Brodie*. As their Honours pointed out in that case, pedestrians are expected to perceive and avoid obvious hazards such as uneven paving, stones or holes. Those are the kinds of hazards which pedestrians should expect in the course of walking along a public street in an urban area. But pedestrians do not expect to find on a smooth concrete pavement a bar across the footpath at shin height. Such a barrier constitutes a trap for pedestrians. They are, in effect, invited to walk along the footpath. They are expected to take care where there are differences in the levels of the ground, but I think it is going too far to expect them to be aware, in the ordinary course, of the presence of a transverse bar, low on the ground, as existed in the particular circumstances that existed in this case. The difficulties of noticing such a hazard are manifest from the prior accident and near accident which I have described.'[3]

His Honour concluded that the trial judge was entitled to accept the plaintiff's evidence that the bar was not obvious to her as she walked along, even if it was quite obvious in photographs afterwards. He also considered that it was unreasonable for the defendant not to have taken steps to remove the hazard within a short time of being informed of its existence.[4]

Comment

Where the risk is obvious it will be very difficult for plaintiffs to succeed in trip and fall cases. However, liability may arise if it is established that the public authority was aware of the risk and did not take reasonable steps to rectify it.[5]

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Of course, legislative changes now specify considerations relevant to the determination of whether a public authority has breached its duty.[6]

Public authorities should have formal, documented risk management systems and procedures for dealing with all aspects of footpath and road maintenance, including acceptable standards, inspections and priority planning.[7]

Where there is evidence that an adequate risk management program was in place and budgetary resource allocations did not allow the removal of all risks, plaintiffs will rarely succeed,[8] particularly where there is no evidence that the authority knew of the specific risk.[9] PL

Endnotes: **1** (2001) 206 CLR 512 at [163]. **2** at [12]. **3** at [13]. **4** at [14]; [16]-[17]. **5** *Sutherland Shire Council v Pallister* [2002] NSWCA 66; *ACT v Badcock* (2000) 169 ALR 585; cf *Spencer v The Council of the City of Maryborough* [2002] QCA 250. **6** For example, in ss 35 and 37 *Civil Liability Act* 2003 (Qld); and in s 42 *Civil Liability Act* 2002 (NSW). **7** See NSW Public Bodies Review Committee report *The Effects on Government Agencies of the Abolition of Nonfeasance Immunity* http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/committees?open&tab=committees. **8** *Percy v Noosa Shire Council* [2002] QCA 245 at [17]; *Burwood Council v Byrnes* [2002] NSWCA 343 at [6]-[11]. **9** *RTA v McGuinness* [2002] NSWCA 210 at [38]; [52] -[53].

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Victory for common sense

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 77 ALJR 1205

In *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*[1], the High Court eradicated arbitrary rules such as normal fortitude, shock or sudden sensory perception as being determinative of a plaintiff's right to sue for nervous shock.

The rights of pure secondary victims (that is, persons who were not at the scene of the distressing event) were undecided.

On this issue the High Court granted special leave to appeal in the matter of *Gifford v Strang Patrick Stevedoring Pty Ltd* ('Gifford'), a case relating to three children whose father was killed on the respondent's work site.

A further issue in *Gifford* was whether section 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) ('the Act') operated so as to permit recovery only by those persons who had a family member killed, injured or put in peril within their sight or hearing. The court unanimously held that section 4(1)(b) of the Act operated to extend liability and could not be used to deny the three plaintiffs the right to sue for lack of perception.

In determining whether the defendant owed a duty of care to the plaintiffs, Gleeson CJ focused upon the reasonableness of ▶

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IS **PAIN** ***THE ISSUE?***

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