The mystery of the water on the floor: County Court confirms that speculation is not enough

Karlevski v Vicinity Centres PM Pty Ltd & Anor [2023] VCC 482

APR23

Authors: **Jonathan Maher** (Partner), **Maddison Fairthorne** (Senior Associate)

wotton kearney

A founding member of LEGALIGN GLOBAL

The County Court of Victoria has reconfirmed that plaintiffs in personal injury actions can rely on inferential reasoning up to a point, but that mere speculation is not sufficient.

The facts

The plaintiff, a 61 year old woman, slipped on some water on the floor at Northland Shopping Centre in Melbourne in July 2019 and injured her knee. She sued the manager of the shopping centre, Vicinity Centres PM Pty Ltd, and its contracted cleaning company, Consolidated Property Services Pty Ltd.

There was no dispute that she had slipped as alleged, as the incident was captured on CCTV. Nor was there any dispute that she had slipped on water, as this was confirmed after the incident.

Critically, however, the CCTV did not reveal where the water came from or how long it had been on the floor before the incident. These issues were firmly in dispute, as was the issue of whether the presence of the water represented negligence on the part of the defendants in any event.

The plaintiff's case

The plaintiff argued that, even though there was no direct evidence about the source of the water, it could be reasonably inferred that it came from a roof leak at the shopping centre. She relied on the fact that:

- there was evidence of rain on the date of the incident
- there had been historical leaks in other areas of the shopping centre on very rainy days
- the CCTV showed that, after the incident, people in the area looked up at the ceiling, and
- the attending ambulance officer made a note that the plaintiff slipped on water from "*? leaking roof*".

The plaintiff argued that if the water had come from a roof leak, then it could also be inferred that it had been present on the floor for a significant period of time before the incident, meaning that there had been a failure of Vicinity's system of inspection and cleaning, as carried out by Consolidated.

The defendants' case

Vicinity and Consolidated submitted that the plaintiff's case went beyond the drawing of reasonable inferences based on the circumstances, and into the realm of speculation.

They pointed out that there was insufficient evidence to support several of her assertions, and significant evidence to counter them, including that:

- if there was rain on the day, there was no evidence of how much, or when it fell

- there was no evidence of roof leaks in that area of the shopping centre ever before, or since
- a cleaner who walked past the area shortly before the incident did not see any water
- after the incident, no-one reported any leaks, and the plaintiff herself did not notice any drips
- there was no way of knowing what the people in the CCTV were looking up at, or why, because they were not called to give evidence
- the CCTV revealed a large number of people walking past the area of the incident in the period leading up to it, and none appeared to slip or notice any water on the floor, and
- there were any number of other explanations for the water on the floor, including a nearby flower vase, babies in prams, children playing with a drink, and a man with a drink bottle.

The defendants further argued that, even if the water had come from a roof leak, there was no evidence before the court to explain why that amounted to negligence on the part of the defendants, either for permitting the roof to leak in the first place, or for failing to promptly identify the water afterwards. On the contrary, the evidence was that Vicinity had a system of proactive roof maintenance, in addition to its cleaning rotations in the shopping centre, and that Consolidated complied with those cleaning rotations immediately before the incident.

The decision

His Honour Judge Purcell confirmed the reasoning of the Victorian Court of Appeal in *Masters Home Improvement Australia Pty Ltd v North East Solutions Pty Ltd*[1], which endorsed the approach of the High Court in *Bradshaw v McEwans Pty Ltd*[2] that, where direct proof is not available, it is enough for a plaintiff to rely on circumstances that give rise to a reasonable and definite inference. However, the circumstances "must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture".

In this case, Judge Purcell noted that there were multiple possible explanations for the water being on the floor of a busy shopping centre, and no circumstances identified by the plaintiff that could give rise to a reasonable inference that one (a roof leak) was more probable. On the contrary, His Honour agreed with the defendants that there were a number of circumstances that weighed against a roof leak being the most likely explanation. "Speculation is not permissible", he observed.

His Honour went on to confirm that even if he had found that the roof had leaked due to rain, there was no evidence that Vicinity had not discharged its duty of care as a reasonable occupier and manager of the shopping centre, or that Consolidated had not discharged its duty as a contracted cleaner. In fact, the evidence suggested there was a "reasonable system of cleaning and inspection, and compliance with that system".

Implications

It is well understood that the absence of direct evidence is not fatal to a plaintiff's case, provided that the plaintiff can point to circumstances that permit reasonable inferences to be drawn regarding what is more probable. Regarding causation, this principle was perhaps most notably reinforced by the High Court in *Strong v Woolworths*[3], another shopping centre slip case.

However, defendants will take some heart from the decision of His Honour Purcell in this case, in its confirmation that a plaintiff cannot expect to discharge its burden of proof by pointing to circumstances that allow no more than speculation as to which inference is the more likely.

Wotton + Kearney acted for Vicinity Centres PM Pty Ltd in this case.

[1] [2017] VSCA 88
[2] (1951) 217 ALR 1
[3] [2012] HCA 5

Australian offices

Adelaide
Level 1, 25 Grenfell Street
Adelaide, SA 5000
T: +61 8 8473 8000

Brisbane
Level 23, 111 Eagle Street
Brisbane, QLD 4000
T: +61 7 3236 8700

Canberra
Suite 4.01, 17 Moore Street
Canberra, ACT 2601
T: +61 2 5114 2300

Melbourne
Level 15, 600 Bourke Street
Melbourne, VIC 3000
T: +61 3 9604 7900

Melbourne – Health
Level 36, Central Tower
360 Elizabeth Street, Melbourne, VIC 3000
T: +61 3 9604 7900

Perth
Level 49, 108 St Georges Terrace
Perth, WA 6000
T: +61 8 9222 6900

Sydney
Level 26, 85 Castlereagh Street
Sydney, NSW 2000
T: +61 2 8273 9900

www.wottonkearney.com.au

New Zealand offices

Auckland
Level 18, Crombie Lockwood Tower
191 Queen Street, Auckland 1010
T: +64 9 377 1854

Wellington
Level 13, Harbour Tower
2 Hunter Street, Wellington 6011
T: +64 4 499 5589

wotton kearney

Need to know more?

For more information on any of these issues, contact our authors, **Personal Injury** specialists.

Jonathan Maher
Partner, Melbourne
T: +61 3 9604 7919
jonathan.maher@wottonkearney.com.au

Maddison Fairthorne
Senior Associate, Melbourne
T: +61 3 9604 7956
maddison.fairthorne@wottonkearney.com.au

Learn more about our Personal Injury expertise here.