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Case Alert

Shaping the future of insurance law

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Is it reasonable to do nothing in response to a foreseeable risk?

Jennings v George Harcourt Management Pty Ltd [2018] ACTCA 50

AT A GLANCE

- Last week the ACT Court of Appeal found in favour of an occupier of a car park in a negligence case.
- The decision is a reminder that the issues of 'foreseeable risk' and 'reasonable response' must not be conflated when considering whether a party has breached its duty of care.
- This case is important for insurers and their insureds in reiterating that sometimes, 'doing nothing', is an entirely reasonable response to a foreseeable risk.

The facts

On the evening of Friday 15 May 2009, the Appellant, then aged 63, fractured her ankle in the car park of the George Harcourt Inn in Canberra (Inn). The gravel car park was outdoors and poorly lit. The individual car parking spaces were separated by low-lying railway sleepers.

The Appellant parked her vehicle and walked across a line of sleepers towards the Inn. As she did so, she stepped over a sleeper, which she had seen, and inadvertently stepped into a small "pothole", approximately the size of a dinner plate, which she had not seen. She then fell, sustaining injuries.

The Appellant commenced proceedings against the occupier of the car park, George Harcourt Management Pty Ltd (Occupier) and the car park's owner, ASB Properties Pty Ltd (Owner). However, no evidence was led against the Owner.

The Appellant argued that the Occupier failed to identify and rectify the pothole or, alternatively, had failed to warn her of its presence. She also argued she had not seen the pothole because of the car park's inadequate lighting.

The primary judge's findings – Supreme Court of ACT

McWilliam AsJ found that the Appellant's foot entered a small "pothole". Her Honour accepted that there was a reasonable and not insignificant risk of a patron injuring themselves while stepping over a sleeper and into a hole in the dark car park. Her Honour also determined the Occupier's system of inspection and maintenance was "casual and ad hoc".

However, regarding a duty to more assiduously inspect and repair the car park, Her Honour found that there was insufficient evidence to establish what more a reasonable occupier would have done about the reasonably foreseeable risk. Her Honour was not satisfied that in the circumstances of the case, "an occupier acting reasonably would have taken the precaution of identifying and repairing every small hole, of shallow depth, on the surface of a dirt car park" in particular in the area on either side of the sleepers.

She found that a reasonable occupier "inspecting regularly and thoroughly enough to discover irregularities in the car park surface and taking all reasonable care to maintain the surface of the car park would not have

considered it necessary to fill every small shallow hole behind a sleeper in order to guard against the risk of injury arising from a misjudged step". Her Honour stated that this was an uncovered dirt car park attached to an Inn, with "all the rustic charms that accompanies that setting… The car park surface was inherently imperfect". She was not satisfied that a reasonable occupier would have instituted an inspection system that was so rigorous that it would have identified even minor imperfections.

Despite accepting that the lighting was undeniably poor at the incident location, her Honour found that the evidence was inadequate for her to conclude that a reasonable occupier would have installed better lighting. Finally, even if a breach of duty had been established, which it had not, Her Honour found that there was insufficient evidence to conclude that any such breach caused the fall.

The Appellant appealed the trial judge's decision. The primary issue on appeal was, among other things, the manner in which Her Honour dealt with the issue of breach of duty of care by the Occupier.

Court of Appeal decision

The Court of Appeal unanimously upheld the trial judge's decision.

The Court agreed with the primary judge's finding that the Occupier's system of inspection and maintenance was inadequate to identify the hazard. The Court also acknowledged the hazard posed a reasonably foreseeable and not insignificant risk of injury to patrons. The Court counselled against combining a finding of foreseeability of risk with a conclusion that a reasonable person would have taken precautions against the risk. The Court noted "[t]he mere fact that an accident is foreseeable does not mandate a conclusion of negligence; it is also necessary to [separately] inquire whether the [Respondent] has failed to respond to the risk by taking the precautions that a reasonable person would have taken".

The Court considered what precautions a reasonable person in the Occupier's position might have taken. It acknowledged that "… in some circumstances, faced with a reasonably foreseeable risk of harm, it may nevertheless be reasonable for an occupier to do nothing."[1] The Court agreed with the trial judge that a reasonable occupier would not have "instituted an inspection system that was so rigorous that it would have identified even minor imperfections in the surface, such as that vaguely described by the appellant in her evidence".

The Court also considered the nature of the car park itself. It noted the trial judge's finding that it was "an uncovered dirt car park attached to an Inn" and the surface of the car park was inherently imperfect.

The Court then turned its attention to the Appellant's allegations regarding inadequate lighting and agreed that the Appellant had failed to lead any compelling evidence about what standard of lighting she considered would have been reasonable. In the absence of that evidence, the Court agreed the trial judge could not "conclude that a reasonable occupier would have installed better lighting".

Despite acknowledging the Occupier had not breached its duty of care, the Court considered the issue of causation. The Court agreed with the trial judge that it was not clear whether more frequent and thorough inspections of the car park surface would have prevented the incident from occurring. The Court noted it was not clear when the pothole came into existence or whether such a small pothole would have reasonably required immediate rectification. Similarly, the Court agreed with the trial judge that given the size and location of the particular hole, "better" lighting would not necessarily have improved the visibility of the pothole itself. The Appellant was walking on gravel or dirt between cars, near a large tree on one side and bushes on the other, and stepping behind raised sleepers would have potentially affected the shadows in the spot where the Appellant put her feet. The Court agreed the incident could also have occurred in broad daylight.

Implications for insurers

This case highlights that just because a risk is foreseeable, a finding of negligence will not necessarily follow. In order for negligence to be established, a defendant must have failed to take reasonable measures in response to a foreseeable risk of injury. That is an objective assessment.

In this matter, the Court found the risk to which the Appellant was exposed was foreseeable but the Defendant's response to do nothing was entirely reasonable. A finding of negligence was therefore not made.

[1] ***Tame v New South Wales*** **[2002] HCA 35** at [99] per McHugh J.

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