



RANKIN ELLISON CASE NOTES

What precautions would a reasonable person take?

Bunnings Group Ltd v Giudice [2018] NSWCA 144

The Court of Appeal recently heard an Appeal against a trial decision pertaining to a personal injury claim against Bunnings. The Court of Appeal discussed the principles of negligence described by the *Civil Liability Act 2002* (NSW) in respect of what a reasonable person is obliged to do.

Material Facts

Ms Giudice attended a hardware store owned and occupied by Bunnings. Within the Bunnings' hardware store was a fenced-in children's play area. The concrete floor of that play area was lined with a shock-absorbing safety mat, which inclined several inches at a steep gradient at the entrance to the play area.

The concrete floor immediately outside the child-proof gate was painted yellow so as to delineate the beginning of the safety matted area. There was also a sign affixed to the fence which limited Bunnings' liability for injuries sustained in the play area.

Whilst at the Bunnings' hardware store, Ms Giudice opened the gate and entered the play area. She tripped over the inclined section of the safety mat and sustained two wrist fractures.

Ms Giudice sued Bunnings for damages, pleading that Bunnings breached its duty of care by creating a trip

hazard and failing to warn her of same. The District Court found in favour of Ms Giudice, making an award for \$179,600.00 (after a 20% deduction for her contributory negligence).

In coming to this decision, the trial Judge stated that a reasonable person would have taken any number of the following precautionary measures to eradicate or reduce the risk of harm:

- Affix a caution sign to the fence,
- Brightly paint the sloped safety mat to draw attention to its gradient, and/or
- Adjusting the gradient of the safety mat.

Bunnings appealed against the trial Judge's decision on the basis that his reasoning in respect of the breach and causation elements of Ms Giudice's cause of action did not comply with the *Civil Liability Act 2002* (NSW) ("the Act").

Appeal

Section 5B(1) of the Act provides the essential elements for proving a breach of duty of care. They are that the risk was foreseeable, that the risk was not insignificant, and that a reasonable person would have taken precautions to prevent that risk from materialising. In

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respect of the latter, the Court is obligated to consider the factors set out in Section 5B(2) of the Act, which are;

- a) The probability that the harm would occur if care were not taken,
- b) The likely seriousness of the harm,
- c) The burden of taking precautions to avoid the risk of harm,
- d) The social utility of the activity that creates the risk of harm.

The Court of Appeal determined that the trial Judge erred in applying the Section 5B(2) factors to those proposed precautions collectively, rather than individually. The Court gave the example that the burden of affixing a caution sign to the fence was substantially different to the burden of flattening the safety mat. The trial Judge did not consider whether flattening the safety mat was even possible, let alone reasonable.

In respect of causation, Section 5D(2) of the Act requires that the injured person prove that the breach of duty was a necessary condition of the occurrence of his/her injury. That is to say, his/her injury would not have occurred if the negligent person had implemented precautionary measures.

By her own admission, Ms Giudice did not notice the existing sign or the yellow paint marking the start of the safety mat. On that basis, Bunnings contended that the presence of an additional sign and bright paint on the graded section of the safety mat would not have prevented Ms Giudice from tripping and suffering injury. The trial Judge rejected that submission.

However, the Court of Appeal distinguished that rejecting Bunnings's submission was not equivalent to making a positive finding that implementing precautionary measures would have prevented Ms Giudice's injury. The Court found that the correct test of causation had not been applied.

It was therefore determined that the trial Judge's decision in respect of breach and causation was erroneous.

Based on the evidence adduced at first instance, the Court of Appeal found that the risk of harm was insignificant and that a reasonable person in the position of Bunnings' would not have done any more to eradicate or reduce the risk of harm. The Appeal was allowed and Ms Giudice's action was dismissed with costs.

Implications

This decision serves as a valuable reminder that the burden of proof rests with the Plaintiff to establish that there were precautions available to eradicate or reduce the risk of harm and that a reasonable person would have carried out those precautions. In considering those issues, the factors provided in Section 5B(2) must be applied to each of the proposed precaution individually, rather than collectively.

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