Commercial Occupiers: What is expected of them to keep premises safe?

Carnemolla v Arcadia Funds Management Ltd [2020] NSWCA 308

Key takeaways

- An occupier of commercial premises does not have a duty to keep a floor dry at all times, but rather to take reasonable steps to minimise the risk of harm by ensuring an adequate inspection and cleaning system is in place.
- The plaintiff bears the onus of providing evidence of the burden of taking precautions to avoid similar risks of harm, for example when arguing that a floor surface is unsuitable and should be replaced.

Background

The appellant slipped and fell outside the women's toilets at a western Sydney shopping centre, injuring her left knee. Within a minutes of the incident, a cleaning supervisor attended the scene. The appellant reported to the cleaning supervisor that she 'slipped on the water'. However, the cleaning supervisor noted in his incident report that he 'was unable to locate any wet or dry contributing factors' that may have been involved in the incident.

The respondent, 'Arcadia', was the manager and occupier of the premises. Arcadia had a building services agreement with 'Asset', for Asset to carry out the cleaning regime. The agreement specified that 'all common areas must be patrolled to satisfy a 15 minute loop cycle monitored by an electronic system and all amenities to have 20 minute loops as well'. The area where the appellant fell was a common area, and a cleaner had carried out an inspection not more than 12 minutes before the appellant fell.

Primary judgement

The primary judge found no liability on the part of the defendant. The primary judge held that the plaintiff did not slip on water, or in the alternative, did not discharge her burden to establish that she did. The claim was dismissed with costs reserved. The plaintiff appealed the primary judge's findings on liability and some other issues.

NSW Court of Appeal decision

The NSW Court of Appeal dismissed the appeal by holding that the primary judge was entitled to reject the appellant's claim that there was water on the floor, and in the alternative, if there was water on the floor, it was not a result of a breach of duty by the respondent.

More importantly, the Court made some useful comments with respect to the duty of the respondent as a commercial occupier. It was not to ensure the floor is dry at all times, but to take reasonable steps to ensure that the floor was dry and not slippery. This required a system for identifying and cleaning spills. The appellant did not criticise the system, and in fact had admitted that it was an adequate system prior to trial when responding to a notice to admit. The Court considered that this should be understood as admitting the adoption of precautions which would have been taken by a reasonable person in the respondent's position, in accordance with s 5B(1)(c) of the Civil Liability Act 2002 (NSW).

The Court reasoned that if there had been water on the floor (which was not accepted), that would have demonstrated that the system had failed, not that the system itself was inadequate as a means of fulfilling the duty of care.

Taking precautions to avoid similar risks of harm – the terrazzo floor.

There was also an issue as to whether the flooring in the premises – terrazzo flooring – was reasonable. The Appellant's expert conceded that the terrazzo floor surface on which the appellant slipped was an appropriate surface, dependent upon it being kept dry. He also agreed that the terrazzo floor surface was almost universal throughout shopping centres in NSW.

On appeal, it was argued that Mr Burn's evidence inferred that some other floor surface should be adopted if it could not be kept dry by use of reasonable precautions. However, given that terrazzo flooring in shopping centres in NSW is universally used, the Court held that a finding that the floor surface should be replaced would have required the Primary Judge to consider 'the burden of taking precautions to avoid similar risks of harm for which the person may be responsible' (s 5C(a)) Civil Liability Act 2002 (CLA)). This would require evidence as to the cost and burden of replacing the terrazzo floors throughout the shopping centre, as to which there was no evidence.

Implications

There is no doubt that commercial occupiers, such as retailers and shopping centre operators, do have a duty to prevent slips and falls. However where, in the absence of any structural issue, there is evidence that an adequate cleaning system was implemented or lack of evidence that the incident involved a hazard (which was an additional problem for the plaintiff in this case), these claims can be defended. It is therefore important to make sure commercial occupiers are implementing adequate cleaning systems with their cleaning contractors to discharge their duty of care.

March 2021

This article was written by Principal Robert Minc and Graduate Amy Hatfield. Please contact Robert Minc if you have any questions or would like more information.

Robert Minc

Principal

+61 3 9810 6765

rminc@meridianlawyers.com.au

Amy Hatfield

Graduate

+61 3 9810 6700

ahatfield@meridianlawyers.com.au

Disclaimer: This information is current as of March 2021. This article does not constitute legal advice and does not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of this article.