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A consideration of liability arising from a fall in a shopping centre car park after the plaintiff slipped whilst distracted by his phone.

IN ISSUE

- The provisions of Section 5B of the *Civil Liability Act 2002* (NSW) (the CLA), in particular sub-section 1(a) addressing the foreseeability of the risk of harm.
- The causative effect of "momentary inattention", and whether this equates to contributory negligence.

THE BACKGROUND

Proceedings were commenced against Coles by Mr Bridge in respect of injuries sustained on 6 April 2014, when he slipped on the wet surface of the car park at Coffs Harbour. He was pushing his trolley at the time, and slipped after removing one hand from the trolley to answer his mobile phone. Slip tests carried out after the accident confirmed that the co-efficient of friction was very low, and the surface had a "very high contribution" to the risk of slipping when wet.

THE DECISION AT TRIAL

Mr Bridge was successful at trial, and awarded damages in the sum of $688,071. There was no finding of contributory negligence.

THE ISSUES ON APPEAL

Coles alleged that the trial judge erred in finding that it owed a duty of care to the plaintiff, and in formulating the content of that duty retrospectively rather than prospectively. Coles also asserted that the trial judge erred in finding that the plaintiff's "momentary" inadvertence when answering his phone did not constitute contributory negligence.

THE DECISION ON APPEAL

The majority of the Court of Appeal dismissed Coles' appeal on primary liability, however allowed the appeal in relation to contributory negligence.

The majority found that the formulation of section 5B(1)(a) of the CLA, which required the risk of harm to be foreseeable, could be carried out retrospectively. The CLA requires the analysis to start with a risk of harm, and there is no single correct way of assessing this – there are leeways of choice between formulations which are more or less general or specific. The formulation must use hindsight however, in that the legal analysis must be framed so as to encompass the risk which is claimed to have materialised and caused the damage of which the plaintiff complains.

In this case the evidence established that Coles was, or ought to have been aware of the risk of harm

bearing in mind an earlier email from a store manager addressing the safety hazard posed by water in the car park. The majority found the email satisfied the critical finding required by section 5B(1)(a) that Coles was aware of the risk posed by the surface of the car park when wet. A reasonable person with this knowledge would have taken the precaution of treating the surface with a non-slip material and providing a pedestrian walkway.

Damages were reduced by 25% however for contributory negligence. The fact that the plaintiff was only "momentarily" distracted did not detract from the conclusion that a reasonable person would not have proceeded into the car park while distracted by his phone, or would have refrained from answering the call.

IMPLICATIONS FOR YOU

A consideration of the risk of harm and foreseeability will involve broad considerations and the element of hindsight. Prior knowledge will work against a defendant attempting to argue against satisfaction of section 5B(1)(a) of the CLA.

Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 (17 August 2018)

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