

CONSIDERING REASONABLE PRECAUTIONS ARE “JUST THE BEGINNING” ... BUNNINGS “BEATS IT” ON APPEAL.

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The NSW Court of Appeal recently overturned the trial judge’s finding of liability against Bunnings for an alleged failure to warn a customer of the risk of tripping when entering the children’s play area within its Ashfield warehouse.

In Issue

- What precautions would a reasonable person in Bunnings’ position have taken against a risk of harm?

The Background

On 4 April 2016, Ms Antonietta Giudice attended the Bunnings warehouse at Ashfield together with her friend and her four-year-old grandson. Her grandson was taken to a fenced-off play area inside the warehouse by her friend, while Ms Giudice inspected some furniture. Ms Giudice gave evidence that she heard her grandson cry and walked to the gate enclosing the play area. At the entrance of the gate were yellow diagonal lines indicating the area where the gate opens outwards. She then opened the gate towards her, stepped forward into the play area and tripped on an inclined slope of shock-absorbent matting and fell injuring her right wrist. Ms Giudice claimed damages for personal injury from Bunnings.

The Decision at Trial

Ms Giudice gave evidence that she did not notice the yellow markings at the entrance of the gate, nor did she notice the warning sign on the gate given that her focus had been on the wellbeing of her grandson. She did admit, however, that she did notice that the floor surface of the play area was different.

Whilst Bunnings admitted that it owed a duty to Ms Giudice to take reasonable care to avoid foreseeable and not insignificant risks, it denied that it had failed to take adequate precautions in the circumstances. Moreover, it argued that there had been no previous incidents of any trips or falls on the inclined surface at the Bunnings warehouse.

The trial judge concluded that Bunnings had breached its duty of care to Ms Giudice on three counts:

1. Failing to bring the variation in floor surface height to her attention by warning, painting or otherwise.

2. Failing to ensure a flush surface between the warehouse and the adjacent playground area.
3. Failing to adjust the entrance to the playground area so as to spread the increase in height over a larger area which would have had the effect of significantly reducing or alleviating any risk of tripping.

The court found Bunnings liable in negligence and awarded Ms Giudice \$179,600 in damages which included a reduction of 20% on account of contributory negligence. Bunnings appealed.

The Issues on Appeal

The main issues on appeal were whether the trial judge erred in finding any breach of duty and whether causation was made out.

The Decision on Appeal

Bunnings was successful on appeal.

The Court of Appeal found that the trial judge erred by offering a hastened conclusion in relation to s 5B(1)(c) of the *Civil Liability Act 2002* (NSW) (CLA) that a reasonable person in Bunnings' position would have taken precautions to minimise the likelihood of the risk occurring. In particular, the Court of Appeal criticised the trial judge's decision to discuss all of the precautions Bunnings should have taken collectively with respect to matters in s 5B(2) rather than considering each precaution individually.

In correctly applying s 5B(2), the Court of Appeal found that it was obvious the floor of the play area was raised. Further, it was apparent that the floor was different from the hard concrete surface of the rest of the warehouse. The Court of Appeal considered the risk of a fall to be low. Whilst the Court of Appeal considered it a small burden of placing an additional warning sign on the gate regarding the inclined slope upon entry to the play area, the shock-absorbent matting, which created the risk of the harm, was in fact designed to protect a person (particularly children) from serious injury.

The Court of Appeal noted that Ms Giudice had not established that the risk of harm was "not insignificant". The Court of Appeal concluded that a reasonable person in the position of Bunnings would not have done more than it had already done, by delineating the fencing of the area with yellow lines, providing a fence and a childproof gate which required entrants to come to a stop before entering. Bunnings' appeal was allowed with costs.

Implications for you

The decision outlines the steps that should be taken when addressing breach and causation, as defined under the CLA. It reinforces the position that the application of s 5B(1)(c) requires reasonableness, not perfection. Such onus remains with the plaintiff to establish. Moreover, the decision highlights the dangers associated in addressing the principles of negligence collectively. The Court of Appeal provides guidance on this point, indicating that consideration ought to be on an individual and separate basis.

[Bunnings Group Ltd v Giudice \[2018\] NSWCA 144](#)

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