

PEDESTRIAN TRIPS ON CABLE, BUT EXPERT EVIDENCE IS THE REAL HURDLE

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A Council has successfully appealed a New South Wales District Court decision that the failure to remove a cable fence at a public sports field amounted to negligence following a pedestrian's trip and fall. A lack of specialist knowledge rendered a key expert witness's evidence inadmissible, and a layman's photographic evidence assisted the New South Wales Court of Appeal to determine that the cable posed an obvious risk within the meaning of the *New South Wales Civil Liability Act 2002* (CLA). The case also considers whether a party is entitled to damages for gratuitous assistance in circumstances where that party was previously in receipt of care from a full time carer.

IN ISSUE

- Whether the primary judge erred in finding that the installation of the concrete blocks with the retention of the cable created a risk of injury by tripping, against which the appellants ought to have taken precautions, and in holding that the appellants were negligent in failing to remove that cable.
- Whether the primary judge erred in admitting aspects of an expert witness's evidence where it was alleged that the witness was not qualified to give that opinion.
- Whether the respondent should be entitled to an award of damages for past and future gratuitous domestic assistance in circumstances where the respondent was already in receipt of around the clock care by her husband.

THE BACKGROUND

On 2 August 2012, the respondent tripped and fell on a steel cable strung between low timber posts forming a fence separating a car park from playing fields. Immediately behind that fence, on the playing fields side, was a row of large concrete blocks spaced 1.45 metres apart. The wooden stumps and cable were installed prior to the concrete blocks as a means of preventing vehicular access to the playing field. The concrete blocks were later installed to serve a similar purpose. The incident occurred as the respondent attempted to access the playing fields from the car park. The park was community land vested in the Hawkesbury City Council and Hawkesbury Sports Council (the appellants).

The respondent sustained a significant leg injury as a result of the incident and sought damages in negligence for the appellants' failure to remove the cable. Damages were claimed

for past and future gratuitous domestic assistance provided by the respondent's husband, who was already in receipt of a carer's pension, and responsible for providing full time care to the respondent following an aneurysm she suffered prior to the incident.

The determination of whether there had been a breach of duty of care on the part of the appellants, or whether the cable posed an obvious risk within the meaning of section 5F of the CLA, depended largely on expert evidence.

At trial, the respondent submitted that the placement of the concrete blocks gave the impression that pedestrians could walk through them to access the playing field, and that shadowing caused by nearby trees reduced the visibility of the cable. She relied on evidence given by an expert described as a building consultant, civil engineer and lawyer. The expert opined that the presence of the concrete posts and the spaces between them detracted from the visibility of the cable, thus posing a not insignificant risk of tripping and falling. The respondent also relied on the evidence of a psychologist who considered that the cable would not have been visible to the respondent on her approach to the concrete blocks, as it was low lying and remained in her peripheral vision only.

The respondent's husband tendered photographs of the scene of the incident, which depicted the concrete blocks, cable and shadowing from nearby trees which he said reduced the visibility of the cable at the time of the incident.

The appellants argued that the presence of the cable was obvious and could have been avoided had the respondent been paying attention to her surrounds. The appellants relied upon evidence from an alternative expert psychologist who considered that the environmental factors present at the time of the incident would not have hindered the respondent's ability to perceive and avoid the cable.

THE DECISION

At first instance, the primary judge accepted the respondent's expert evidence that visibility of the cable was reduced by elements of its surrounding environment, and found that the appellants were negligent in failing to remove the cable. A 30% reduction in damages was made for contributory negligence. In terms of quantum the primary judge held that the respondent was entitled to damages for gratuitous care as the level of care provided by her husband following the subject injury transcended that which was provided beforehand.

This decision was overturned on appeal. Meagher JA and Emmett AJA in majority rejected the evidence of the respondent's expert engineer/building consultant on the basis that his opinion regarding visual perception of the cable was not based on 'specialised knowledge' from his area of expertise. As such, the evidence did not satisfy section 79 of the *Evidence Act 1995* (NSW) and was not admissible. Further, the majority held that the evidence (in particular the photographs) established that the risk of tripping on the cable was obvious within the meaning of section 5F of the CLA. Accordingly, the appellants were not required to take steps to remove the cable, notwithstanding that the burden of doing so would not have been onerous and that the 'social utility' of retaining the cable was questionable. The respondent was unable to establish a cause of action in negligence as a result. Given that the respondent's claim failed on liability, the issue of quantum was not discussed in the majority judgment.

In dissent, Simpson AJA upheld the trial judge's decision in relation to liability and quantum. In particular, she allowed the claim for damages for gratuitous care on the basis that it was appropriate to make an allowance representing the escalation of the respondent's care needs

following the incident.

IMPLICATIONS FOR YOU

This case serves as a reminder that care should be taken when selecting experts to ensure that they hold the appropriate qualifications and experience to provide the opinion required.

The case confirms the decision in *Gordon v Truong* [2014] NSWCA 97 that damages may be awarded for an escalation in an injured party's care needs, where they were already in receipt of care for pre-existing conditions prior to the relevant incident.

It is also an example of where care should be taken in relying on photographic evidence as it may be interpreted in an unintended manner.

[Hawkesbury Sports Council v Martin](#) [2019] NSWCA 76

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