Barry.Nilsson.
LAWYERS

WARNING, OBVIOUS RISK!

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The WA Supreme Court of Appeal has confirmed that a residential occupier was not liable for injuries suffered by a neighbour who fell through a laserlite roof panel at the occupier's home. The Court of Appeal confirmed that the risk was an obvious risk, for which there is no duty to warn.

IN ISSUE (ON APPEAL)

- Was the risk of falling through a laserlite roof panel, if it were walked on, an obvious risk and did a duty exist to warn of the risk?'
- What is the correct construction of s5O of the CLA.
- Had there been a duty to warn (at the time of the accident), would that have impacted upon the circumstances of the accident?

THE BACKGROUND

Keven Gors (the appellant) and his brother (Clifton Gors) attended a residential property owned by Phillip and Jennifer Tomlinson (the respondents) to remove a hot water system unit from the roof of the respondents' house. While they were on the roof, the appellant and his brother offered to clean the respondents' gutters and replace some tiles that had cracked (near the unit). Mr Tomlinson played no part in planning how the unit would be removed from the roof and there was no discussion between the appellant and the respondents as to how this would occur. Whilst in the process of removing the unit from the roof, the appellant stepped backwards and fell through the patio roof.

The appellant commenced proceedings against the respondents, relying on their duty owed as occupiers under the Occupiers Liability Act 1985 (WA) and also generally under and the *Civil Liability Act 2002* (WA) (CLA).

THE DECISION AT TRIAL

The Court found that the risk of injury by stepping on the laserlite roof was a risk that would have been obvious to a reasonable person in the position of the appellant and accordingly, there was no duty to warn on the part of the respondents pursuant to s5O of the CLA. The Court went on to find that, even apart from s50, the appellants were not required to warn the appellant as working on a roof is always dangerous and presents some risk of injury. The appellant constructed his own work method and did not request, or expect, Mr Tomlinson's input. Finally, the Court found that even if Mr Tomlinson had warned the appellant of the risk, the circumstances of the accident meant it was unlikely that a warning would have prevented the accident.

Gors appealed to the Supreme Court of WA on various grounds related to the application of s 5O of the CLA and the duty to warn of a risk (specifically, an obvious risk).

THE DECISION ON APPEAL

The appeal was dismissed on all grounds. In doing so the Court of Appeal confirmed:

- There are authorities which make it clear that in some instances a foreseeable risk is so obvious and the remoteness of the likelihood of it eventuating may be such that reasonableness may require no response to the risk at all;
- The trial judge did not err in finding that the risk of harm was not a foreseeable risk (for which a warning was required);
- There was no reason to disturb the finding of the trial judge that the risk of stepping onto the patio roof was obvious;
- The appellant's argument, that s 5O CLA is limited in its application to cases where voluntary assumption of risk is pleaded, and that the trial judge erred in applying s 5O because there was no pleading or finding that the appellant voluntarily assumed the risk of harm, could not be substantiated.
- The finding that the appellant fell through the patio roof simply because he stepped backwards without looking (and therefore there was no causal link between the failure to warn and the occurrence of the incident) was open to the trial judge.

IMPLICATIONS FOR YOU

This decision confirms that (subject to s5O(2) of the CLA) there is no duty to warn of an obvious risk.

KEVEN GORS by his Plenary Administrator JANET CHRISTINE GORS -v- TOMLINSON [2020] WASCA 164

GET IN TOUCH

GEORGIA HANCY
SENIOR ASSOCIATE

+61 8 6424 0407
georgia.hancy@bnlaw.com.au