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Bunnings not liable for injuries on raised playground surface

Bunnings Group Limited ("Bunnings") v Giudice [2018] NSWCA 144

Key Points

- The Court needs to be careful when considering the precautions available to an occupier, including assessing the burden on the occupier with respect to each and every precaution.
- Bunnings appealed the decision of His Honour Judge Wilson (DCJ) from the District Court of New South Wales. Ms Giudice was awarded damages in the amount of $179,600 after she sustained an injury at Bunnings Warehouse in Ashfield on 4 April 2016.
- Bunnings alleged that the primary judge erred in finding breach of duty and causation.

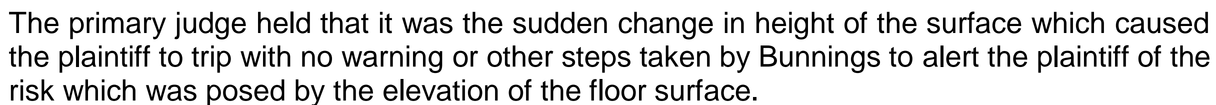
Facts

- Ms Giudice attended Bunnings with her grandson who was in the play area. The play area was fenced.
- Ms Giudice went to attend to her grandson in the play area, opened the gate with her right arm, stepped forward and tripped and fell, sustaining injuries to her right wrist.
- Photographic evidence of the play area showed that the surface of the play area was higher than the concrete surface of the floor.
- Ms Giudice alleged that Bunnings was in breach of a duty owed to her by permitting the gradient to exist or by failing to warn her of the gradient.
- At the edge of the safety matting there was a broad yellow painted line. The line clearly delineates the end of the concrete floor and the beginning of the play area with the safety matting. When the gate is closed, the yellow line is more difficult to see by a pedestrian.
- Warning signs were on the gate recommending that children need to be supervised.

District Court Proceedings

Ms Giudice gave evidence that she did not see the differential in height of the floor of the play area nor did she see any of the yellow markings at the entrance to the gate.

Bunnings presented evidence that there had been no incidents involving any adult or child falling or tripping at the entrance to the playground in at least four years.



The primary judge held that it was the sudden change in height of the surface which caused the plaintiff to trip with no warning or other steps taken by Bunnings to alert the plaintiff of the risk which was posed by the elevation of the floor surface.

The primary judge also held that the risk of injury was foreseeable, not insignificant and a reasonable person in the position of the defendant would have taken precautions to either remove the risk entirely or take steps to reduce the risk.

The specific precautions which the primary judge considered Bunnings should have taken included providing a warning sign, varying the colour of the lip as opposed to the other areas or altering the surface between the two areas to ensure a flush surface.

Appeal

Bunnings submitted that the primary judge erred in relation to his findings that Bunnings breached its duty of care. Bunnings also submitted that as to causation, Section 5D(1) of the *Civil Liability Act* ("CLA") was not satisfied.

Bunnings was successful in its appeal.

Breach

The primary judge addressed Section 5B(1)(c) of the CLA in one sentence - finding that Bunnings should have taken precautions to either remove the risk entirely or reduce the risk eventuating.

The Court of Appeal criticised this approach because it conflated the ways in which Bunnings should have taken precautions. The approach was flawed because the precautions carry different burdens. For example, the burden of installing a Watch Your Step sign would be very different from the burden of aligning the surface of the play area with a concrete surface.

Causation

The Court of Appeal also held that the test for causation had not been satisfied. Specifically, the primary judge failed to make a determination or positive finding that had a warning sign had been in place, Ms Giudice would have seen it, taken heed of the warning, and not fallen.

Conclusion

The Court of Appeal commented that the parties chose to litigate the dispute with serious limitations upon the available evidence. On that basis, a retrial was not appropriate.

The Court of Appeal also held that Ms Giudice failed to establish that the risk of harm was not insignificant. Evidence was led that no person had sustained injury from a fall as she entered the opening of the child-proof gate, and that up to 10 children use the play area each day. Thus, the risk of fall was low. For those reasons, Ms Giudice failed to establish that the risk of harm was not insignificant in accordance with S5B(1)(b) of the CLA.

On that basis, a reasonable person in the position of Bunnings would not have done anything more than it had already done, by delineating the fencing area with yellow lines, a fence and a child-proof gate which obliged entrants to stop. For these reasons, Ms Giudice failed to establish the matters in section 5B(1) of the Civil Liability Act.

Lessons Learned

- The plaintiff bears the onus of establishing that of the precautions available to an occupier, a reasonable occupier would have in fact implemented them.
- The Court needs to be careful when undertaking the exercise of considering the precautions available to an occupier, including assessing the burden on the occupier with respect to each and every precaution.
- The Court needs to make a considered finding and determination as to causation to satisfy S5D of the CLA.
- A foreseeable risk may be insignificant (thus S5B(1) of the CLA not satisfied) if it can be shown no similar incidents had occurred for a significant period of time.

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