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Cleaners who are not perfect are not necessarily negligent:
Court of Appeal win for cleaning contractor represented by HBA Legal

Argo Managing Agency Pty Ltd v Al Kammessy [2018] NSWCA 176

Key Points

- It is possible to win a 'contract cleaner' matter where a spill is not detected by a cleaner, provided they are exercising "reasonable care". Perfection on the part of the cleaner is not required.
- Reasonable care to identify and remove hazards is the duty. This duty does not guarantee that contract cleaners will remove every hazard in their surveillance of floors.
- The initial win to the plaintiff in the District Court was based on a finding of a "casual act of negligence" on the part of a cleaner – this was overturned by the Court of Appeal.
- A contract between a 'contract cleaner' and a principal (in this case **SCentre**) does not determine the duty owed by the cleaner to the plaintiff – it might inform aspects of the duty but it does not determine the duty.
- While building the case prior to appearing in Court, being unrelenting in tracking down key witnesses is crucial.

Background

Mr Gassan Al Kammessy was shopping with his daughter at a Westfield Shopping Centre (Liverpool, Sydney) on 28 December 2013. At 10.44am, he slipped and fell on liquid on the floor. The floor consisted of terrazzo tiles (commonly placed in shopping malls). Prior to falling, Mr Al Kammessy had noticed "a spot of water" on the floor and told his daughter to walk around it. Immediately after, he turned towards his daughter and slipped. He gave evidence that after falling, he noticed that his clothes were wet as well as his arms and legs. He said the water was clear.

Atlantic Cleaning & Security Pty Ltd (**"Atlantic"**) was the cleaning company contracted to provide cleaning services at the shopping centre. The services included, but were not limited to, regular "loops" by cleaners walking with cleaning trolleys. The trolleys contained all necessary equipment to deal with any spill identified and to collect rubbish.

CCTV confirmed that a cleaner, employed by Atlantic, had conducted an inspection of the fall site at 10.35am (nine minutes before the fall). It was common ground between the parties in Court that this inspection had been conducted with reasonable care and that the liquid was not on the floor at that time

(10.35am). The same cleaner also inspected the fall site a short time prior at 10.28am.

A different cleaner walked past the vicinity of the spill (and the soon to be fall site) at 10.43am (approximately 90 seconds before Mr Al Kammessy slipped). Therefore, the evidence demonstrated that cleaners had been in the vicinity of the fall at 16 minutes, nine minutes and 90 seconds prior to the fall.

Mr Al Kammessy brought proceedings in Sydney's District Court of NSW against both Atlantic and SCentre Shopping Centre Management Pty Ltd ("SCentre"), the managing agent of the centre. Proceedings were resolved by consent against SCentre many months before the District Court hearing.

Atlantic went into liquidation just prior to the District Court hearing and its insurer, Argo Managing Agency Limited for and on behalf of the Underwriting Member of the Syndicate 1200 at Lloyd's ("Argo"), was substituted as the second defendant pursuant to the Civil Liability (Third Party Claims Against Insurers) Act 2017.

Preparing the Case

Over several years, HBA Legal has defended hundreds of retail/shopping centre/supermarket cases.

A key aspect of these cases is witness preparation. This can be complicated in contracting cleaning matters due to the transient nature of the workforce. In this case, HBA made significant efforts to ensure cleaners present at the time of the fall were identified and located. This included an international search, mainly via social media.

After building a good rapport with local witnesses, HBA was assisted by those witnesses to successfully track down other key witnesses via social media sites including Facebook. HBA's lawyers were unrelenting in the social media search (even after the hearing had started), resulting in Mr Mark Nguyen appearing via video link from Vietnam to give evidence that was ultimately crucial to our eventual win on Appeal.

District Court Hearing

The matter was heard over the course of seven days before His Honour Judge Maiden DCJ from 28 March 2017 to 2 June 2017. HBA Legal appeared for Argo and instructed Ben Wilson of Counsel.

During the hearing, the female cleaner seen on CCTV conducting her inspection 16 minutes before Mr Al Kammessy's fall, gave evidence she had passed more or less directly over the location of the plaintiff's fall. The cleaner could be seen on the CCTV moving her head from side to side inspecting the floor. It was accepted that the spill (which would have been slightly to her left as the cleaner made her way through the centre) was not present when she conducted her inspection at 10.28am. The same cleaner conducted a further inspection 9 minutes before the plaintiff's fall. There was no dispute that the cleaner had carried out her duties appropriately.

A second male cleaner, Mr Nguyen, took the same route as the first cleaner, only this time the inspection was 90 seconds prior to the fall. Mr Nguyen gave evidence that if the spill was present at that time he would have cleaned it, and there was nothing unusual which caused him to look at the floor. He also gave evidence he could see both sides of the common area without moving his head from side to side.

During the course of the hearing, it was clear that His Honour was accepting of Mr Al Kammessy as an honest witness. At the same time His Honour clearly accepted the first female cleaner's evidence – she did not falter in giving her evidence and demonstrated she was proud of her work as a cleaner.

His Honour also appeared to be impressed by Mr Nguyen who was very straight-forward in his answers. In particular, Mr Nguyen stated that he regarded the request to give evidence as his responsibility to the company he once worked for.

His Honour gave an ex tempore judgment in which he found that Atlantic had an adequate system of cleaning. However, His Honour found that the second cleaner did not look to his left towards the area where the plaintiff fell, and that this was a 'casual act of negligence' in failing to properly inspect for spillages.

Mr Al Kammessy's employment history became relevant given His Honour, in the District Court, awarded a generous amount for past and future economic loss (and non-economic loss). The total damages awarded were $476,736.42. Mr Al Kammessy alleged that following the incident he struggled with his role as a case coordinator assisting refugees once they arrived in Australia. His role was mostly sedentary using a computer and sitting at a desk. His employer was largely government funded but the funding had ceased and the company went through a restructure. Employees were asked to reapply for jobs. Mr Al Kammessy was offered alternative employment for less pay, however chose to take a voluntary redundancy. He was unable to secure alternative employment after this redundancy.

HBA was of the view that His Honour's findings should be subject to scrutiny on Appeal. Although different factually, the 'casual act of negligence' finding was similar to His Honour's reasoning in McQuillan v Woolworths, (also a matter where HBA Legal acted to defend the matter for Woolworths and took the case to Appeal and won) where a customer had slipped on a grape. His Honour's decision in this case was delivered two weeks after his decision in McQuillan had been overturned by the Court of Appeal.

Argo appealed to the Court of Appeal on liability grounds.

Court of Appeal

The Court of Appeal comprised McColl JA, White JA and Sackville AJA.

On behalf of Argo, Mr Sexton SC submitted that the primary judge had erred in finding that the fluid came to be present on the floor before the second cleaner passed through the area where the plaintiff fell. All three judges determined that on balance the water, on which the plaintiff slipped, was present

when the second cleaner passed through the area.

Both parties tendered the CCTV footage. Interestingly, Sackville AJA stated it's important to keep in mind the limitations of CCTV and cautioned parties' reliance on CCTV footage as it can be misleading.

Sackville AJA, referred to the "sage advice" of Lord Reid; *"lawyers are not experts in reading or construing photographs and thus should generally not adopt their own interpretation of the photographic evidence on contested issues".*

While the CCTV did give a precise timeline of events, it could not explain other important factors including the dimensions of the area near where Mr Al Kammessy fell and the distance to the nearby shops and structures. By viewing the CCTV footage alone, it was difficult for the viewer to obtain a clear understanding of the precise location of the fall. It was also difficult to determine how close the cleaners came to the accident site or how many patrons walked over or near the accident site.

Counsel for Argo emphasised the duty required of Atlantic was not perfection, but only to take reasonable care to prevent the materialisation of the risk of a patron slipping and falling.

In considering this issue, Sackville AJA noted the primary judge found Atlantic had "*an adequate system for cleaning*". Sackville AJA noted the contractual terms between Westfield and Atlantic (to inspect the common malls every 20 minutes) did not define the scope of Atlantic's duty to patrons. The finding that Atlantic had an adequate system would likely have defeated any claim by the plaintiff.

In addressing breach of duty of care, Sackville AJA found:

> *"[101] …the terms of the contract between Atlantic and SCentre inform, but do not determine, the scope of the duty of care owed by Atlantic and [the second cleaner] to patrons of the Centre, including the respondent. …"*

And:

> *"[116] … The fact that [the second cleaner] did not detect the wet patch on which the respondent slipped does not of itself necessarily demonstrate that [the second cleaner] or Atlantic breached the duty of care they owed to the respondent as a patron of the Centre…"*

Sackville AJA found the evidence did not establish that the wet patch extended over more than a small area. It was difficult to detect because of the design of the terrazzo floor. The area was heavily trafficked. There was no reason for Mr Nguyen to expect wet patches in the subject area. Sackville AJA concluded the wet patch was present when Mr Nguyen conducted his rotation and that he had failed to detect the wet patch, but stated:

> *"[129] … the duty owed by Atlantic and [the second cleaner] to the respondent and other patrons was to exercise reasonable care to identify and remove potential hazards to their safety. It was not to guarantee that all hazards would be removed. …"*

The best summation of Argo's position on the failure to detect the water lies in Mr Sexton SC's oral contention:

- *"All that can be drawn from the CCTV footage is that the respondent slipped on something, can't tell how big it was, you cannot tell how observable it was and it's a very long and in our submission untenable bow to suggest that whatever it was that caused the [respondent] to fall was something that a cleaner, who had other responsibilities, ought to have observed if he was keeping a reasonable look out in circumstances where what it's said that the respondent slipped on was clear fluid on a terrazzo floor".*

Paragraph 129 of the judgment of Sackville AJA summarises the position of the majority of the Court:

- *I do not think that it was open to the primary Judge to infer from the CCTV footage that Mr Nguyen was remiss in the way he went about the task of inspecting the corridor for hazards. In the absence of an adverse finding as to the credibility or reliability of Mr Nguyen's evidence, there is no sound basis for concluding that he did not conduct the inspection with reasonable diligence and care. On the basis of the finding that the wet patch was present at 10.45, Mr Nguyen failed to detect the hazard that led to the respondent's fall. But the duty owed by Atlantic and Mr Nguyen to the respondent and other patrons was to exercise reasonable care to identify and remove potential hazards to their safety. It was not to guarantee that all hazards would be removed. And it is not permissible to conclude with the benefit of hindsight that by reason of Mr Nguyen's failure to detect a particular hazard that he and Atlantic breached the duty of care they owed to the respondent".*

Argo won the Appeal, which amounts to a significant win for the contract cleaner in this factual scenario. While the matter was decided on a factual basis, it is still a very useful case for contract cleaners.

Lessons Learned

1. The duty of a contract cleaner is to exercise reasonable care. This does not mean perfection is required on the part of cleaners.

2. A Court will use the probability theory to make a finding as to the timing of a spill. CCTV has limitations and is not always a safe means of establishing what happened. This demonstrates that the "probability theory" of Hayne J in *Kocis v SE Dickens Pty Limited* is very much alive and this allowed the Court to hold that the wet patch was created in the nine minutes before the fall.

3. The facts in this case are <u>often</u> seen in 'contract cleaner' matters in general.

4. The evidence is crucial – early identification and conversations with cleaners must be a priority.

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