Personal Responsibility: Recent Developments in the New South Wales Courts

Limitation Act Developments with the Concept of Discoverability

Preamble:

In late 1990s and the early years of this century the Australian appellate courts toughened up on the concept of duty of care in the context of personal injury liability cases.

Prior to this the situation had developed whereby it was generally accepted that virtually everything which happened to an injured plaintiff was foreseeable, and at least at the trial court level, should have been preventable. This led to easier access to personal injury damages to plaintiffs, more cases being brought through the courts, and the subsequent "crisis" which led to Tort reform in the various State and Territory jurisdictions in Australia from 2002.

In simple terms a risk of injury was foreseeable where it was not far-fetched or fanciful. In deciding whether there had been a breach of duty in a failure to take steps to prevent the risk from occurring, the courts considered the magnitude of the risk and degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action; *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

However the High Court commenced the tightening of the common law in *Romeo v Northern Territory Conservation Commission* (1998) 72 AL JR 208, a case where an intoxicated teenager wandered from the parking area near a cliff top reserve, to a cliff and fell over. That case emphasised that the duty of care of occupiers is to plaintiffs taking reasonable care for their own safety.

Justice Heydon led the charge in the New South Wales Court of Appeal to tighten the concept of breach. He is now a judge of the High Court. But in 2002 when as a judge of the NSW Court of Appeal he stated:

> *"Almost any injury that happens is an injury in respect of which there can be said to have been a foreseeable risk. In that sense, there was a foreseeable risk of injury here. But it was not a reasonably foreseeable risk of injury to pedestrians using reasonable care for their own safety"; Richmond Valley Council v Standing [2002] NSWCA 359.*

There were a number of cases in 2002 involving road authorities where persons had tripped over cracks in footpaths, as in *Standing*. In these cases the New South Wales Court of Appeal overruled trial judges finding for plaintiffs on the basis that the cracks should have been repaired: *Lombardi v Holroyd City Council & Anor* [2002] NSWCA 252; *Burwood Council v Byrnes* [2002] NSWCA 343; *RTA v McGuinness [2002] NSWCA 210:*

In these cases not only did Heydon JA and other justices of the Court of Appeal focus on what a reasonable pedestrian would have done i.e. look where they were walking, but also the trial courts were admonished to adopt commonsense.

This led to a critical examination of the use of engineering experts in personal injury cases. In the case of *Makita (Aust) Pty Ltd v Sprowles* [2001] NSWCA 305 Justice Heydon was extremely critical of the almost universal practice of plaintiffs' lawyers in engaging engineering experts to say that a particular finish on a stair was unsafe because it did not have adequate slip-resistance, when there was a history of incident-free use of the stairs. In *Makita* Justice Heydon stated:

> *"The lay history of incident-free use of the stairs suggests that they were not slippery. That inference from that history is preferable to Professor Morton's conclusions. If the stairs were not slippery, the defendant was not in breach of its duty of care as occupier and employer.*

The plaintiff had fallen on stairs leading from a rooftop car park to the offices below where she worked, having used the stairs every day for over two years prior to the accident. She relied on the liability expert Professor Morton to say that the stairs should have been provided with a non-slip finish, the stairs being smooth concrete.

This then was the background when the various States enacted the Tort Reform legislation from 2002, for example in New South Wales the *Civil Liability Act 2002*. The concept of foreseeability

was supposedly tightened with the words "not far-fetched or fanciful" being replaced by the words "not insignificant"; s.5B(1) *Civil Liability Act NSW*. There were then general principles stated, which in effect repeated the common law, for example the subsequent taking of action which would have avoided a risk does not of itself give rise to liability. The liability and quantum provisions of the *Civil Liability Act* have been dealt with in numerous papers since 2002. The purpose of this paper is not to revisit old ground, but to demonstrate a possible trend developing in 2009 in the trial courts.

There has been a significant reduction in the number of litigated personal injury public liability actions since 2002, and I believe it fair to say that a very significant reason for this is the cost restrictions on plaintiff's lawyers established in the *Legal Profession Act NSW* in 2002; where personal injury damages do not exceed $100,000, the maximum solicitor and barrister costs are fixed at 20% of the amount recovered, or $10,000, whichever is the greater; s.338.

The concept of personal responsibility has weakened:

A recent trend we have seen in conducting liability litigation over the years since 2002 is that the trial courts are softening in their approach to the concept of breach of duty since 2002 when we had the combined effect of tough appellate court decisions and Tort reform. Now personal injury liability cases are run basically the same as they were prior to 2002; in virtually every slip and fall case a plaintiff's lawyer will engage an engineering liability expert, just as was done prior to *Makita*. The liability experts attempt to address the questions demanded by Justice Heydon in *Makita*'s case; which are:

(1) Did the report furnish the trial judge with the necessary scientific criteria for testing the accuracy of its conclusions?

(2) Did the report enable the judge to form his own independent judgment by applying the criteria furnished to the facts proved?

(3) Was the report intelligible, convincing and tested?

(4) Did it contain within itself materials which could have convinced the trial judge of its fundamental soundness?

But whatever the limitations placed by Justice Heydon and his fellow appellate judges in 2002, the trial judges are relying simply on plaintiffs' liability experts to get plaintiff's "over the line" in heavily contested liability cases, where the defendant has brought evidence to say that there have been no similar prior accidents to indicate that there ever was a risk of injury. I refer to two examples in which we were involved in 2008.

Jandson Pty Ltd v Welsh [2008] NSWCA 317

This was a case which we contested at the District Court level, and on Appeal, and are appealing to the High Court in an attempt to bring the NSW judges "back into line".

The plaintiff and her husband attended a display home at Kellyville in Western Sydney on 14 January 2006. In walking through the single storey house there was a carpeted area which led to a timber floored area at the rear. At the end of the carpeted area there were two steps leading down to the timber floor. The plaintiff was looking at the furnishings and did not see the difference in floor height between the end of the carpet, where the stairs were, and the timber floor. She was not looking where she was walking. She stepped over the stair, not knowing it was there, and fell sustaining her injuries. The plaintiff's solicitors engaged the liability expert Neil Adams. He stated that the absence of highlighting nosing strips, the absence of sloping handrails and the absence of any warning sign resulted in the plaintiff's fall. In his view the uniformity of the carpeting over the stairway created a risk of injury which could have been prevented by one of the three steps he mentioned. We called lay evidence to state that despite extensive inspections of the display home over years there had been no reports of injury. We called the architectural expert Dr John Cooke to say that there was no requirement of the stairs to have any of the preventative measures outlined by Mr Adams, given that it was a domestic dwelling. Nevertheless the trial judge her Honour Judge Ashford found for the plaintiff and awarded substantial damages. The risk of injury was not insignificant and should have been prevented by one of the steps stated by Mr Adams.

At the Court of Appeal by majority two judges to one, the result was the same. The leading judgment was by MacFarlan JA who stated that the absence of reported injuries, while of assistance to the defendant/appellant, was not conclusive. The absence of reported injuries did not negate the inference to be drawn from the circumstances found by the trial judge that there

was a not insignificant risk of someone being injured. The weight to be attached to an accident-free history involves a question of fact to be determined in the light of all relevant circumstances.

It would appear that the "weight" in 2008 was not as compelling as in 2002. The fact is that circumstances differ in every case and this allows distinctions to be drawn.

Dr Cooke had stated in evidence that while people were encouraged to look around, the premises being commercial to the extent that they were open for display to prospective purchasers of similar houses, that person still needed to pay attention to where they were walking. The Court of Appeal accepted Mr Adams' evidence that changes in levels in single storey houses were unusual. Accordingly one of the preventative measures Adams stated should have been taken. Conversely the sole judge in dissent Hammerschlag J stated that the absence of other injuries over an extended period of time provides compelling support for the conclusion that the risk posed by the steps was insignificant.

We had a similar result in the matter of *Kenway v Stojan (No.9) Pty Ltd* before the District Court Chief Judge Blanch, judgment delivered 27 November 2008. This was a case where a lady finished work in a shopping centre. She walked to her car in the Plaza car park before realising that her husband had the keys. Her husband was at a local hotel. She decided to take the shortest route to the hotel by steps at the rear of the car park leading to a park which led to the hotel. It was dark and there was no lighting in the park, for which the Local Council was the occupier. There were clothing bins in the Plaza area adjacent to the stairs, which were a further factor in limiting the light at certain parts of the stairs, including the landing where this plaintiff tripped and fell.

The stairs were on Council land. The Plaza had been in operation since 1976. There was never a report to the managing agent of the Plaza of any complaint or accident concerning the stairs. The plaintiff's accident occurred in June 2003. There were alternative routes the plaintiff could easily have taken i.e. a lit footpath. The plaintiff took the shortcut.

Some years before the incident the local Police had written to the Council expressing concern about drug users in the park after dark. It was suggested that the clothing bins be removed because they were providing concealment. Council referred this letter to the Plaza managing agent but no action was taken prior to the plaintiff's fall.

If there was ever a case to contest the alleged negligence of the managing agent, this was it. Firstly the steps and park were Council land. Secondly there was never any notice to the Plaza that the bins caused a light deficiency to stair users. However his Honour said that the bins should have been removed after the Police letter had been provided and the insured was at fault in ignoring that letter.

On instructions we are taking this case on Appeal. It is another example of the trial courts currently not attaching much weight to an extended period of incident-free use of a stairway.

We are appealing the *Welsh* case to the High Court on the single ground that the steps were not unusual and the failure to provide a handrail, warning sign or nosing was not called for. The case will give us an indication as to whether the High Court is interested in this area of negligence at this time. The makeup of the High Court has significantly changed since the late 1990s and early years of this century. A trend which is firmly coming out of recent trial court decisions is that the fact of incident-free use of any particular place is not necessarily a substantive factor in trial judge decision making. Furthermore, notwithstanding the stringent criticism of the use of "experts" by the appellate courts in 2002, their use is just as widespread as at that time, and they are being relied on by trial judges to find for plaintiffs. The other adage which is as true now as it was before 2002, is that the result in any case significantly depends on the judge you draw.

***Limitation Act NSW* – Date of Discoverability:**

For injuries which have occurred since 6 December 2002 there is no longer a discretion in trial judges to allow an extension of time where it is just and reasonable to do so. The limitation period for these injuries is three years running from the date on which the action was discoverable; s.50C. The cause of action is discoverable when the plaintiff knows or ought to know of each of the following facts:

(a) The fact that the injury or death concerned has occurred,

(b) The fact that the injury or death was caused by the fault of the defendant,

(c) In the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action; s.50D(1)

There have been a number of lower court decisions concerning the date when a plaintiff should be aware of the concept of fault by a defendant. In a *Limitation Act* dismissal Motion we brought in the matter of *Daniela Bet v UTS Haberfield Club Ltd* in the District Court Judge Elkaim on 18 June 2008 accepted that the concept of fault did not require the plaintiff to have a legal opinion. The plaintiff was aware that persons had been spilling drinks on the dance floor of the Club where she fell. She was aware of people complaining to the bar staff to clean it up. In his Honour's view that was enough. If the test required the intervention of expert advice, the section would have said so. Further his Honour stated that such an interpretation is contrary to the intention of the section which is to impose upon a potential plaintiff the obligation to commence proceedings within three years of knowing that there was a defendant who had been at fault. This case is presently on Appeal by the plaintiff.

The test has been further explored by her Honour Justice Fullerton of the Supreme Court of New South Wales on 26 September 2008 in *Foster v QBE Insurance (Australia) Ltd* [2008] NSWSC 1004. The construction of the word "fault" was such that it related to the time at which the plaintiff knew, or ought to have known, that there was a causative link between the defendant's conduct and the injury suffered. In *Foster*'s case the plaintiff was a boner at an abattoir, being contracted to the abattoir operator Rockdale Beef by a labour hire agency. Rockdale Beef had leased the premises to NAIQ Pty Ltd. The plaintiff was injured in November 2003 but not aware of the contractual arrangements concerning responsibility for the abattoir. The Statement of Claim was not filed until 2 April 2008.

Her Honour Justice Fullerton stated that knowledge of "fault" within s.50D was demonstrated if a defendant could establish that the plaintiff knew or ought to have known that the defendant was responsible for the health and safety of contractors such as the plaintiff in the abattoir. It is not sufficient for a defendant to show that a plaintiff's solicitor had knowledge of responsibility for the place of the accident. The knowledge has to be with the plaintiff.

However the defendant did not succeed on its Motion because there was a significant area of disputed facts as to knowledge of fault. Consequently the judge ruled that the issue was to be determined by the trial judge when determining all the disputed facts in the substantive proceedings.

We believe that this is likely to be the way the Courts will rule in many limitation Motions seeking summary dismissal on the basis of a plaintiff's knowledge. The concept of fault irretrievably is related to the liability issue of whether the defendant has been negligent or in breach of some statutory duty. There are likely to be substantive issues as to a plaintiff's knowledge. These issues will go not only the *Limitation Act* questions, but also to the liability question. For example if a plaintiff knew of a particular area being unsafe, such as a balcony at a Club, then not only is that evidence relevant to his knowledge of fault, but it is also relevant to liability, in that a defendant would say that the person with knowledge exercising due care for his or her own safety would avoid the balcony. Where the facts are disputed and are involved in a number of issues which can only be determined by substantive proceedings, then questions of fault will be stood over to the trial judge.

There is no discretion to extend the date of discoverability. The main area of dispute we foreshadow, as well as the fault concept, is the date of the injury being sufficiently serious. We predict this will be a particular factor in psychiatric cases especially. For example in molestation cases where the real effect on a person abused at a young age is not known until many years afterward. We await the decision of the Appellate Courts with interest.

We now have a Court of Appeal decision from the New South Wales Court of Appeal 4 March 2009; *Baker-Morrison v State of New South Wales* [2009] NSWCA 35. That case involved a minor injuring the fingers of her right hand on 26 May 2004. The Statement of Claim was issued on 21 June 2007, being twenty-six days after the three years had expired. The respondent, being the State of New South Wales, sought to strike out the claim on the basis that it was statute-barred. A minor no longer has three years from the age of 18 in which to bring a case. If the minor has a capable parent or guardian, the facts required for discoverability are taken to be those known or ought to be known by the capable parent or guardian; s.50F(3).

Johnstone DCJ struck out the matter in the District Court. The decision was set aside by the Court of Appeal. The Court heard that in ascertaining the content of the word "fact" in s.50D(1) the factors necessary to be determined, include those necessary to establish legal liability. In

Baker-Morrison until the plaintiff's mother was aware or ought to have been aware of the availability of a protective guard or covering along the area of the sliding glass door, where the fingers of the two years old girl were caught, she could not be said to be aware that the daughter's injury was caused by a failure on the part of the State to take reasonable care for her safety.

S.50D(2) states that a person ought to know a fact at a particular time if the fact would have been ascertained by the person had the person taken all reasonable steps before that time to ascertain the fact. The Court confirmed that the test was not to look at enquiries a solicitor should make.

Johnstone DCJ held that the mother had relevant knowledge when she consulted her solicitor on 1 June 2004, knowing of the injuries to her daughter and that the Police Department occupied the premises, and was responsible for those premises. But that was not enough. She had to be aware of a device which could make the sliding door safer. Thus concepts of responsibility for a certain area are not enough. It is necessary for the putative plaintiff to know of a fact which would lead to the fault of a defendant.

Conclusion:

It is safe to say that when construing s.50D NSW courts will be very cautious, knowing that there is no discretion to extend the limitation period. Already the concept of knowledge of fault has been "watered down" in *Baker-Morrison*. Furthermore we can expect more decisions on defendants' dismissal motions to be referred to trial judges, thus deferring the Limitation Act issue to the trial.

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