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A Crack in the Plaintiff's Case?

McKenzie v Charles Stewart & Company Proprietary Limited (trading as Colac Rental Management) [2024] VCC 429

Introduction

Josiah Lee, Senior Associate, and Natasha Fiodoroff, Special Counsel, of HBA Legal acted for the successful second defendant in this matter after a hard-fought hearing over 12 days with two juries discharged. The matter was determined by judge alone by Her Honour Judge Myers.

Background

The plaintiff, Alan McKenzie, was the tenant of a property located in Colac, Victoria. The plaintiff commenced proceedings against the landlord, Graham Newman Pty Ltd as first defendant and the real estate property manager, Charles Stewart & Company Pty Limited as second defendant. The first defendant was released from the proceedings on the first day of trial.

The plaintiff alleged, in his Statement of Claim that *“On 27 September 2019.... As he attempted to walk up the stairs at the rear of the Property into the house... he tripped on a higher step/raised and exposed lip which was present on part of the step causing the Plaintiff to fall and thereby suffer injury...”*

The plaintiff sustained a left ankle injury in the incident. There were no witnesses to the fall. The plaintiff's case centred around whether the defendant's assessment of the stairs was reasonable and appropriate.



Plaintiff's case

The plaintiff gave evidence that he had complained about the cracked and unsafe state of the steps and the absence of a handrail prior to the incident. Her Honour did not accept the plaintiff's evidence on this.

Following the incident, in October 2019, the plaintiff's brother helped him vacate the property. He recorded two short videos being a reconstruction of the incident. The plaintiff's senior counsel submitted these videos provided the best description of what happened in the incident. Her Honour found the plaintiff's account of the incident in the videos was different to his oral evidence. Her Honour also found that each of the contemporaneous accounts recorded in the hospital notes and the GP notes were inconsistent with the account given in oral evidence.

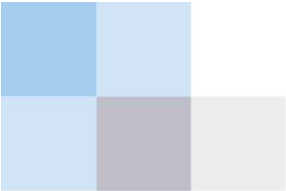
The Law

The defendant owed the plaintiff a duty to take such care as was reasonable in all the circumstances to ensure the plaintiff was not injured by reason of the state of the premises or of things done or omitted to be done. That is, that an occupier is required to take reasonable care to avoid foreseeable risk of injury.

The features of the stairs were found to present a risk of harm, which was not insignificant. The absence of a handrail added to the foreseeable risk of harm, in that there was no handrail to grab in the event of mishap.

The plaintiff submitted the defendant had been negligent in not ensuring its staff had the appropriate training to identify or detect abnormalities in the steps. Further, that its assessment of the steps was inadequate because their state of repair had gone unnoticed. Consequently, if the defendant had not breached their duty, those factors would have been addressed.

Her Honour found that reasonable care required the defendant to regularly inspect the house, respond reasonably to defects drawn to its attention, and ensure repairs were made which such inspections or notice disclosed to be reasonably necessary. The nature and extent of the duty did not require the defendant to train their staff in relation to assessment of the concrete steps and of the requirement of handrails. The steps were old and even in places but solid and



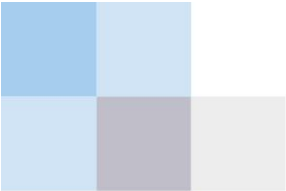
reasonably fit for purpose. The duty owed is not one of strict liability. It is not a duty to ensure that premises are as safe as they can reasonably be made to be.

Her Honour said [at 301] "...Mr McKenzie has established no more than that the steps could have been made safer; that is different from establishing an unreasonable want of care." The plaintiff failed to establish that the defendant had breached its duty of care.

Turning to causation, Her Honour was not persuaded the incident occurred in the manner alleged by the plaintiff in his oral evidence and was not satisfied that any defect in the steps was a cause of the incident.

If Her Honour's finding of the plaintiff's account of the incident was wrong, her Honour considered the plaintiff's oral evidence regarding the position and manner in which he placed his foot on the step. Her Honour found it was more probable than not that the plaintiff only contacted the step with the front of his boot, that his foot slipped back off the step because he did not have enough of his boot on the step. On the basis of those findings, the plaintiff had not satisfied his onus to establish the incident occurred as per his oral evidence. Her Honour was not persuaded the injury would have been averted if there had been a handrail present for several reasons. The plaintiff's reasoning was hindsight reasoning. Noting the steps were wide, there would have been various points of entry at a variety of angles; there may have been the need for more one handrail; and a handrail affixed to the wall would have been out of the plaintiff's reach. Her Honour found the plaintiff had not established that any breach of duty regarding the features of the step or absence of a handrail was the cause of his injuries.

Her Honour addressed contributory negligence. The defendant submitted the plaintiff was familiar with the condition of the step. He had used them 2,325 times in the 31 months he had lived in the house; he had warned his parents about the step; and he did not place a sufficient part of his foot onto the step to safely ascend. Her Honour accepted the plaintiff's evidence that he had sufficient light to see where he was going. He had held the washing basket in front of him in such a way that he could not see where he was placing his feet. Her Honour found if he had placed at least the ball of his foot onto the step he would not have fallen. Had he been paying proper attention to where he was stepping, he could have avoided the part of the step where the crack was. Her Honour found the plaintiff's conduct went beyond mere inadvertence, inattention or misjudgement. The plaintiff's failure to take reasonable care for his own safety



was the principal cause of the injury suffered. Her Honour considered contributory negligence with a reduction of 70% to be appropriate.

Critical findings

Her Honour found several aspects of the plaintiff's evidence to be inconsistent, reconstructed and at odds with normal human behaviour. A primary criticism was that a reasonable person aware of the unsafe condition of the stairs would take care avoid the crack and to not step directly on it.

Additionally, hospital and GP records recorded that the plaintiff said he "fell over step at home", "...tripped on a concrete step and foot twisted", and "walking on concrete twisted left foot". Each of these accounts was inconsistent with the plaintiff's oral evidence, suggesting the injury occurred because he had simply tripped on a step.

The plaintiff gave oral evidence that he had no recollection of his brother taking the videos that describe the account of the injury because he was on heavy medication. Her Honour commented that he was "pretty coherent" in the videos. Further, the plaintiff refused to confirm whether the video a re-enactment. On the balance of probabilities, Her Honour was not persuaded the injury occurred as alleged in his oral evidence. Given his familiarity with the characteristics of the steps, had he been more mindful of where he was stepping, it was likely that the injury would not have occurred regardless of their cracked state or the absence of a handrail.

Lessons Learned / Implications

- A managing agent owes a duty of care to tenants to take reasonable care in inspecting, maintaining, and reporting on required repairs for any premises under their management.
- The duty to inspect and keep a premise safe for tenants does not extend to detecting structural issues. Absent any obvious structural issues not detected through routine inspections, the duty to prevent all trips and falls is beyond the scope of reasonable duty of care.
- A good and proper system of record-keeping, written policies for conducting inspections and handling tenant complaints regarding repairs can assist in defending claims such as these.



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