
Occupiers' Liability in the Retail Industry

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Abstract

When a customer is injured on the premises of a retailer, the retailer may be liable for damages. The cause of action is 'occupiers' liability', which since *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479 has been incorporated into the ordinary principles of negligence. This article examines the liability of retailers in the tort of negligence, with particular reference to the required standard of care. The *Wrongs Act 1958* (Vic), *Occupiers Liability Act 1985* (WA), and *Wrongs Act 1936* (SA) are included in the discussion. Cases referred to include *Wheat v Lacon* [1966] AC 552, *Rose v Abbey Orchard Property Investments Pty Ltd* (1987) Aust Torts Reports 80-121, *Drakos v Woolworths (SA) Ltd* (1991) Aust Torts Reports 81-135, *Kocis v SE Dickens Pty Ltd (t/as Coles New World Supermarket)* (1996) Aust Torts Reports 81-382, *Kelly v Lend Lease Retail* (1993) Aust Torts Reports 81-216, *Griffin v Coles Myer Ltd* (1991) Aust Torts Reports 81109, *Razic v Cruz* [2000] NSWCA 66 and *Daily v Spot-On Investments Pty Ltd t/as Spot-On Photos* (1995) Aust Torts Reports 81-365.

Introduction

Despite the growth of Internet shopping, the situation where customers visit retail premises to make their purchases is still very much the norm. Retailers, large and small, rely on the physical presence of shoppers in shops for most of their mutual transactions. If a customer is physically hurt whilst on the premises of the retailer, the customer may well seek damages to compensate for the injury suffered. This situation is known as 'occupiers' liability'. 'Occupiers' liability' is not limited to retail premises, but to any circumstance in which one person goes onto the property of another and is injured.

The legal action through which occupiers' liability takes effect is the tort of negligence. A tort is a civil wrong in those situations where the law determines the rights and obligations of the parties.¹ The tort of

negligence concerns those situations where the negligent act of one party causes damage to another and the law, in certain circumstances, deems that the loss be shifted from one to the other. The first part of this article examines negligence generally. The second part looks at the operation of 'occupiers' liability' as it operates in Australia, but focusing on the application of this area of law to retail premises.

Part one

The legal requirement in a negligence action

In the situation of injury to a customer on retail premises, the injured customer is the plaintiff and the retailer is the defendant. The plaintiff in a negligence action must prove the following:

- that the defendant, here the retailer, owes the plaintiff a duty of care (the duty of care);
- that the defendant has failed to conform to the required standard of care (the standard of care);

¹ This is in comparison to the law of contract which may also be categorised as a civil wrong, but here the parties themselves have decided upon their mutual rights and obligations.

- that there has been material damage to the plaintiff (damage), caused by the defendant and which is not too remote.

Duty of care (the legal duty to be careful)

Fleming defines the duty of care as "... an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others."² The history of the duty of care concept shows that the courts have always envisaged that there must be a closeness between the parties, a relationship neatly crystallised in Lord Atkin's 'neighbour' speech in *Donoghue v Stevenson*.³ Lord Atkin said: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".⁴

Different justices in the High Court of Australia have, in recent times, come up with a number of different propositions for establishing when a duty of care will exist.⁵ Where the 'damage' suffered by the plaintiff is personal injury, however, the courts, including the High Court, generally have no difficulty in finding that a duty of care exists. In these cases the nature of the damage demonstrates that there must have been at least a physical closeness between the parties at some point. This is the situation where a customer is injured on the premises of a retailer.

Standard of care (how careful is careful enough?)

This is the negligence part of a negligence action. The defendant need only take precautions against reasonably foreseeable risks, and the test for this is risks that are 'not far fetched or fanciful'.⁶ Once it is ascertained that the risk is foreseeable, the required standard of care expected of a defendant is reasonable care, based on what a reasonable person would have

done in the circumstances. Baron Alderson described 'negligence' as follows:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.⁷

Reasonable care is therefore determined by objective standards:

... in other words, the appropriate standard is not that which the defendant *could* have reached, but rather the standard which the law says *should* have been reached.⁸

As Fleming points out, "This means that individuals are often held guilty of legal fault for failing to live up to a standard which as a matter of fact they cannot meet."⁹

In the case of the retailer, the standard of care would be assessed according to what a prudent and reasonable retailer would have done in the circumstances. Matters that are taken into account when deciding what a prudent and reasonable man, or retailer, would have done include:

- the seriousness of the risk;
- the practicability of precautions (measured in terms of expense, difficulty and inconvenience); and
- the importance or utility of the defendant's conduct.

² J. Fleming, *The Law of Torts* (1998) Sydney, 149.

³ *Donoghue v Stevenson* [1932] AC 562.

⁴ *Donoghue v Stevenson* [1932] AC 562, 580.

⁵ See, for example, the various judgments in *Perre v Apand* (1999) 198 CLR 180.

⁶ *Wyong S.C. v Shirt* (1980) 146 CLR 40, per Mason J, 47.

⁷ *Blyth v Birmingham Waterworks Co.* (1856) 11 Ex 781, 784

⁸ F. Trindade and P. Cane, *The Law of Torts in Australia* (1999) Melbourne, 436.

⁹ Fleming, *supra* n. 2, 119.

It is interesting to note at this point that occupiers' liability used to be very complex when it came to establishing the required standard of care because the standard of care varied according to the class of 'visitor'. The standard of care required where a trespasser, an unlawful entrant, was injured, for example, was not as demanding as the standard required where the occupier had invited the injured party onto the property.

In the 1987 case of *Australian Safeway Stores v Zaluzna (Zaluzna)*¹⁰ the High Court dispensed with these differing requirements, imposing instead the ordinary principles of negligence. In *Zaluzna* the plaintiff was injured when she slipped on a wet supermarket floor.

Damage

The third element the plaintiff has to prove is that the plaintiff has suffered damage, i.e. the plaintiff has suffered material injury caused by the negligent act of the defendant (causation) and such damage is not too remote (remoteness).

Causation

Causation requires the plaintiff to show that the defendant's negligence caused, or materially contributed to, the plaintiff's loss. This may be established by using the 'but for' test: the question asked is, "Would the plaintiff's loss have occurred 'but for' the defendant's negligence?"¹¹ If the loss would have occurred even if the defendant had not been negligent, the defendant is not liable. Where the 'but for' test does not work in a satisfactory way, the court will apply a common sense approach to the situation.¹²

¹⁰ *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479.

¹¹ *EH March v Stramare* (1990-1991) 171 CLR 506, per McHugh J, 533-534.

¹² *EH March v Stramare* (1990-1991) 171 CLR 506.

Remoteness

Where the defendant's negligence has caused the plaintiff's injury, the plaintiff is only compensated if the damage caused by the defendant was reasonably foreseeable. Consequences are reasonably foreseeable if they are the result of the occurrence of a risk which the reasonable person would describe as 'real' (even if 'remote') rather than 'far fetched'.¹³

Defences

There are two possible defences to a claim in negligence. The first, voluntary assumption of risk, can be equated to consent. It is based on the proposition that the plaintiff has waived their right to complain of the damage suffered, for example injuries resulting as a result of the normal rough and tumble of contact sports. If the court finds that voluntary assumption of risk applies, the plaintiff loses the case.

The second defence, contributory negligence, allows apportionment of damages. This means that the judge is able to reduce the damages by however much the plaintiff is deemed to have contributed to their own injury. Contributory negligence occurs where there is a failure by the plaintiff to meet the standard of care for their own protection and that failure is a legally contributing cause together with the defendant's negligent act in bringing about the injury. An example is where injuries in a car accident are worsened by not wearing a seat belt.

Part two

This part examines the operation of occupiers' liability in Australia, focussing in particular on its application to the retail industry. As noted above, South Australia, Victoria and Western Australia have passed legislation that modifies the law relating to occupiers' liability. In effect the legislation in these States subjects occupiers'

¹³ *Overseas Tankships (UK) v Miller SS Co* [1967] 1 AC 617, 643.

liability to the general principles of negligence, but includes some guidance as to how the court should assess the appropriate standard of care and other matters.

What is meant by ‘premises’?

‘Premises’ is defined in the Victorian and Western Australian Acts as including “any fixed or movable structure, including any vessel, vehicle or aircraft” and in the South Australian Act as:

- land; or
- a building or structure (including a moveable building or structure); or
- a vehicle (including an aircraft or a ship, boat or vessel).¹⁴

Courts would apply similar definitions in the other States. As far as retailers are concerned, ‘premises’ would obviously include the inside of shops, supermarkets and the like, but it would also include outdoor display areas and the car park.

Who is an occupier?

In a case involving occupiers’ liability, the defendant retailer must be the occupier of the premises on which the plaintiff was injured. In this context the question is, who has control over the premises? Sometimes this will be the owner, or, if the premises are leased, it may be the tenant.

Sometimes there may even be shared occupation. In the English House of Lords case of *Wheat v E. Lacon & Co Ltd*¹⁵ the defendant was the owner of a public house. The manager and his wife lived in a flat above the pub, and the wife was allowed by the defendant to take in paying guests. One of these paying guests died after falling down the poorly lighted staircase leading from the flat to the bar. It was held that the owner,

rather than the manager, was the occupier of the premises:

In order to be an ‘occupier’ it is not necessary for a person to have entire control over the premises. He need not have an exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be ‘occupiers’. And whenever this happens, each is under a duty to use care towards persons coming ... onto the premises, dependant on his degree of control.¹⁶

In the situation of a shopping centre, there may be a number of different ‘occupiers’ responsible for different areas. Examples are the inside of the shops, the areas outside the shops where the retailer displays goods on racks or tables, the walkways, lifts, escalators, stairs, toilets, gardens, car park and so on. Some of the examples show that there may be overlapping occupation. Where there is more than one ‘occupier’, each may be required to contribute towards any damages awarded against one of them.

The required standard of care

In most situations where a customer is injured on the premises of a retailer, the defendant retailer (assuming the retailer is the ‘occupier’ as above) would owe the plaintiff customer a duty of care. The main arguments as to liability would be in terms of whether or not the defendant retailer fell below the required standard of care. Since the decision in *Zaluzna*, issues relating to standard of care in occupiers’ liability cases are assessed in the same way as in any other negligence action.

As mentioned above, in South Australia, Victoria and Western Australia the law relating to occupiers’

¹⁴ *Wrongs Act 1958* (Vic), s 14A; *Occupiers Liability Act 1985* (WA), s 2; *Wrongs Act 1936* (SA), s 17B.

¹⁵ *Wheat v Lacon* [1966] AC 552.

¹⁶ *Wheat v Lacon* [1966] AC 552, per Lord Denning, 578.

liability is regulated by legislation.¹⁷ The legislation gives indicators for assessing the requisite standard of care for occupiers in those states. The sorts of factors to be taken into account include, for example, the nature of the premises, the extent of the danger, the age of the injured person and what was done to eliminate the danger.¹⁸ Since *Zaluzna*, however, it is likely that these are guidelines rather than directives. If they were to be treated as directives, it would mean that the standard of care would vary from state to state, something that the High Court in the *Zaluzna* decision apparently intended to dispense with once and for all.

Many of the cases involve spillage and slippage. Although each case will be determined on its own particular facts, these cases provide good examples of how the courts assess what the standard of care should be in varying circumstances. It would seem that in heavy traffic areas, where spillage is likely, the courts expect an effective inspection system to be in place as evidence that the occupier has exercised reasonable care. The spillage and slippage cases also give an indication of who may be sued as the defendant when a customer is injured.

*Rose v Abbey Orchard Property Investments Pty Ltd*¹⁹ involved the spillage of some oil on the car park floor in a busy shopping centre. The New South Wales Court of Appeal found for the injured plaintiff (who slipped on the oil) on the basis that inspections at that time of day should have taken place every twenty minutes, and this had not been done. One of the judges in *Drakos v Woolworths (SA) Ltd*²⁰ made the point that the system of inspection should be more than an ad hoc arrangement. The plaintiff slipped on some vegetable oil in a supermarket aisle and although the

store staff all knew they had to deal with spillages immediately, “what was everybody’s responsibility was nobody’s responsibility”.²¹ The plaintiff customer won (in a two to one majority decision) in the South Australian Court of Appeal.

In *Kocis v SE Dickens Pty Ltd (t/as Coles New World Supermarket)*²² the plaintiff customer slipped on some spilt disinfectant and injured her back. The supermarket had been open for some ninety minutes. The supermarket’s system of floor cleaning at thirty minute intervals was not operating at the time of the injury, and the Victorian Court of Appeal found for the plaintiff. In *Kelly v Lend Lease Retail*²³ the ACT Supreme Court found the defendant, Lend Lease Retail, liable for the injuries suffered by a customer who slipped on a woodchip that had dropped out of a planter box in a shopping mall. The court found the defendant had fallen below the required standard of care in not properly containing the wood chips, and in not having an adequate checking and cleaning system in place during a busy holiday period. A contrasting case is *Griffin v Coles Myer Ltd*²⁴ where the plaintiff customer was injured when she slipped on some spilt icing sugar mixed with shredded coconut (the same colour as the terrazzo floor) in the drapery section of the store. The plaintiff customer lost because the court found that the cleaning system was adequate for that particular area.

Not all cases involve spillage and slippage. The plaintiff customer in *Razic v Cruz*²⁵ was injured when she stepped backwards into a bag dispenser in the defendant’s supermarket. The New South Wales Court of Appeal, in a majority verdict, found for the plaintiff.

¹⁷ *Wrongs Act 1936* (SA); *Wrongs Act 1958* (Vic); *Occupiers Liability Act 1985* (WA).

¹⁸ *Wrongs Act 1958* (Vic), s 14B(4); *Occupiers Liability Act 1985* (WA), s 5(4); *Wrongs Act 1936* (SA), s 17C.

¹⁹ *Rose v Abbey Orchard Property Investments Pty Ltd* (1987) Aust Torts Reports 80-121.

²⁰ *Drakos v Woolworths* (1991) Aust Torts Reports 81-135.

²¹ *Drakos v Woolworths* (1991) Aust Torts Reports 81-135, per Zelling AJ, 69,293 (citing the trial judge).

²² *Kocis v SE Dickens Pty Ltd (t/as Coles New World Supermarket)* (1996) Aust Torts Reports 81-382.

²³ *Kelly v Lend Lease Retail* (1993) Aust Torts Reports 81-216.

²⁴ *Griffin v Coles Myer Ltd* (1991) Aust Torts Reports 81-109.

The location of the bag dispenser did pose a risk to customers, and it would have been simple for the defendant to alleviate the danger. The dissenting judge considered that it was not the duty of a supermarket to protect customers from their own carelessness. *Daily v Spot-On Investments Pty Ltd t/as Spot-On Photos*²⁶ went the other way. Here the plaintiff customer, a seventy-nine year old woman, lost her action. She sued for damages after she was badly injured when she fell over a display rack in the defendant's shop. Relevant issues were the fact that the display rack was open to view, and shoppers would expect the presence of objects such as this in a shop of this nature so should take avoidance action.

Conclusion

All occupiers of premises should be aware of their potential liability for injury to people coming on to the property. This is particularly so for retailers. The cases outlined above illustrate that when customers are injured on retail premises, a high level of care is expected on the part of the occupier. It is clear from the decisions mentioned in this paper that to satisfy this requirement in cases of spillage, there must be inspection and cleaning protocols in place, and these must actually be in operation at the time of the plaintiff's injury.



²⁵ *Razic v Cruz* [2000] NSWCA 66.

²⁶ *Daily v Spot-On* (1995) Aust Torts Reports 81-363.