22. Negligence

- Jurisdiction of the Victorian Planning Appeals Board

- Date of Accrual of Cause of Action

The Mayor Councillors and Citizens of the City of Castlemaine, Supreme Court of Victoria, Gobbo J., 5 August, 1988.

Mrs Page was the owner of land situated in Bruce Street, Castlemaine. In 1980 a dwelling was erected on the land. The plans of the dwelling were approved by the City of Castlemaine. A certificate of occupancy was issued on about 22 September, 1980.

In about July 1983, the City carried out certain works to channelling, kerbing and drainage to land near Mrs Page's property. In September 1983, Mrs Page's property was flooded. Mrs Page sought the recovery of damages from the City.

Mrs Page commenced proceedings against the City before the Planning Appeals Board under the Drainage of Land Act 1975. The matter then found its way to the Supreme Court of Victoria. When the matter came before the Supreme Court, two questions were to be resolved. These were:

1. Whether a claim in neglignece, against the City, for breach of statutory duty, was within the jurisdiction of the Planning Appeals Board?
2. When did Mrs Page's cause of action against the City accrue?

Negligence

Mrs Page alleged that the City was negligent in approving the building plans and issuing the Certificate of Occupancy.

It was alleged that the lowest floor in the dwelling was constructed lower than 300mm above the maximum flood level. It was also alleged that the City, in contravention of the Uniform Building Regulations, had failed to ensure that the house was constructed so as to avoid the effects of flooding. Finally, it was alleged that the City was negligent in issuing the Certificate of Occupancy, when it should have know that the house was the subject of flooding.

Pursuant to provisions of the Drainage of Land Act 1975, the Planning Appeals Board has exclusive jurisdiction in relation to certain matters arising out of the flow of waters and the interference with the flow of the waters. It was because of this exclusive jurisdiction that Mrs Page originally commenced proceedings before the Planning Appeals Board. The Chairman of the Planning Appeals Board struck out that aspect of Mrs Page's claim, which related to negligence, on the basis that it was not within the jurisdiction of the Planning Appeals Board.

Gobbo J. upheld the Chairman's decision. His Honour observed that the real allegations against the City were related to the issue of the building approval and the Certificate of Occupancy and not to the flow of water. The only relevance of the flow of water was that it had been associated with the actual occurrence of damage. However, it was not associated with the crystallisation of Mrs Page's claim against the City.

Limitation Period

The building permit in relation to the dwelling was issued in 1980. As noted above, the Certificate of Occupancy was issued in September 1980. The flooding, and the damage, occurred in September 1983. At the time of the commencement of proceedings, six years had expired from the date of the issue of the building approval and the date of the issue of the Certificate of Occupancy but not the date of the flooding. It was asserted, by the City, that if it had been negligent, the cause of action accrued in 1980. Accordingly, as proceedings were not commenced within six years, Mrs Page could not now pursue the matter.

The City's argument, that the cause of action accrued at the time of the approval of the plans or the issue of the Certificate of Occupancy, has come to be described as the "doomed from the start" argument. His Honour discussed many cases in relation to this argument starting with *Pirelli General Cable Works Limited v Oscar Faber & Partners* (1983) 2 AC 1. His Honour also discussed the three more recent cases of *London Congregational Union Incorporated v Harriss & Harriss (a firm)* (1988) 1 All ER 15, *Jones & Anor v Stroud District Council* (1988) 1 All ER 5 and *Ketteman & Ors v Hansel Properties Limited* (1988) 1 All ER 38. His Honour concluded that these cases drew a distinction between the defect itself and the damage flowing from the defect. His Honour concluded that the cause of action did not arise until the damage occurred. In discussing *Jones'* case, His Honour observed " ... that a property could only be considered as doomed from the start ..... in extreme cases where gross defects were likely to be disclosed almost immediately, and accordingly a property could not be described as doomed from the start where a defect, although serious, might not lead to any danger to health or safety for many years."

His Honour finally concluded that the "doomed from the start" principle could not be applied to this case and, accordingly, the owner's cause of action did not accrue until the damage occurred, that is until September, 1983.

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23. Negligence - Occupiers' Liability

Sleiman v Franklin Food Stores Pty Ltd NSW Court of Appeal 11/5/89 (1989) Aust. Torts Reports 80-266, concerned an action against a supermarket by a shopper who had slipped on water on the supermarket floor and injured herself.

The trial judge, Stein J. in the District Court, found for *Franklin Food Stores*, as he was not satisfied that there was a breach of duty on the part of *Franklins* which was causally related to the injuries which *Sleiman* suffered.

In the appeal, Kirby P. noted that the High Court had recently decided in *Australian Safeway Stores Pty Ltd v*

Zaluzna (1987) 162 C.L.R. 479 that the question as to whether or not a duty arose is not determined, at least exclusively, by reference to a fixed categorisation of the relationship to the occupier of the premises as being that of invitee, licensee or trespassor. Instead of these former supposed "special duties" of an occupier of property, the question was now to be posed in terms of the less demanding and more generally stated principles of negligence, expressed in a familiar term of the duty owed to one's neighbour.

In the appeal Sleiman submitted that the trial judge had erred in withdrawing the case from the jury, as facts were proven which gave rise to a case for consideration by it. Her case was that, after completing her shopping in the Supermarket and paying for he purchases at the checkout counter, she slipped on some water while walking between the checkout counter and the entrance to the premises. Her claim was that Franklin's servants were negligent in failing to remove the water and that this negligence caused her injuries.

There was no evidence of the length of time during which the water had been lying on the floor, nor was there any evidence to explain its presence. Sleiman suggested that as the fall occurred close to the checkout counters, Franklin's servants should have been on notice that there was a real possibility that there would be liquids on the floor. It was held (Clarke and Meagher JJA):

1. The evidence failed to disclose that there would be water on the floor in the area of the fall - the manner in which the water got there remained a mystery.
2. If it were accepted, as the trial judge had, that the presence of the water on the floor was capable of being found to be an unusual danger, the question remained whether, in the absence of any evidence as to the length of time the water had been there, any failure by Franklin's to maintain a proper system of cleaning caused the accident, or put another way whether the institution of a proper system would have prevented Sleiman's injury.
3. It may be proper in certain circumstances, to take account of the nature of premises and the regular use of the premises by many people in determining whether an inference of negligence should be drawn, but those factors do not bear on the question of causation. There is no legal basis upon which the Court may infer simply from the nature of the premises that there was a causal connection between any negligence on the part of Franklins and Sleiman's injuries.
4. In New South Wales, the onus remained with the Sleiman at all times to prove the elements of her cause of action.
5. The evidence did not show that the proper or better system would have avoided Sleiman's injuries
6. The absence of any indication of the length of time during which the water had been on the floor and the lack of any explanation for its presence left the determination of the cause as matter of speculation.

The appeal was dismissed (Kirby P. dissenting on the basis of a total lack of a proper system of maintenance and inspection by Franklins, the nature of the premises, and the inferences a jury might have drawn concerning the risks of spillage).

- John Tyrril

24. Negligence
- Safe System Of Work
- Union Interference

The case of *Jenkins v Hansen and Yuncken (Tasmania) Pty Ltd* (1989) Australian Torts Reports 80-255 involved an action by builder's labourer against his employer for an alleged negligent failure to provide a safe system of work. The labourer had injured his knee as he stepped into a shallow pier excavation, whilst carrying prefabricated formwork.

On some occasions, the labourer had carried the formwork and placed it himself, on others he had been assisted by an apprentice carpenter. On the day of the accident, a representative of the Builders Labourers Federation had come on site and threatened to call a strike on the basis that the work being carried out by the apprentice carpenter was work which should have been performed by a member of the Builders Labourers Federation.

The foreman then instructed the builder's labourer to place the formwork without the assistance of the apprentice carpenter and in doing so the labourer slipped and injured himself. The labourer's allegations of negligence included assertions that the employer had failed to employ sufficient workmen and had failed to provide sufficient assistance for lifting and carrying materials.

In the Supreme Court of Tasmania, Wright J. held that the employer had had a satisfactory system of work in place, which had worked satisfactorily in the past. This system had been disrupted by the intervention of the union representative, rather than by the employer's negligence. The labourer had then improvised with a work method of his own. Wright J. noted that there had been no allegation that the foreman's instruction constituted negligence for which the employer should be held vicariously responsible; although subject to the foreman's direction, it was a matter for the labourer's discretion as to how the instruction was carried out.

The labourer failed to establish any evidence that the union interference, which had unexpectedly deprived the labourer of assistance and which had led him to carry on alone, was foreseeable by the employer. Even if the union representative's visit and its consequences were foreseeable, it could not be said that the employer ought to have anticipated an accident of the kind sustained by the labourer; the evidence did not establish that the load was excessive, that the labourer was walking "blind" or that the