DISTRICT COURT OF QUEENSLAND

CITATION:	*Hansson v Caloundra City Council & Ors* [2001] QDC 078
PARTIES:	**DESMOND LESLIE HANSSON** (Plaintiff) **and** **CALOUNDRA CITY COUNCIL** (Defendant) **and** **PEDDLE THORP & HARVEY PTY LTD** (Third party)
FILE NO/S:	Plaint No.382 of 1998
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	Maroochydore District Court
DELIVERED ON:	15 May 2001
DELIVERED AT:	Maroochydore
HEARING DATE:	8-14 March 2001
JUDGE:	K S Dodds DCJ
ORDER:	**1) I give judgment for the defendant against the plaintiff on the plaintiff's claim.** **2) I give judgment for the third party against the defendant on the third party claim.**
COUNSEL:	L T Barnes for the plaintiff D R Murphy for the defendant R J Oliver for the third party
SOLICITORS:	Boyce Garrick Lawyers for the plaintiff King & Company Solicitors for the defendant Thynne & Macartney solicitors for the third party

[1] This is an action for personal injuries. The plaintiff allegedly slipped, fell and was injured just outside the public entrance to the defendant's building at Caloundra. He was going there to pay his rates.

[2] According to the plaintiff he had parked in the street. It was a wet day. He had walked across an area of paving and mounted a step to an area of tiled surface. This was an area outside the public entrance to the defendant's building. Much of it was covered from the weather but its outer extremities were wet by rain. According to

the plaintiff he had only taken a couple of steps on the tiled surface when his right foot slipped forward and he fell.

[3] The date on which the plaintiff allegedly fell was 12 June 1996. At that time he was 59 years of age. He had had previous surgery to his neck and back. He had been on a disability support pension since 1995 because of a lower-back problem.

[4] The building had been constructed over a 12 to 15 month period. Practical completion was in June or July 1995 and the first defendant then occupied the building. The tiles in question were probably laid between February and May 1995. The area is well illustrated in photographs in exhibit 9, a report by Mr Shepherd (Shepherd), an engineer and consultant to Intersafe, a business working in the area of ergonomics and forensic engineering.

[5] The plaintiff's statement of claim alleged that his fall was due to the negligence of the defendant. The negligence was particularised as a failure to warn that the tiled surface was slippery; to put down slip resistant matting; to ensure the tiled area provided a safe and secure footing; to ensure that the tiled area was covered with a non-slip or slip resistant surface.

[6] In its defence the defendant asserted that the area where the plaintiff slipped was constructed using non-slip tiles in accordance with applicable standards and it was not aware that the tiled surface was slippery. It alleged both contributory negligence and volenti.

[7] A number of third party notices were issued. The project manager for the construction of the building - Wiley and Co Pty Ltd – was brought in, as was the firm of Architects - Peddle Thorp & Harvey Pty Ltd - which the project manager had contracted with to, inter alia, select the tiles in question. So also was the tile supplier. By the time of the trial, proceedings had been discontinued against the project manager and the tile supplier.

[8] There was a great deal of evidence about the type of tile which had been used, its coefficient of friction when new, its coefficient of friction when tested in situ at

various times after the date of the alleged fall and the perceived advantages and disadvantages of various methods of testing a wet surface for its coefficient of friction.

[9] Dr Coyle (Coyle), the principal consultant of Safety Search Pty Ltd, occupational health and safety consultants conducted some on-site tests on 2 October 1998. He was critical of the pendulum and tortus testing methods required in the then applicable Australian Standard dealing with slip resistance for pedestrian surfaces: AS/NZ 3661.1. His testing method was a sliding surface test. For the surface wet he obtained dynamic coefficients of friction, ranging between 0.17 for worn leather, to 0.38 for soft synthetic rubber.

[10] Shepherd conducted on-site tests on 3 February 1999. Two different types of test were conducted: the pendulum test and an inclined leg test. On the wetted surface the average coefficient of friction obtained using the pendulum test was 0.40, and using the inclined leg test 0.45. On 4 February 1999 he also conducted tests on unused tiles of the type used outside the defendant's building. On the wetted surface using the pendulum test the average coefficient of friction was 0.57. Using the inclined leg test the average coefficient of friction was 0.67.

[11] Mr O'Hara (O'Hara), a laboratory technician with the Main Roads Department, conducted on-site tests on the tiles on 7 August 2000. Using the pendulum test, on tiles that had been especially cleaned for the purpose, he obtained dynamic coefficients of friction on the wetted surface ranging between 0.30 and 0.37 in trafficked areas. In untrafficked areas he obtained a range of 0.38 to 0.51.

[12] Evidence was also given by Dr Jenkins (Jenkins), an engineer and an associate of WBM, a group of Consulting Engineers. Jenkins commented on the various test results obtained and the methodologies adopted.

[13] Evidence was also given by Dr Olsen (Olsen), a consultant in occupational medicine and a consulting engineer. Olsen was in favour of the sliding surface test used by Coyle. He considered that in the hands of an experienced operator it produced more reliable results than the pendulum test.

[14] Dr Cubitt (Cubitt), a consulting engineer, also gave evidence. He also commented on the test results. He regarded the sliding surface test in the hands of an experienced operative as a more indicative test than the pendulum test.

[15] Mr Bowman (Bowman), a principal ceramic scientist with CSIRO, also gave evidence. He conducted various tests on tiles of the type used outside the defendant's building. He tested tiles which were both unused and which had been abraded to simulate use.

[16] As I have already mentioned, when the building was being built and when the plaintiff allegedly slipped and fell, AS/NZ 3361.1 was in force. For wet surfaces, such as where the plaintiff allegedly slipped, it required a mean dynamic coefficient of friction of 0.40 or greater. In a more recent standard slip resistance classification of new pedestrian surface materials - AS/NZ 4586.1999 - pedestrian surfaces are divided into five categories each with a range of friction coefficient. The contribution of a surface to a risk of slipping when wet is categorised from very low to very high. From 0.35 upwards using four-s rubber the contribution ranges from moderate to very low. Above 0.54 it is very low. Below 0.35 is high to very high.

[17] The plaintiff's account of how he was injured was challenged. Reliance was put on an assertion in correspondence from the plaintiff's solicitors. However, I accept the plaintiff's evidence that he slipped and fell on the tiled area outside the defendant's building, and not on a step. I find that he had taken a couple of paces on the tiled surface when his right foot slipped forward and he fell onto his shoulder and his side. He was walking at his normal pace and was wearing ordinary jogger type shoes. There were no mats, nor was there any signage warning of any risk of slipping on wet tiles.

[18] The defendant's duty as the occupier of the building was to take such care "as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises": *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479. The duty is to take

reasonable care. The defendant was not under a duty to warrant the safety of all persons who may come upon the area.

[19] Despite the criticism by some witnesses of AS/NZ 3661.1, it is or was at material times the relevant published standard. Persons responsible for pedestrian surfaces may reasonably be expected to regard the standard as a guide. Proof of adherence to an applicable standard will usually be a relevant fact, always recognising that each case will depend on its own particular circumstances.

[20] It seems clear enough that the type of tile properly manufactured and in a new, unused condition has a dynamic coefficient of friction, when wet, in the region of that claimed by the manufacturer (0.57). Whilst with the benefit of hindsight prudence may suggest use of a surface material of a higher coefficient of friction in an area which might be expected to become wet and to be well trafficked, I do not think the selection and use of a tile which may reasonably be expected to wear well, and with a coefficient of friction the evidence suggests the tiles had or should have had, can be regarded as demonstrating a lack of reasonable care.

[21] The testing that was done was done quite some time after the plaintiff's fall. Even at the highest coefficients of friction obtained, it seems to indicate a more rapid deterioration of the surface of the tiles than might reasonably have been expected from a high quality tile as these were supposed to be. Shepherd suggested that a floor owner should audit the slip resistance of a surface such as this on an annual or two-yearly basis to ensure satisfactory friction levels are maintained. There was no evidence that the defendant had done this. However, the plaintiff's fall occurred within about 12 months of the tiles being laid.

[22] I do not consider that it has been shown that the defendant was in breach of its duty of care because of a failure to warn and a failure to put down slip resistant mats. In addition to the matters mentioned earlier it was plain the area where the plaintiff slipped was an outside area exposed to the weather. It could reasonably have been expected to be obvious to any person of ordinary powers of observation approaching the area on a wet day that the surface area was wet. It may reasonably be expected persons would be aware that wet areas are prone to be more slippery

than dry areas. The placing of signs, warning that the area was wet would not appreciably add to a pedestrian's awareness of that fact. The laying out of mats whenever it rained may introduce a tripping hazard. To the defendant's knowledge the tiled surface had a surface coefficient of friction well within what AS/NZ3661 indicated was appropriate. It had no knowledge of any other persons slipping on the tiled area.

[23] I do not consider that it has been shown that the defendant was in breach of its duty of care to the plaintiff because of the tiled surface. At the time the plaintiff fell the defendant was not aware, nor could it reasonably have been aware, of any deficiency in the surface of the tiles. So far as the defendant was aware the tiles used had a more than adequate coefficient of friction. It had relied upon expert advice in the selection of the tiles which were used. The plaintiff's fall was within about 12 months of the tiles being laid. The evidence suggested that the surface of tiles of the type used should maintain its characteristics to a reasonable extent for 10 or so years. The evidence disclosed nothing that could have reasonably lead the defendant to contemplate that the surface would deteriorate to an extent within 12 months that they would become a danger to pedestrians if wet. Whilst it could not be excluded as a possibility that a person could slip on the tiles, in the defendant's state of knowledge at the time, provided a person took an ordinary amount of care in walking on them while wet, the possibility was quite remote.

[24] The defendant's claim against the third party was based in negligence. It sought both contribution or indemnity against any liability it may suffer in respect of the plaintiff's claim and damages for the cost of retiling the area with tiles suitable to provide a safe footing for people entering and exiting the area. It alleged the third party failed to exercise the reasonable skill and care of an ordinary skilled Architect when selecting and specifying the tiles to be used. Particulars relied upon alleged a failure to:

- take into account the known or likely use of the tiled surface when specifying the tiles;
- ensure the specified tiles had an adequate coefficient of friction to minimise slipping;

- to anticipate the amount and type of pedestrian traffic and the effect of wear on the tiled surface;
- take into account the potential changes in slip resistance during the life-span of the tiled surface;
- provide special provision for slip resistance in areas which would predicably become wet or contaminated during use;
- prepare a report, or conduct engineering and surfaces analyses, or arrange material testing of the tiled surface and warn the defendant the tiled surface was slippery when wet;
- provide special provision for slip resistance in areas which would predicably become wet or contaminated during use;
- provide advice to the defendant to audit the slip resistance of the floor surface on an annual or two-yearly basis to ensure satisfactory friction levels were maintained.

[25] The third party denied there was any contractual relationship between the defendant and the third party. It denied it owed any duty of care to the defendant and that it was negligent. It asserted that the tiles where the plaintiff slipped and fell were fully vitrified slate tiles with a slate textured finish, were selected by the defendant and the project manager on the tile supplier's recommendation, the tile manufacturer's product literature and with regard to the project manager's budget allowance for tiling for the project, and exceeded the Australian Standard requirement for tiled surface slip resistance both in wet and dry conditions. It asserted that its role in the project was limited to the preparation of extent of work clauses and specification of materials, including flooring materials within budget allowances for selection by the project manager. It denied that it was under any obligation to pay for the cost of retiling the tiled area. Further, it asserted that the defendant had not mitigated its alleged loss and, in addition, that the tiles could be treated with a non-slip sealant application in lieu of total replacement.

[26] There was no contractual relationship between the defendant and the third party. Nonetheless the evidence establishes that there was such a degree of proximity between the defendant and the third party for there to arise a duty of care on the part

of the third party to the plaintiff. That duty is neatly described by White J in *Robt Jones Pty Ltd v First Abbott Corporation Pty Ltd* (1997) QSC 210, where she says:

> "an architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due skill and diligence. He is not required to have an extraordinary degree or the finest professional attainment. But he must bring to the task that he undertakes the competence and skill that is usual among architects practicing their profession."

[27] In the third party's case, Mr Jones (Jones), an Architect, gave evidence. At material times he had been employed by the third party. He had been the person who had dealt with the project manager and the defendant in the tile selection process. According to Jones the tile selection was done within the parameters provided by the project manager. He prepared a schedule and selected samples, which he sent to the project manager. He took into account that the area where the tiles were to go was a public area which he thought could expect moderate pedestrian traffic. The tile selected had a high degree of hardness and was a fully vitrified tile with a slate surface. He had made inquiries with other architects and had become aware that the same type of tile had been selected in a number of public areas around south-east Queensland, such as QUT, Toowong Village Shopping Centre and the Mater Children's Hospital. It emerged in evidence it had been used in the foyer of the Maroochydore Court House also. He spoke with the tile supplier and obtained the manufacturer's technical reports (see exhibits 28 and 29). He considered tests undertaken, which appear to support the slip resistance of the tile. He followed practice notes issued by the Architects Association. In the light of all of the information he had obtained he was satisfied with the tile. He did not order any independent testing of the tile.

[28] Evidence was also given in the third party's case by Mr Deshon (Deshon). Deshon appeared to be an architect of wide experience. His evidence supported a view that the third party was not in breach of a duty of care to the defendant.

[29] I am not satisfied that the defendant's claims against the third party are proven. The tile, which was ultimately selected at the time of selection, appeared suitable for the purpose required. I find that the inquiries that the third party made were reasonable inquiries in all of the circumstances. Having made those enquiries there was no indication, which reasonably would have suggested that some extra independent testing of the tiles, should be undertaken. They appeared to be widely used in areas subjected to pedestrian usage. They appeared to be a very hard tile with a dynamic coefficient of friction well within the Australian Standard.

DAMAGES

[30] The plaintiff was born on 12 of June 1937. He is 63 years of age now. He was 59 years of age when he fell and was injured.

[31] When the plaintiff fell he injured his right shoulder, right hip and right knee. The injury to the right shoulder was a tear to his rotator cuff. The injury to his right hip was a muscular injury which cleared up relatively quickly. The injury to his right knee presented as pain and swelling which remained symptomatic for a longer period but eventually reduced to pre-fall levels.

[32] The plaintiff visited a general practitioner, Dr Clutterbuck, on 15 June 1996. At that time he had right shoulder pain with grossly reduced range of movement. He returned again on 18 June when he was given a hydro-cortisone injection to the shoulder. At that time he was also seen to have a swollen right elbow, probably caused by the fall. On 22 June he returned again with a swollen right forearm diagnosed as cellulitis. He was referred to the Caloundra Hospital. He was admitted there on 22 June. His arm was elevated and rested. The pain and swelling decreased and he was discharged on 25 June on oral antibiotics. He saw Dr Clutterbuck on the 22nd of July. He had increased pain and reduced movement in his right shoulder. He was referred for ultra sound examination, which indicated a partial tear of the rotator cuff. He then had physiotherapy which assisted with the range of movement in his shoulder, but pain persisted. He was referred for orthopaedic assessment to Dr Ho. On 28 November 1996 Dr Ho operated. He found a complete supra-spinatus tear which he repaired. Initially the recovery went reasonably well. The shoulder

was supported in a sling and a gradual increase in exercised was undertaken. However, by 14 December the wound had become infected. Antibiotics were commenced but it continued to be a problem. In February 1997 the wound was drained by Dr Ho. It had healed by late March 1997 and by 17 April 1997 the plaintiff had a near full range of movement. Since, he has continued to have problems with his shoulder, particularly with movement above his head. Strength is also reduced.

[33] Evidence was given by Dr Ho and two other Orthopaedic Surgeons: Dr Pentis and Dr Boys.

[34] I find that there was probably some age related pre-existing degenerative change within the acromio-clavicular joint and the rotator cuff tendons before the plaintiff's fall. It was not symptomatic and was not causing the plaintiff any problem.

[35] For the purposes of an assessment of damages, the only significant difference in the opinions of the specialists is that Dr Ho said that the injury to the plaintiff's shoulder had left him with a 10% permanent partial impairment of the whole person, whereas Doctors Pentis and Boys quantified it as a 10% loss of the efficient function of the limb, and a 10% impairment of upper-extremity function respectively . I find that as a result of the right shoulder injury the plaintiff has suffered an approximate 10% loss of the efficient function of his right upper-limb.

[36] I assess damages as follows:

Pain and suffering and loss of amenities

The plaintiff has undergone a good deal of suffering. I accept his evidence that over the whole period he suffered quite a deal of pain. He is right handed. He has ongoing problems with his right shoulder which adversely impacts on his life. He cannot effectively use his right arm above his head. He suffers a catching pain in his right shoulder from time to time. He has a loss of strength in his right arm. He can no longer play golf. He is limited in activities with his grandchildren. He cannot effectively swim any longer. Activities around his house and yard, which he used to

do without difficultly, are now done with discomfort and difficulty. I refer to mowing, vacuuming, and mopping; tasks of that nature. There is some residual surgical scarring, the appearance of which causes some embarrassment. However, it is generally covered by clothing. Under this head I assess of damages of $25,000. I assess interest on $12,000 of that sum at 2% for 4.9 years rounded off in an amount of $1176.

Need for care and assistance

[37] I find that for a considerable period of time until the shoulder properly healed, the plaintiff required assistance. Since, he has required assistance but to a lesser extent, principally in some heavier tasks.

[38] Various estimates were given in the evidence of the amount of time required to provide assistance to the plaintiff. These sorts of estimates given in this type of evidence are notoriously imprecise. I will assess damages for the need for care and assistance for the period from the date of his fall until the end of April 1998 using an average of 2 hours a day. The parties have agreed that the appropriate hourly rate is $13 per hour until 3 November 2000.

[39] For the period to end of April 1997 I assess an amount of $8,372.

[40] Beyond April 1997, I find the plaintiff was able to do most things that a man of his age, and physical condition (excluding his shoulder injury) would be able to do, albeit with some discomfort and difficulty. I have had some regard to that in awarding general damages. I assess a further $2700 under this head of damages to the date of judgment. This is based on a need for 1 hours assistance per week.

[41] I assess interest on the total sum for the need for care pre trial at 5% for 4.9 years rounded off in an amount of $2718.

[42] For the future I assess an amount of $5000. The parties have agreed an appropriate rate for the provision of care and assistance is $16 per hour. I have based the assessment on 70% of 1 hour per week for approximately 10 years.

Special damages

[43] Special damages were agreed in the sum of $4,451.35. I assess interest on $951 of that sum at the rate of 6% for 4.9 years rounded off in the amount of $280.

Future expenses for analgesics and physiotherapy

[44] An amount of $1500 is assessed for analgesics and some intermittent physiotherapy.

[45] Damages total $47,023.35

[46] Interest total $4,174

[47] I give judgement for the defendant against the plaintiff on the plaintiff's claim.

[48] I give judgment for the third party against the defendant on the third party claim.