



A win for the cleaners – practice doesn't require perfection

20 AUGUST 2018

AT A GLANCE

- Last week the NSW Court of Appeal found in favour of a cleaning contractor in ***Argo Managing Agency Pty Ltd v Al Kammessy [2018] NSWCA 176***.
- The Court reiterated that the duty of care owed by a cleaner is to exercise reasonable care to identify and remove potential hazards, not to guarantee that all hazards would be removed.
- The decision is a reminder that despite there being evidence of spillage, it does not automatically follow that the cleaner has been negligent.
- The Court emphasised a degree of caution needs to be exercised before placing a heavy reliance on CCTV footage and photographic evidence. The case highlights the importance of taking detailed statements from the cleaners on duty and having them give evidence about the system of work.

The facts

On 28 December 2013, the Plaintiff was injured when he slipped and fell on a wet patch in a public area of the Westfield Shopping Centre, Liverpool (**Centre**). The Plaintiff brought proceedings against Westfield (which were resolved by consent prior to trial) and Atlantic Cleaning and Security Pty Ltd (**Atlantic**), the cleaning contractor at the Centre. Atlantic went into liquidation and its insurer, Argo Managing Agency Ltd, was substituted as the Defendant.

The contract between Westfield and Atlantic required Atlantic to inspect "common malls" every 20 minutes. The incident was captured on CCTV footage which showed that at approximately 10.35am, Atlantic's

cleaner, Ms Chaemkhuthod, inspected the area and found no evidence of a spillage. A second cleaner, Mr Nguyen, passed the area where the incident occurred eight minutes later at 10.43am. He gave evidence that he had inspected the area and not detected any water. The CCTV footage shows the Plaintiff's fall occurred approximately 90 seconds later at 10:44.29am.

The Plaintiff's evidence was that he had avoided a few spots of water before reaching the incident site but did not see any water on the floor in the area where he fell. His evidence was also that after falling, his shorts, T-shirt, hands and legs were wet.

The primary judge's findings – District Court of NSW

Maiden DCJ held that Atlantic had an adequate system for cleaning in place at the Centre however Mr Nguyen had engaged in a “casual act of negligence” in failing to detect the wet area at the incident site. He found that Mr Nguyen was “remiss in his duties” because the CCTV footage showed that he failed to look to his left whilst conducting his inspection and as a result failed to identify the wet patch where the Plaintiff fell.

His Honour also found that the spillage at the incident site extended for at least one metre in one direction and therefore “any person walking along, whose duty was to look to the ground should have observed that fluid”.

Atlantic appealed the trial judge's decision. The issue on appeal was whether the primary judge erred in finding that Mr Nguyen, had he acted with reasonable care, should have detected the wet area and cleaned it before the Plaintiff reached it.

Court of Appeal Decision

The Court of Appeal overturned the decision of the District Court of NSW. It acknowledged that the reasoning of the primary judge was somewhat disjointed with gaps in the analysis.

The Court agreed with the primary judge's finding that the Plaintiff slipped on a wet area on the terrazzo floor, but found the evidence did not establish that the wet area extended at least one metre. The Court stated the primary judge failed to take into consideration the Plaintiff's evidence that he had avoided small spots of water just before he slipped yet failed to detect the wet area. In the Court's opinion, this suggested that the wet patch was small and difficult to perceive.

The Court of Appeal determined that the wet area was present at the time Mr Nguyen conducted his inspection. The Court considered it was not open for the primary judge to infer from the CCTV footage that Mr Nguyen was negligent by failing to move his head to the left or right to identify hazards.

The Court held that it is not permissible to infer from Ms Chaemkhuthod's apparent method of inspection (of moving her head from side to side) that Mr Nguyen's method was defective given Mr Nguyen's evidence that he did not need to move his heads to the left and right in the same manner as Ms Chaemkhuthod in order to carry out his duties effectively as he inspected “all around the site” as he

moved forward. Further, in the absence of an adverse finding as to the credibility of Mr Nguyen, there was no basis for the primary judge to conclude that he did not conduct the inspection with reasonable diligence and care. Sackville AJA stated:

“CCTV footage in a particular case may well reveal that a cleaner has been derelict in his or her duty. But something more is needed than footage taken at a distance and from behind where the person concerned appears to be discharging his duties in a reasonably methodical fashion.”

The Court warned again that while CCTV footage can be useful, the weight to be attached to CCTV footage is dependent on the quality and clarity of the image as it can be quite misleading. Given the distance of the CCTV camera from the incident site, it was difficult to obtain a clear understanding of the precise location of the fall and to determine how close the cleaners, particularly Mr Nguyen, came to the incident site.

Similarly, the Court rejected the Plaintiff's submissions that close up photos of the floor showed discolouration indicative of liquid on the floor and found that it was impossible to infer that the photographs depicted a wet area.

The Court held that the terms of the contract between Atlantic and Westfield informed but did not determine the scope of the duty of care owed by Atlantic and Mr Nguyen to patrons of the Centre including the Plaintiff. The Specification to the contract indicated that the cleaners' duty of inspection extended to the entirety of the areas for which they were responsible.

However, even as between Westfield and Atlantic, the Court held that the Specification cannot be understood to require Atlantic's cleaners to scrutinise separately every square metre of an area during the course of each 20 minute rotation. Mr Nguyen's responsibilities included cleaning the “loop” from one end of the corridor to the other which was a substantial area. The Court held that:

“As a practical matter, no cleaner, no matter how efficient, could be expected to inspect closely every square metre of a large area, especially taking into account his or her responsibility for performing other duties such as removing rubbish and attending to clean-ups....

The duty owed by Atlantic and Mr Nguyen to patrons of the Centre was not absolute. They were required to exercise reasonable care to

detect and remove potential hazards to patrons including wet patches on the terrazzo floor. The standard to be attained was that to be expected of a cleaner discharging his or her duties of inspection with reasonable diligence and care. A failure to detect a particular hazard did not necessarily involve a breach of that duty. Whether or not it did so depends on the particular circumstances."

The Court of Appeal ultimately held that the primary judge erred in finding that Mr Nguyen's "casual act of negligence" caused the incident. The Appeal was allowed and the orders made by the primary judge were set aside.

Implications

- This case offers a reminder firstly that the duty of care owed by a contract cleaner is not 'perfection'. Secondly, that care should be taken to not place too much reliance on CCTV and photographic evidence. The Court stated that whilst CCTV can be useful, it is important to bear in mind the limitations of such evidence.
- In this case, the distance between the incident area and the camera was considerable and therefore to obtain an understanding of the matters that took place was not clear. If there is obstruction or ambiguity of view, it requires expert evidence to provide comment on what has occurred otherwise it is tantamount to mere speculation.
- The cleaner's evidence in this case was extremely important. Although the cleaner was able to provide evidence from overseas via an interpreter, it highlights the importance of obtaining a detailed witness statement as soon as reasonably practicable following an incident.

W+K Contacts

For more information please contact:



Paul Spezza

Partner, Brisbane

T: +61 7 3236 8701

Paul.Spezza@wottonkearney.com.au



Lilian See

Special Counsel, Brisbane

T: +61 7 3236 8710

Lilian.See@wottonkearney.com.au

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