

McCabe Terrill Lawyers

Case Review

Bader v Jelic [2011] NSWCA 255

Synopsis

The NSW Court of Appeal decision in *Bader v Jelic* was handed down on 31 August 2011.

McCabe Terrill Lawyers who acted for the Appellants, Mr and Mrs Bader were successful in overturning a verdict entered against the Baders in the District Court, which held them liable for injuries sustained by a Foxtel technician who sustained serious injury after tripping upon a rug inside their home.

The decision is important in clarifying both the role and responsibility of a private homeowner to visitors to their homes.

More importantly, the court also confirmed the existing law surrounding the obligations of occupiers as expounded by the decisions of *Phillis v Daly* (1988) 15 NSWLR 65, *Jones v Bartlett* (2000) HCA 56, and *Neindorf v Junkovic* (2005) HCA 75.

Background

The plaintiff, Mr Jelic attended the townhouse owned by the Baders for the purposes of upgrading a Foxtel connection. He arrived at approximately 2.00 pm on 1 March 2005 and was shown upstairs by Mr Bader.

After examining the Foxtel unit upstairs, Mr Jelic went back downstairs to return to obtain some equipment from his truck. Mr Bader remained upstairs.

When Mr Jelic went down the stairs he had his accident. Mr Jelic claims that the front door to the townhouse was closed, and so he mistakenly walked towards two unmarked glass panels, believing it to be the door. When he realised it was not the door he turned to his left and “stumbled” on one of the oriental rugs which lay on the floor. He fell against the window, which caused the glass to break badly lacerating his right arm.

At first instance His Honour Judge Cogswell held that the Baders owed Mr Jelic a duty of care as the occupiers of the premises, and breached this duty. His Honour found inter-alia that:

1. The unstable rugs upon the floor surface could present a trip hazard;
2. Such a trip hazard may cause an entrant to trip and fall into the fixed glass panel;

3. There is a risk to non-social entrants present with a business focus. It was reasonably foreseeable a business visitor might mistake a clear glass panel for a doorway as such a visitor would be a “*man on a mission*” with “*a business task to perform*”; and
4. Accidents are known to happen, which is evidenced by markings on glass door panels now being a requirement of law.
5. In response to the risk, the Baders should have adopted the steps suggested by the plaintiff’s liability expert Neil Adams, such as warning the plaintiff of the risk of the rug slipping and the presence of the fixed glass panel, and affixed the middle fixed glass panel with a visual identification strip to distinguish it from a doorway.

His Honour relied predominantly upon the decision of the Western Australian Court of Appeal in the matter of *Homestyle Pty Ltd v Perrozzi* [2007] WASCA 16, which involved an entrant to a display home who walked through a glass panel. No reference was made to the decisions of *Phillis v Daly*, *Jones v Bartlett*, and *Neindorf v Junkovic*, the principles of which were relied upon in support of the Baders’ defence.

Court of Appeal Judgment

On appeal it was submitted on behalf of the Baders that:

1. The primary judge failed to have proper regard to the relevant provisions of the *Civil Liability Act 2002*.
2. The primary judge should have attached significance to Mr Bader’s evidence that the premises had been in use with rugs in place for five years before the accident occurred.
3. There was no evidence that it was required for a homeowner to place “visual identification” on windows in-situ prior to new glass standards being introduced.
4. There was no basis for the primary judge to conclude that the rug was insufficiently secured to the floor, or that this was somehow causative of Mr Jelic’s fall.
5. A warning to Mr Jelic was not required because any risk posed by the glass or the rug was obvious in the circumstances.
6. Mr Jelic had not demonstrated that his accident was caused by any negligence on the part of the Baders.

By unanimous decision delivered by Justice Macfarlan (with whom Young JA and Sackville AJA agreed) the decision at first instance was overturned and a verdict entered in favour of the Baders.

The Court of Appeal was critical of the trial judge’s failure to adequately consider and apply the relevant provisions of the *Civil Liability Act 2002*, specifically Section 5B as to whether the Baders were negligent.

The Court rejected any notion that a home owner such as the Baders owed a higher duty to a class of person in the position of Mr Jelic, namely a ‘focussed business entrant, than the duty they would owe to any other entrant, such as a social visitor.

Mr Bader's evidence of an accident-free history for the five year period prior to the incident was accepted by the Court as a relevant consideration when determining what the Baders ought to have done to avoid the risk of injury posed to entrants.

Having considered the evidence of the Baders, the Court held that a reasonable person would have considered the risk of a serious accident occurring to an entrant to their home as low, and would not therefore have considered it necessary to replace their fixed window panels with safety glass, nor have pulled the blind down to distinguish the panel as glass and not a doorway.

The Court referred to the 'aesthetic factors' of not having to draw a blind across the window in the same context as the obiter of Justice Samuels JA in the decision of *Phillis v Daly*.

Justice Macfarlan noted that the commentary of Justice Gleeson in *Jones v Bartlett* remained relevant:

"There is no such thing as absolute safety. All residential premises contain hazards to their occupants and to visitors. Most dwelling houses could be made safer, if safety were the only consideration. The fact that a house could be made safer does not mean it is dangerous or defective. Safety standards imposed by legislation or regulation recognise a need to balance safety with other factors, including cost, convenience aesthetics and practicality. The standards in force at the time of the lease reflect this. They did not require thicker or tougher glass to be put into the door that caused the injury unless, for some reason, the glass had to be replaced. That, it is true, is merely the way the standards were framed, and it does not pre-empt the common law. But it reflects common sense."

Whilst finding that the Baders had not breached any duty of care owed to Mr Jelic, they also held that even had a duty been breached, Mr Jelic failed to establish that his accident was causally related to Baders failure to draw down the blinds of the premises.

Summary

The Court of Appeal's decision fortifies the existing common law position expounded by the earlier decisions of *Phillis v Daly*, *Jones v Bartlett*, and *Neindorf v Junkovic*, that the duty of care owed by a home owner must be assessed in consideration of the fact all residential premises contain hazards, these premises are designed with consideration to aesthetic factors, and home-owners should not be burdened with expensive and onerous obligations to 'safety-proof' their premises.

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