

**RECENT DECISIONS**

## Warning not required for 'simple and obvious' risk

*Drew v State of New South Wales* [2015] NSWCA 159 (11 June 2015)

[Link to decision](#)

### Summary

This case confirms that despite an employer's non-delegable duty of care with regard to its employees, an employee still has to have due regard for his or her own safety and that the employer will not be liable for a risk that it did not know of or could not have reasonably known of; and that a defendant (whether an employer or otherwise) will not usually be liable for the risk that should have been obvious to the claimant.

### Background

Mrs Drew was employed as a cleaner by Menzies Property Services Pty Ltd. On 14 November 2005, she was working at Campbelltown Public School. While performing her normal cleaning duties, she had to walk through a classroom which was being used to store items for a school fete. When she first passed through that room, she noticed a box which was in her way and she moved it slightly to one side so that she had a clear passage through the stored items. On her sixth trip through the classroom she caught her foot on the box and fell, sustaining injuries to her knees. The parties agreed that the box had been placed in the classroom either on the day of the injury or shortly beforehand.

Ms Drew sued the State of New South Wales as the occupier of the school premises, and Menzies as her employer. The hearing of the case took place 8 years after the date of injury.

### Decision of the trial judge

The Court of Appeal noted that the trial judge had acknowledged the employer's non-delegable duty of care, but:

He observed that cleaning classrooms in a school is not a dangerous activity, although he said that an employer could and should have checked whether the floor or doors or the rooms needed repair. However, the box was not in the classroom on the previous day, and Menzies could not have been aware of its existence unless informed by someone. The judge relied on *O'Connor v Commissioner for Government Transport* ... where it was said:

"It seems fanciful to treat the question [of an obvious risk] as one to be gone into and decided by some superior officer, as distinguished from the workmen on the spot, and still more fanciful to suppose that a warning or special instruction was demanded about so simple and obvious a matter requiring neither special skill or knowledge to decide, and ordinarily treated as a matter for the man doing the job."

[The trial judge] was satisfied that "there were no precautions which [Menzies] was required to take to avoid the risk of injury in the circumstances. [Mrs Drew] could have as she had earlier done walked around the box and avoided the accident. She misjudged where the box was and caused her own injury.

The claim against the employer was therefore rejected because the employer was not aware of the presence of the box in the room and Mrs Drew had not taken reasonable care for her own safety.

In relation to the claim against the State, the plaintiff argued that as the occupier of the school it should have ensured that the box was placed to the side of the room or should have marked out an area where the plaintiff could have walked without encountering any obstacles. The trial judge rejected this argument and found that it was not necessary for the State to take these precautions as they would not have avoided the risk of injury.

The trial judge concluded that Mrs Drew had simply failed to walk past an obvious obstacle in the middle of the room (which she had managed to avoid on five prior occasions) and had not taken appropriate care for her own safety.

### **Court of Appeal Decision**

The Court of Appeal dismissed Mrs Drew's appeal, agreeing with the primary judge's reasons for rejecting the claim and confirming that:

- an employer will not usually be liable for a risk of which it had no knowledge (and could not reasonably have known of); and
- an occupier (or employer) is generally entitled to expect that people entering the premises will exercise reasonable care for their own safety, particularly when the risks of harm are obvious.

### **For more information, please contact:**



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