

COMMON LAW PRACTICE UPDATE 66

Shopping Centres

The plaintiff slipped and fell on a walkway leading into a shopping centre in *Pavlis v Wetherill Park Market Town Pty Ltd* [2014] NSWCA 292. There was evidence that the walkway was prone to being slippery at least when the surface was wet and that it fell below the relevant recommended Australian Standard. The defendants, however, said that a risk had been identified and precautions taken through the application of non-slip paint less than 10 months before the accident and that the precautions were reasonable and appropriate in the circumstances. In weighing those considerations, the judge at first instance did not err by failing to be satisfied that the defendants had not taken reasonable precautions against the risk of harm which had materialised. Although the risk was foreseeable, the lack of evidence of other falls indicated that, even if the risk was not insignificant, it was not high.

Expert witnesses/section 56 *Civil Procedure Act 2005* (NSW)

Orders were made for liability experts in their respective areas of expertise to confer in *Goldsmith v Bisset* [2014] NSWSC 1272. They were to report on matters agreed and disagreed in the conclave, and set out the reasons behind any disagreement. The plaintiff's solicitors drafted a letter which raised questions about the veracity of certain witnesses for the experts to consider. The defendant's solicitors objected, asserting that no question should be put to the experts that required them to assess whether a witness should be accepted as truthful or their evidence was accurate. The defendant's solicitor's also contended that the experts should not be requested to express any opinion about any matter or fact which was for the trial judge to decide. The defendant did not propose any alternate sets of questions.

The plaintiff's solicitors sought orders from the court in this respect. Garling J found that the attitude of the defendant was contrary to the court's order and the Practice Note governing conclaves. The defendants demonstrated a complete failure to comply with their obligations to the court under s 56 *Civil Procedure Act 2005* (NSW). There was no proper basis to expect that the court would excuse non-compliance with the preparation of questions to be placed before the experts. Although the questions proposed by the plaintiff's solicitors may have been open to criticism, they were not responded to in a way which complied with the court's orders. Garling J did, however, note that it was the role of the court, not the expert witnesses, to consider two accounts given in evidence and indicate which was preferred. Garling J then settled the questions for consideration by the expert conclave in a schedule attached to his judgment.