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Coles Supermarkets Australia Pty Ltd v Meneghello [2013] NSWCA 264

Key Points

- Recent slip and trip cases - NSW

Background

In a win for the supermarket, the New South Wales Court of Appeal overturned the decision of the District Court in Meneghello. The trial judge had awarded approximately $120,000.00 in damages to Ms Meneghello for minor injuries sustained in a fall in the Coles Neutral Bay supermarket on 22 May 2010. There was insufficient evidence to support the trial judge's findings as to negligence and causation. The significant award of damages was also erroneous.

The Law

The Trial Judge's Decision

Ms Meneghello gave evidence that she fell onto her right shoulder while leaning over to collect dip in the dairy section. When she got up to her feet, she had noticed two small pieces of cardboard, one resembling a paddle pop stick nearby. Ms Meneghello claimed that she suffered pain in her arm and back and her ability to work and do housework were affected.

The trial judge found that Ms Meneghello had slipped on the two pieces of cardboard, and that its presence was due to the negligent actions of Coles staff. The cardboard was a foreseeable slip hazard and the risk of injury was not "insignificant" within the meaning of s5B(1)(b) of the Civil Liability Act 2002. The judge held that Coles was negligent for failing to take precautions against the presence of the cardboard on the floor.

The Appeal

On appeal, Coles argued that the evidence at trial did not support the trial judge's findings that Ms Meneghello slipped on the cardboard, or that the cardboard presented a hazard likely to cause someone to slip. The Court of Appeal upheld these grounds.

Barrett JA (with whom the Court agreed) observed that there was no direct evidence that Ms Meneghello's foot was in contact with the cardboard. Ms Meneghello saw the cardboard near where she had fallen. This was insufficient to give rise to an inference that the claimant had slipped on the cardboard.

The Court also considered whether the cardboard actually represented a slip hazard. Barrett JA considered the evidence of the expert witness, Mr Fogg. Mr Fogg had not undertaken any slip testing or provided any reasons for his opinion that the cardboard constituted a slip hazard. There was no evidence as to whether the cardboard represented a severe hazard, a material hazard or merely a negligible risk. Therefore no weight could be attached to his opinion.

Assessment of Damages

Barrett JA went on to consider the trial judge's awards for non-economic loss and economic loss. The Court set aside the trial judge's finding that the severity of non-economic loss was 20% of a most extreme case. This assessment was "demonstrably excessive" on the evidence and a correct assessment for non-economic loss was below the threshold. The Court held that the awards for future paid assistance and past and future economic loss were also excessive.

Conclusion

The decision of the Court of Appeal in Meneghello is a welcome decision for supermarkets following the High Court's decision in Strong v Woolworths Limited [2012] HCA 5, which suggested that supermarkets in Australia may be held to a very high standard of care. The decision in Meneghello demonstrates that a plaintiff has the onus of proof and must establish all elements of a negligence claim on the balance of probabilities.

The decision in Meneghello bears similarities to Justice Heydon's dissenting judgment in Strong v Woolworths Limited. In his judgment, Justice Heydon observed that there was no direct evidence as to when the chip was deposited on the floor, and therefore, the claimant had failed to prove her case.

Rennie Kissun v Coles Supermarkets Australia Pty Ltd [2013] NSWDC 134

In another recent decision of the District Court this month, Ms Rennie Kissun was awarded $173,260 in damages for injuries sustained after slipping in a puddle of water in the Coles Supermarket at Castle Towers Shopping Centre.

The trial judge accepted the evidence of Ms Kissun that she slipped in water adjacent to the freezer section. Ms Kissun saw the water on the floor and after the fall her pants were wet.
Ms Kissun gave evidence that after the fall she was assisted by a Coles employee who apologised. The staff member advised that she had seen the puddle and had gone to retrieve a warning sign. The trial judge accepted this evidence and did not accept the contradictory evidence of the relevant Coles employees.

The trial judge observed that he adopted the probabilistic reasoning approach of the High Court in Strong v Woolworths Limited and found that no cleaning took place in the freezer section in the 2 hours and fifty minutes prior to the fall and that the water spilled during this time period.

The trial judge found that the risk of injury was foreseeable and not insignificant. The Coles cleaning system did not adequately respond to the risk involved and the supermarket's safety system was breached by the employee who had left the area to retrieve the warning sign.

Ms Kissun's injuries included an injury to her lower back involving a small disc protrusion with nerve root impingement and a reactive depression. Damages for non-economic loss were assessed at 25% of a most extreme case. Awards were made for treatment and economic loss and Ms Kissun received judgment in the sum of $173,260.00.