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Fitzsimmons v Coles Supermarkets Australia Pty Ltd [2013] NSWCA 273 (29 August 2013)

Key Points

- The NSW Court of Appeal has recently delivered another interesting judgment in a slip and trip claim brought against Coles Supermarkets.
- The Court awarded only nominal damages to the appellant Ms Fitzsimmons and ordered her to pay the supermarket's legal costs.
- The most significant aspect of the decision however were the findings made the majority in relation to the issue of liability.

Background

The undisputed facts of the case were that Ms Fitzsimmons had slipped on a wet floor in the Gorokan supermarket. Ms Fitzsimmons gave evidence that she was in a hurry and carrying her child on her hip at the time. Ms Fitzsimmons agreed that she might have been arguing with her partner and was quickly searching the aisles for a birthday cake for her daughter. Ms Fitzsimmons failed to observe the warning signs that were put in place by the supermarket warning of the wet floor.

The Law

The Trial Judge's Decision

The trial judge in the District Court dismissed Ms Fitzsimmons' claim, finding that the supermarket had taken adequate steps to warn customers of the slippery condition of the wet floor, by erecting 3 yellow warning signs. The trial judge went on to make a provisional assessment of damages in the amount of $1,773.00 for out of pocket expenses, and was not satisfied that Ms Fitzsimmons had established that her alleged disabilities were related to the accident.

The Appeal

On appeal, Ms Fitzsimmons argued that the trial judge erred in law in failing to find Coles negligent. She argued that the supermarket breached its duty of care in failing to ensure that a member of staff guarded the wet area of floor, or in failing to barricade the area.

Ms Fitzsimmons also argued that the trial judge's assessment of damages was inadequate and that damages ought to be assessed in excess of $100,000.00.

The three justices of the Court of Appeal delivered separate judgments in relation to the issue of liability. Emmett JA gave a dissenting judgment, findings that there was no breach of duty by the supermarket since adequate steps were taken to warn the customers of the risk posed by the wet floor by erecting the 3 yellow warning signs.

The majority, McDougall J and Basten JA overturned the trial judge's decision and found that the supermarket had failed to discharge its duty of care. The supermarket was negligent for failing to take the additional precaution of having a member of staff remain at the scene to direct customers away from the area. Despite 3 differing judgments, the Court ultimately agreed contributory negligence at 50% and the trial judge's assessment of quantum was not disturbed.

Conclusion

The decision of the Court of Appeal in *Fitzsimmons* comes only a few weeks after the Court of Appeal dismissed the plaintiff's claim in *Meneghello* (see related law update).

Whilst in *Fitzsimmons* the plaintiff was ultimately unsuccessful in her claim, it is important to note that the supermarket was found to be negligent despite having erected three yellow warning signs. The majority of the Court of Appeal held that in addition to the warning signs, the supermarket ought to have had a member of staff remain at the affected area, directing customers away from the hazard.

The decision of the majority follows similar reasoning to the almost strict-liability approach adopted by the High Court in *Strong v Woolworths Ltd* and operates as a warning to supermarkets as to the nature of the warning systems that must be implemented in wet-floor situations.