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VINCENT V WOOLWORTHS LIMITED

When is a person expected to take reasonable care for their own safety?

Vincent v Woolworths Limited (2016) NSWCA 40[1]

Background

On 27 November 2008, the appellant, Ms Christine Vincent, sustained injuries to her back and knee when she stepped off a safety ladder and into the path of a moving shopping trolley in a Woolworths supermarket.

Ms Vincent was employed as a merchandiser by Counterpoint Marketing & Sales Pty Ltd (**Counterpoint**). Immediately prior to the incident, she was arranging shampoo products on shelves in an aisle whilst standing on a 50cm high safety ladder supplied by Woolworths. It later became evident from the CCTV footage tendered at trial that, when preparing to step off the ladder, Ms Vincent looked to her left and right but failed to turn her head fully to either side to check for persons behind her.

Primary proceedings

Ms Vincent brought separate proceedings in the Common Law Division of the Supreme Court claiming damages for negligence against Woolworths as the occupier of the premises and Counterpoint as her employer. Woolworths and Counterpoint cross-claimed against each other. The proceedings were heard together.

The crux of Ms Vincent's argument was that Woolworths was negligent in that it failed to take precautions to avoid the risk of injury by providing a plastic barricade, a substantial step ladder or a helper to keep the aisle clear while Ms Vincent arranged the shelves. Ms Vincent argued that as her employer, Counterpoint owed her a non-delegable duty of care, a duty which comprised devising and implementing a safe system of work and taking reasonable care to avoid exposing her to unnecessary risks of injury[2].

On 17 April 2015, Campbell J rejected Ms Vincent's claims and judgment was entered for the defendants (*Vincent v Woolworths Ltd and Vincent v Counterpoint Marketing & Sales Pty Ltd* [2015] NSWSC 435) on the basis that although each defendant owed Ms Vincent a duty of care, the collision was an accident properly so called because neither the customer pushing the shopping trolley, nor Ms Vincent looked where they were going as ordinary care usually requires.

Woolworths – the occupier

Campbell J was not satisfied that a reasonable retailer in the position of Woolworths would have taken any of the suggested precautions. He held at [54] that a reasonable occupier in the position of Woolworths was entitled to expect that the low grade risk of actual injury occurring through a collision between an entrant and a moving shopping trolley could be managed, that is avoided, by the exercise of reasonable care on the part of each entrant, customer and merchandiser.

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[1] Held: Macfarlan JA (McColl and Ward JJA agreeing) dismissed the Appeal. Judgement date: 15 March 2016. Jurisdiction: Court of Appeal (NSW). Primary proceeding citation: *Vincent v Woolworths Ltd and Vincent v Counterpoint Marketing & Sales Pty Ltd* [2015] NSWSC 435

[2] *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13

Counterpoint – the employer

As to Counterpoint, Campbell J was satisfied that the system of work and the equipment provided complied with the common practice in merchandising throughout Australia.

An employer may be justified in not taking 'steps to eliminate a real risk if it is small and the circumstances are such, that a reasonable man, careful of the safety of his neighbour would think it right to neglect it'[3].

Court of Appeal

Ms Vincent appealed to the Court of Appeal, challenging the primary judge's findings concerning negligence, causation and apportionment of responsibility between the defendants.

Woolworths

Ms Vincent argued that the primary judge underestimated the likelihood of a collision occurring and of appreciable injury resulting. In particular, she contended that the primary judge erred in:

- declining to find that for the purposes of s.5B(1)(b) of the *Civil Liability Act* 2002 (NSW) (***CLA***), the risk of harm was 'not insignificant' or a risk of some appreciable personal injury; and
- finding, for the purposes of s.5B(1)(c), that a reasonable person in Woolworths' position would not have taken precautions in relation to such risk of harm as existed.

Macfarlan JA (McColl and Ward JJA agreeing) dismissed the appeal.

Section 5B(1)(b) of the CLA

Ms Vincent argued in relation to s.5B(1)(b) that by saying 'appreciable personal injury due to a collision between a merchandiser and a customer's trolley enjoys a very low probability of occurrence', the primary judge interpreted the notion of 'not insignificant' as being directly related to the assessment of the probability of the occurrence of risk as opposed to the seriousness of the injury.

Macfarlan JA found that the primary judge appropriately held that the likely seriousness of the harm was relevant to the question of whether a risk was 'not insignificant' within the meaning of s.5B(1)(b).

Macfarlan JA also found that the primary judge referred, as was appropriate, to the principle that occupiers of property are in general entitled to expect that users of the property will exercise reasonable care for their own safety and to the fact that this principle is of varying significance depending upon the circumstances of particular cases. The principle was applicable in the present case because of the commonplace character of the activity that led to Ms Vincent's accident, namely, her getting up and down from a small step at a time when it was possible that something or someone might be passing behind her.

Section 5B(1)(c) of the CLA

Ms Vincent submitted that the primary judge erred in expressing concern 'about the impact which any plastic barrier would have had on the convenience of customers accessing the aisles and the shelves near the merchandiser'. She further submitted that the evidence did not support the primary judge's finding that the method of work accorded with common supermarket practice concerning the activities of merchandisers.

In rejecting Ms Vincent's submissions, Macfarlan JA found that of particular relevance was Ms Vincent's plain visibility to customers and the customers' plain visibility to the Ms Vincent, if either of them chose to look around.

Furthermore, Ms Vincent herself attended other supermarkets operated by Woolworths, Coles and Bunnings. Neither of which provided cones or barriers of any type. Nor did the evidence suggest that any of those supermarkets considered the provision of an assistant to the merchandiser as essential.

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[3] *The Wagon Mound (No. 2)* [1966] UKPC 1; [1967] 1 AC 617

Counterpoint

Macfarlan JA found that whilst the *CLA* was inapplicable to the claim against Counterpoint as Ms Vincent's employer, application of the common law principles identified in *Wyong Shire Council v Shirt* 146 CLR 40 required little substantive difference in approach.

With that in mind, Macfarlan JA turned to whether Counterpoint breached its duty of care and held that the fact an employer's duty of care requires the employer to take account of the possibility of inadvertence or thoughtlessness of the employee , does not mean the employer is not entitled to expect the employee will exercise care in carrying out straight forward activities.

Importantly, Counterpoint was found to have given careful attention to the practices its employees were to adopt when working in supermarkets by preparing an occupational health and safety manual where express consideration was given to whether the use of 'safety' steps gave rise to a risk of injury.

Implications

The Court of Appeal has provided welcome confirmation that it is reasonable for both occupiers and employers to rely upon employees and/or entrants to stores to exercise care for their own safety.

Whilst Courts are willing to accept that premises have risks, and that injuries arising from these risks may not be insignificant, it is not necessarily the case that these risks will result in a breach of the duty of care, particularly in circumstances where such risks are rare and obvious.

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