

# Insurance Case Note

7 July 2009

## Sleighed at the supermarket

### *Coles Supermarkets Australia Pty Limited –v– Tormey [2009] NSWCA 135*

by Graeme Armstead, Partner and Dianna Gu, Lawyer

#### Facts

On Saturday, 8 February 2005, Rebecca Tormey was shopping at a Coles supermarket with her daughter when she was knocked over as the result of two men “skylarking” with a shopping trolley. The men had been playing with the trolley in the supermarket during that afternoon. One would run with the trolley pulling it from the front while the other would ride on the back as his companion pulled him along. The man in front would then let the trolley go as it built up speed and the momentum would propel the trolley forwards with the man at the rear clinging on with his legs in the air.

Ms Tormey injured her back, underwent surgery and for a time was hospitalised after partial paralysis left her unable to walk. Ms Tormey brought proceedings against Coles alleging that the supermarket failed to provide adequate supervision “to ensure perpetrators of horseplay were checked, spoken to and prevented from engaging in dangerous activity”.

#### District Court Findings

The trial judge found that Coles owed Ms Tormey a duty “to take reasonable steps to prevent injury to people in its store ... from the misbehaviour of other people in its store.” Nield DCJ accepted Ms Tormey’s evidence and noted that “the voices being made by the two men and their behaviour with the trolley was

such that [Cole’s] employees within the store must have known of the unruly behaviour of these men and must have realised that this unruly behaviour should be stopped. Ms Tormey was awarded \$298,224 in damages plus costs.

#### Court of Appeal Decision

Nield DCJ’s decision was overturned on appeal. Coles argued that its employees did not know of the activities of the two men on the premises and therefore did not owe a duty to stop their behaviour from occurring within the store.

Ipp JA noted that the critical finding of the trial judge was that Coles employees must have known of the unruly behaviour of the men. It was this finding of actual knowledge that was the basis for both the duty of care and the breach that was found. Ipp JA cited his decision in *South Tweed Heads Rugby League Football Club Limited –v– Cole [2002] NSWCA 205* in which he stated:

*“If, to the knowledge of the occupier, activities conducted on the premises bring about a risk of injury to the entrant, the circumstances may give rise to a duty of care wide enough to encompass a duty to take reasonable care to avoid a foreseeable risk of injury arising from those activities...”*

Ipp JA noted that the capacity to control the conduct of persons in its premises

was present in this case and therefore did not need to be considered. The significant point for consideration was whether Coles “knew of the activities of the two men on the premises and therefore should have foreseen the risk of injury from those activities”.

Ipp J broke down Nield DCJ’s reasoning to two considerations:

1. that Coles’ employees must have heard the noise the men were making; and
2. that Coles’ employees must have seen the men misbehaving with the trolley.

In respect of the noise argument, Ipp JA found that Ms Tormey and her daughter’s evidence made it clear that although the men were noisy, they “were not aggressive”. Accordingly, Ipp JA found that the noisiness “on its own, did not suggest that the men might cause harm to others in the store”.

Ms Tormey gave evidence of two incidents. She described the first incident she witnessed of the two men pushing as occurring when she entered the store. It was accepted that Coles’ employees would have also witnessed this incident. The second incident was of the trolley going “at speed” about three-quarters of the way down an aisle. There was no evidence which indicated that any Coles employee would have witnessed this occurring.

Ms Tormey submitted that knowledge of the first incident alone, coupled with the noise gave rise to a reasonable foreseeability of harm. Ipp JA did not accept this submission as there was no evidence which indicated that the two men were handling the trolley in a way that might pose a danger to others. Based on Ms Tormey's evidence, which was accepted, the trolley in the first incident went "for a little bit and then stopped", suggesting that during the first incident the trolley was not pulled at any speed likely to cause harm to others. This was the incident witnessed by Coles employees.

Ipp JA considered the second incident more serious and that any person seeing such behaviour would have perceived that if it continued, other persons would be at risk of harm. As there was no evidence indicating that the second incident was witnessed by Cole's employees, Ipp JA concluded that there was insufficient knowledge to give rise to a duty to take reasonable care to avoid a risk of injury arising from those activities.

In an interesting comment Ipp JA suggested that had it been argued knowledge of the first incident coupled with the continuing noise made by the men should have led Coles employees to monitor their behaviour. Mrs Tormey's claim may have succeeded

but unfortunately her lawyers failed to pursue such an argument.

## What does this mean for Occupier's Liability Law?

The decision required a consideration of *Modbury Triangle Shopping Centre Pty Ltd -v- Anzil [2000] HCA 61* ("Modbury"), where the High Court found that an occupier owes no duty to a visitor who sustains injuries as a result of criminal activities of third parties, except in limited circumstances. Part of the reasoning behind this decision is that the criminal conduct of third parties is unpredictable and can not be reasonably foreseen. Therefore, the attackers were the direct cause of the injuries sustained. Since Modbury Triangle it has been generally accepted in most cases that an injured person is excluded from recovering damages from an occupier in negligence where the damage is consequent upon the criminal act of a third party. The exception to the rule invariably concerns cases where the defendant owes the plaintiff a duty of care and retains some ability to control the behaviour of the third party.

This decision illustrates that where an occupier has the ability to control the

conduct of persons on its premises and a sufficient knowledge of activities which may result in harm, a duty of care may arise.

A further distinction can be drawn between Modbury and the present case based on the behavior of the third parties involved. In the present case the behavior of the men was considered to be "unruly" but not criminal.

Interestingly, the decision does not distinguish the need for constructive or actual knowledge of third party's actions on an occupier's premises. Ipp JA notes in his judgment that "knowledge of the first incident, together with the continuing noise, should have led the Coles employees who observed the first incident to have monitored the men". The failure to pursue this argument meant that the court did not need to consider whether actual knowledge is required of the activities which may cause harm.

Each case will turn on its own facts. However, occupiers who might be regarded as having a capacity to control the conduct of others would be well advised to have procedures in place to ensure that they are equipped to monitor, and if necessary, remove or otherwise deal with persons who may be engaging in unruly or criminal behaviour which may harm other people.

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