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Same Safe-T-Step but one supermarket employer did not owe a duty of care.

Coles Supermarket Australia Pty Limited ("Coles") v Harris [2018] ACTCA 25

Key Points

- Coles' owed a duty to properly train an employees how to use a "Safe-T-Step", even though previous cases involving the same step did not require the supermarket to do so.
- Coles appealed the decision of the Supreme Court of the ACT of Acting Judge Ashford.

Background

Nicole Harris, was an employee of Coles. She was arranging stock on higher shelves and was using a "Safe-T-Step" which is a four-sided, cube shaped, plastic step with an upper platform and a recessed triangular halfway step on each of its four sides.

Ms Harris injured herself when she fell to the ground when dismounting the step sideways.

Ms Harris' evidence was that she had worked her way down the supermarket aisle, dismounting the step sideways via the intermediate step to her right with her right leg, before stepping down to the floor with her left. She then kicked the step along the aisle, before stepping up again to reach the next portion of high shelving, repeating the manoeuvre down each aisle. She had observed a co-worker using the step in this fashion and imitated that method.

Coles denied liability. It alleged that Ms Harris had been trained in the safe use of the step by the provision of an induction book and training video.

Ms Harris gave evidence that the materials regarding the Safe-T-Step had not been brought to her attention nor had she been specifically instructed on how to use the step.

Coles' alternative plea, which forms the subject of the appeal, was that no amount of training or supervision was necessary because Ms Harris made a deliberate choice to use the step in a way that she knew or ought to have known would expose her to a risk of harm.

Supreme Court Decision

The trial judge held that Coles was liable as the risk was reasonably foreseeable and not insignificant. The precautions to eliminate the risk such as training and supervision were not onerous or burdensome, and in fact Coles had already assumed responsibility to train its employees how to use the step.

Appeal

Coles' grounds for appeal were that the trial judge erred by:

(a) Finding Coles' duty of care as employer extended to the provision of training and supervision when the safe use of that step was straightforward.

(b) Failing to apply, or misapplying, sections 42, 43 and 44 of the *Civil Law (Wrongs) Act* 2002 (ACT) ("CLWA").

(c) Requiring Coles to take precautions of explicitly instructing its employees in the use of the step when the proper method was obvious.

(d) Giving undue weight to a spreadsheet analysis of incidents involving the use of the Safe-T-Step. Properly understood, the frequency of incidents was said to be "infinitesimally low" and insufficient to require any precautions to be taken by Coles.

Submissions on the appeal focused on two factual issues:

(a) Whether the use of the step was "straightforward" or "obvious".

(b) Whether the probability that the harm ought to have been assessed by the trial judge as "infinitesimally low".

Scope of Duty

In relation to the obviousness issue, the Court of Appeal held that it had not been shown that the risk of injury in dismounting the step sideways was so obvious that no reasonable person in Coles' ought to be expected to warn against it (whether by training, supervision or otherwise).

That is, the risk was not so obvious so as to provide a complete answer to the question of standard of care, breach or contributory negligence.

The Court of Appeal distinguished the case of *Vincent v Woolworths Ltd* [2016] NSWCA 40, which was a case involving a plaintiff using the same Safe-T-Step. The plaintiff in that case stepped backwards off the step into the path of a shopping trolley. The plaintiff's claim was dismissed (at first instance and on appeal) because the Court found that the simple nature of the task was such that the safe use of the step could be left to an adult employee.

The Court of Appeal also distinguished the case of *Cowie v Gungahlin Veterinary Services Pty Ltd* [2016] ACTSC 311 which involved the plaintiff falling off a stepladder. The Court held a stepladder was an ordinary piece of equipment that was simple and domestic in nature that did not require the provision of training.

The Court of Appeal did not consider that the above cases established any proposition for the duty to warn of the risk of injury when using a device in the nature of a step or ladder.

Breach

The Court of Appeal held that the risk of harm was foreseeable and not insignificant because employees were required to repeatedly mount and dismount the step to work the length of an

aisle. The method adopted by Ms Harris was a 'time saver' therefore the risk that an employee might use the step in that way was foreseeable.

The task itself was not complex, but the danger was inherent in the way the step was used. However it was not obvious that it could reasonably go without saying.

As to the probability issue, Coles could not explain how the adoption of the phrase "infinitesimally low" might be reconciled with Coles' concession at trial that there was a foreseeable risk of harm and the risk was "not insignificant".

What must be considered is what the reasonable person in the defendant's position would have done to respond to the risk. Even though a risk might be extremely unlikely to occur, it is nonetheless a foreseeable risk.

The Court of Appeal agreed with the trial judge that the taking of precautions to eliminate the risk (such as training and supervision) was not onerous or burdensome.

Therefore, the grounds of appeal were rejected and the appeal dismissed.

Lessons Learned

- Even though there may only be a very small chance of a risk of harm occurring, defendants are still required to consider what precautions, if any, need to be taken to eliminate or reduce the risk; and

- Each case will turn on its own facts – noting that two similar Court of Appeal cases (one involving the use of the same type of step) were distinguished.

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