SHORT SHOTS

Civil liability claims and section 151Z recoveries: Worker succeeds in action against third party; employer not negligent

Tsoromokos v Australian Native Landscapes Pty Ltd

LINK TO DECISION

On 17 September 2007, the worker (an independent contractor) was carrying out repairs on a Volvo loader owned and operated by the Australian Native Landscapes Pty Ltd ('ANL').

While he was attempting to remove a 200 kg metal bash plate from the underside of the loader to gain access to the fuel tank, the plate fell onto the worker's right arm, causing serious injury.

The loader was previously repaired in April 2007, when the bash plate was re-aligned and secured using bolts that were unsuitable and a temporary tack weld. ANL informed the worker at the time that this work would be rectified shortly, however, this never took place.
The worker brought proceedings against ANL in the Supreme Court of NSW claiming damages in respect of his injury. The worker's allegations of negligence included a failure to provide a safe place of work, failure to provide the relevant service manual, and failure to provide suitable plant and equipment to enable the bash plate to be safely removed.

The worker did not sue the employer, however, ANL filed a cross-claim alleging a number of breaches of the employer's non-delegable duty of care.

The employer filed a cross-claim against ANL seeking indemnity in respect of compensation paid to and on behalf of the worker pursuant to section 151Z of the *Workers Compensation Act 1987*.

Justice Latham considered the provisions of the *Civil Liability Act 2002* before finding that ANL had breached the duty of care that it owed to the worker, given that a 'reasonable person in the defendant's position would have ensured that the weld was rectified and appropriate bolts inserted after re-alignment of the plate within a short time after the weld was carried out.' It followed that the worker suffered serious harm as a result of this breach.

On the issue of contributory negligence, the Court held that a failure to carry out a proper visual inspection of both sides of the loader before commencing work was 'objectively unreasonable' and that the worker had exercised his judgment in deciding to work in circumstances that were unsafe by lying underneath the loader without any support for the bash plate. The Court assessed the worker's contributory negligence at 40%.

As the employer was not in a position to know the risks that occur or are likely to occur, the cross-claim against it was dismissed. Conversely, the employer succeeded on the cross-claim seeking indemnity pursuant to section 151Z as ANL was found liable for the worker's injuries thereby satisfying the pre-condition for recovery.

The decision confirms that an employer's non-delegable duty of care is not absolute with the court approving *Shoalhaven City Council v Humphries* [2013] NSWCA 390, where it was held that an employer must be in a position to know the risks that are occurring or are likely to occur in order to be found liable in negligence.

Decision Number: [2018] NSWSC 321
Decision Date: 15 March 2018
Decision Maker: Latham J Supreme Court of NSW

back to top