RECENT DECISIONS

No employer fault for injury on third party work site

Avopiling Pty Ltd v Bosevski; Avopiling v Workers Compensation Nominal Insurer [2018] NSWCA 146 (23 August 2018)

Link to decision

Summary

The Court of Appeal considered whether to overturn the primary findings of the trial judge that an employer was not liable in negligence for injuries sustained by an employee at a third party work site and that there was no contributory negligence on the part of the worker.

The Court unanimously affirmed the decision of the primary judge stating that the employer could not be held liable for a risk of harm of which it was unaware and could not appreciate, and that the worker had not disregarded his own safety and had acted reasonably in the circumstances.

Background

The worker was employed as a labourer by the employer (Professional Contracting Pty Ltd) and was responsible for keeping a drilling area clear at the site of Cringila Public School, NSW. The worksite was operated by Avopiling Pty Ltd ('Avopiling').

Whilst a mast on a pile driving rig was being erected by two Avopiling employees at the site, an auxiliary cable attached to the mast suddenly snapped causing metal objects to fall and strike the worker. The worker sustained injuries to his head, neck and chest as a result.

The worker commenced proceedings against Avopiling claiming damages for his injuries. Avopiling pleaded contributory negligence against the worker and raised a defence based on the contribution alleged to be payable by the employer pursuant to section 151Z(2) of the *Workers Compensation Act 1987*.

The Workers Compensation Nominal Insurer ('WCNI'), as the entity responsible for compensation payments to the worker, commenced separate proceedings claiming an indemnity in respect of the compensation paid from Avopiling, pursuant to section 151Z(1)(d) of the *Workers Compensation Act 1987*.

The proceedings were heard together by Justice Rothman in the NSW Supreme Court on 13 April 2015 with judgment ultimately entered for the worker in his proceedings, and for the WCNI in the related indemnity proceedings.

The primary judge found that the employer was not negligent and the worker had not been guilty of contributory negligence. Damages were awarded to the worker in the sum of $2,632,390.93, with the WCNI recovering just over $919,000.

Avopiling appealed from the decisions in favour of the worker and WCNI challenging, *inter alia*, the following:

1. Whether the primary judge had formulated the risk of harm for the purposes of the negligence of the employer and the contributory negligence of the worker in a way that was impermissible;
2. Whether the primary judge had erred in finding that the employer was not negligent; and
3. Whether the primary judge had erred by not finding contributory negligence.

There was no challenge made to the finding that Avopiling was liable to the worker for failing to ensure that there was sufficient slack in the auxiliary cable prior to or during the erection of the mast on the pile driving rig and to continually observe the cables.

Employer Negligence

On appeal, Avopiling challenged the primary judge's formulation of the risk of harm as 'the risk of tension failure of a secondary cable in the erection of the pile driving rig' as being "unreasonably specific".

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Instead, it was submitted that the formulation of risk must encompass the precise set of circumstances which occurred and should not be confined to those circumstances. Avopiling contended that the risk of harm should include a "risk of harm… that a person might sustain injury by reason of an unexpected hazard from objects falling or being flung from a pile driving rig during the erecting process", which would apply to the employer as well as Avopiling.

Relying on *Road and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 and Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90, the Court of Appeal concluded that the primary judge had properly identified the 'true source of potential injury' and the 'general causal mechanism of the injury sustained'.

The Court of Appeal held that the neither of Avopiling's alternative risk formulations allowed for the proper identification of the likelihood of the risk eventuating, nor the reasonableness of precautions that might have be taken, as the 'true source of potential injury' required a determination of the mechanism of the object which might become detached, rather than an undefined and unexpected hazard failing without an identified mechanism.

Avopiling also challenged the finding that the employer did not have the requisite knowledge of the dangers of the pile driving rig given that the risk of cable failure was "ever-present" and that the "relevant risks" were well known within the construction industry. Avopiling also submitted that the employer should not have permitted the worker to be in the vicinity of the pile driving rig irrespective of whether it had foreseen the precise mechanism of injury.

The Court referred to a statement made by an Avopiling employee that was admitted in evidence at the trial and accepted that the worker was involved in and authorised to work in the pile driving rig area, given the need to construct a concrete pad.

Furthermore, the primary judge's finding that the employer lacked the requisite knowledge to be negligent was not disturbed. The unchallenged finding of the primary judge, that the employer would have been satisfied that the system of work was adequate on questioning of Avopiling, demonstrated that the employer did not have any reason to have known that it was dangerous for its employees to be anywhere near the construction of the pile driver. It was also established that the employer could not have appreciated the risk of tension failure of the pile driving rig simply by looking for hazards.

The Court also noted Avopiling's reliance upon the worker's pleadings in formulating its defence pursuant to section 151Z(2).

The fact that Avopiling was found liable (which was not challenged) drew attention to the way that the matter was presented to the primary judge, indicating that the appellant "faces a problem at the outset."

Based on the above findings, the Court of Appeal rejected all grounds of appeal against the employer.

Contributory negligence

Avopiling alleged that the worker was guilty of contributory negligence as he was standing in the vicinity of the pile driving rig during its erection and failed to stand a safe distance away.

The primary judge found that the worker was likely to have been standing at least 6 metres away from the pile driving rig during its erection and that he was in the vicinity of the rig because he was required to construct a concrete pad. Furthermore, at least one employee of Avopiling was aware of the worker's presence.

The primary judge also held that one of the worker's functions was to assist the pile driving rig operators and that once he was told that his assistance was no longer required, was in the process of leaving the scene when he was injured.

In its appeal, Avopiling submitted that the primary judge had failed to identify any evidentiary basis for 'feeling actual persuasion' that the worker was departing the scene when struck.

In response, the Court of Appeal referred to statements by Avopiling employees which supported the finding that the worker had a legitimate reason for being in the zone around the pile driving rig when injured. Furthermore, the Court considered that Avopiling had failed to show that the worker knew or ought to have known of the risk of tension failure or the hazards involved in erecting the pile driving rig.

Following, it was held that the primary judge did not err in failing to make a finding of contributory negligence.

Conclusion

This decision is a further reminder that employers will not necessarily be held strictly liable for injuries sustained by employees and should make appropriate safety enquiries and conduct risk assessments when placing employees to work at third party sites.

The employer's actual knowledge of the risks of harm to its employees and potential reliance on the expertise of other parties, such as other sub-contractors or principal contractors, in formulating such risks are important evidentiary issues that require careful consideration.

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Further, potential inferences that may be drawn as to an employer's knowledge surrounding the nature of tasks being undertaken by third parties may require analysis. In the present case, the evidence did not establish that the employer had knowledge of what was purported to be an "ever-present" risk of tension failure, notwithstanding the allegations set forth by the appellant.

Finally, this case illustrates that independent recovery actions claiming indemnity in respect of compensation paid remain a potent tool against third parties who are liable to pay damages in respect of compensable injuries.

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