Who is in Control?

Victorian Workcover Authority v Stoddart (Vic) Pty Ltd [2015] VSC 149

Peter Moriarty & Anna Morris | May 2015 | Insurance & Financial Services

Summary

The Victorian Supreme Court has held a principal contractor liable for injuries sustained by an employee of its sub-contractor.

In determining liability, the Court explored the issue of what constitutes 'control' in the context of site work and whether adherence to general industry practice is an operative defence against a finding of negligence and breach of statutory duties.

Background

On 30 July 2009 a worker, employed by Rowville Way Pty Ltd (the Employer), fell 2.8 meters from the roof of a residential home under construction in Bendigo sustaining injuries (the Incident). The VWA accepted the worker's claim for injury and made payments in accordance with its obligations under the *Accident Compensation Act*.

Prior to the incident, the builder responsible for construction of the house had contracted with Stoddart, a roofing company, to install the roof at the house. Stoddart had then sub-contracted the Employer to install the roof.

Prior to the Incident, Stoddart had supplied the Employer with Safe Work Method Statements which specifically required that:

- perimeter scaffolding be installed where a fall of three metres could take place; or
- if the risk was a fall of less than three meters that a two metre clear zone was maintained.

There was no one from Stoddart present on the site when the incident occurred.

At trial it was agreed that prior to the incident, guardrails had been erected around a portion of the perimeter, but not the entire perimeter. Those guardrails were erected by another subcontractor at Stoddart's request. Stoddart provided the guardrail supplier with site plans and directed it as to the placement of the guardrails.

The VWA brought proceedings solely against Stoddart pursuant to section 138 of the *Accident Compensation Act* to recover payments made to or on behalf of the Worker as a result of the injuries he sustained in the incident. The VWA did concede that the Employer would also be held liable for the incident.

The VWA alleged that Stoddart had breached its statutory duties under Part 3.3 of the *Occupational Health and Safety Regulations 2007* (the Regulations) which deals with the prevention of falls. Specifically it was alleged that guardrails should have been installed around the entire perimeter of the house as there was a potential fall of over two meters.

In its defence Stoddart denied that it was bound by the Regulations as it was not an 'employer' for the purposes of those regulations. It was argued at trial that Stoddart had no 'control' over the work being performed by the employer and its employees.

Further, Stoddart submitted that its system of work and specifically the placement of the guardrails complied with Codes of Practice issued by Worksafe Victoria (an arm of the VWA) in 2004 and 2008.

It was also argued in evidence that Stoddart's system of work and installation of perimeter rails was in accordance with usual practice in the domestic construction industry

which in July 2009 was only to supply guardrails around the entire perimeter at a height of three or more metres.

Judge's findings

In his judgement, Forrest J conducted an analysis of the Victorian OH&S framework as it was in July 2009.

On the issue of control and Stoddart's liability under the Regulations, Forrest J found that Stoddart was bound by the Regulations as the evidence demonstrated that Stoddart had managed and provided direction as to the installation of guardrails around the roof. This activity operated as to control the risk of the worker falling from the roof.

Forrest J also confirmed that in analysing the issue of 'control' the test is broader than simply the ability of a principal to give direct instruction to its sub-contractor's employee. In assessing the question of control the Court will consider the enterprise being undertaken, the hazard which is posed and other relevant factors. Forrest J also confirmed that the 'control' does not necessarily require only one party to have exclusive control, the Regulations allowed for circumstances where two or more parties can exercise control over the same risk.

In relation to Stoddart's argument that it complied with relevant Practice Codes issued by Worksafe, Forrest J confirmed that in keeping the normal principles of statutory construction, where there is any inconsistency, the Regulations prevail over and above the Codes.

Forrest J held that the Regulations did require that perimeter fencing was required to be installed around the entire perimeter of the house. By failing to install guardrails around where the worker was working (and subsequently fell) Stoddart and the employer had each breached their statutory duties under the Regulations. The breach of duty was clearly causative of the worker's injuries.

Stoddart were also held to have owed and breached its common law duty to the worker. Forrest J confirmed that a common law duty would still exist even though Stoddart did not directly control the worker's activities nor was it in direct control of the site on the day of the incident. It was sufficient that it controlled the fall protection system under which the worker operated.

In relation to Stoddart's argument that it acted in accordance with general industry practice, Forrest J noted that where the industry practice is inconsistent with the Regulations this will not dispose of the issue of liability. Further, Forrest J noted that reliance upon industry practice to justify its system of work was wholly unsatisfactory in circumstances where such practice was clearly in breach of the Regulations.

On the issue of degree of liability and the Factor X figure, Forrest J held that Stoddart was 50% responsible for the incident with the employer bearing the remainder of the liability. His Honour did not comment on any liability owed by the principal builder or the company who installed the guardrails.

Implications for Insurers

This decision is of relevance to principal builders, their specialist contractors and employers who work in the construction industry, as well as their respective liability insurers.

The decision confirms that:

- the issuing of Safe Work Method Statements to a specialist sub-contractor will not absolve a principal of liability;
- the Court will be willing to find that 'control' is exercised by a principal or specialist contractor over the employees of their respective sub-contractors in circumstances where that principal or contractor controlled the system of work within which the worker operated;
- the definition of 'employer' under the relevant OH&S regulations can be more broadly interpreted. The focus of the Court's attention will be on the control each party exercised;
- adherence to generally accepted or widely used industry practice will not operate as a defence to a finding of liability, particularly where such a practice is in breach of the OH&S regulations.

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