

**RECENT DECISIONS**

## Employer not liable where third party fully responsible for breach

*State of New South Wales v Charter Hall Retail Management Limited (formerly Macquarie Countrywide Management Limited) and Anor* [2019] NSWDC 95 (25 March 2019)

[Link to decision](#)

### Summary

An employer was found not to have breached the duty of care owed to an injured worker where an uncommon hazard, not identified by the employer, caused injury to the worker. Rather, the entity in control and possession of the premises was held to be fully responsible as reasonable steps were not taken to avoid such a risk of injury.

The plaintiff (“employer”) was employed by the State as a NSW firefighter. The State sought to recover compensation payments pursuant to section 151Z of the *Workers Compensation Act 1987* made to the injured worker from an injury arising at the Metro Plaza Shopping Centre at Orange (“Centre”).

The Court considered whether the employer had breached the duty of care owed to the worker in not identifying a hazard at the premises or whether the entirety of liability lay with the Owner and/or Management of the Centre (“Charter Hall”).

### Background

On 22 January 2007 the worker responded to a fire alarm at the Centre. The worker was escorted to the roof access door at the top of a ladder by a security guard to check an air conditioning unit. The door had a metal locking bar in front of it which had to be lifted in order to provide access to the roof.

The security guard opened the door and in doing so moved the locking bar to lean it against the wall on the side of the door. The worker and his partner went through the door, checked the unit, and after they were satisfied there was no fire, they exited.

Upon descending from the roof on the ladder the worker was struck on the neck by the locking bar. The worker suffered injury to his neck, and received workers compensation.

At all times the employer accepted that it owed a non-delegable duty of care as an employer to take reasonable care to avoid exposing the worker to an unnecessary risk of injury.

### Decision

Judge Scotting of the District Court delivered judgment on 25 March 2019.

The Judge considered evidence given by the security guard that there was no mechanism installed to keep the locking bar in position by management of the Centre, and he had also described two prior occasions where the bar had fallen on him, both of which he reported to management.

Charter Hall were found to have breached its duty as occupier of the centre, having possession and control of the premises.

The Judge found that the duty to take reasonable care required management to protect the worker from a not insignificant risk which could reasonably be foreseen and avoided.

In deciding whether there had been a breach of the duty of care, Judge Scotting found the failure of management to restrain the locking bar posed a foreseeable risk of injury by it falling onto a person, and they had actual knowledge of the risk which caused the worker’s injury.

In respect of the allegation that the employer bore responsibility, Judge Scotting found the worker had received

[back to top](#)

training, on the proper use of ladders and risk assessment procedures in the course of his work as a firefighter. Despite this training, the worker had not perceived the danger of the locking bar as the set up was not common.

His Honour was not satisfied that the employer had breached its duty of care to the worker, and accordingly, he did not apportion any responsibility for the incident to the employer, but found Charter Hall to be wholly responsible.

Accordingly, the recovery claim by the employer was successful against Charter Hall.

### **Implications**

This case re-enforces the longstanding principles of negligence found in section 5 of the CLA, and subsequent common law authorities, that an employer, as well as any entity that exercises control or supervision over a worker, will be found to hold a duty of care to that worker.

Each matter must be determined on its own facts. The mere existence of that duty does not automatically give an occupier a right to contribution from the employer to the worker's damages.

**For more information,  
please contact:**



**Dominic Maait**  
Partner  
[dominic.maait@turkslegal.com.au](mailto:dominic.maait@turkslegal.com.au)