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LAWYERS

BAND-AID APPROACH TO RISK IS INSUFFICIENT TO DISCHARGE YOUR DUTY!

6 APRIL 2018 | EMPLOYER'S LIABILITY

The defendant was found liable for injuries sustained by an independent contractor, the plaintiff, for failing to take precautions against a foreseeable risk which it created.

IN ISSUE

- Whether the defendant owed a duty of care to the plaintiff as a supervisor.
- Whether the defendant was negligent for failing to take precautions against a risk of harm.

THE BACKGROUND

On 17 September 2007, the plaintiff, an independent contractor, was carrying out repairs to the fuel tank of a Volvo loader, owned and operated by the defendant, Australian Native Landscapes Pty Ltd, at the defendant's premises at Eastern Creek. In the course of attempting to remove the bash plate, which weighed in the order of 200kg, the bash plate fell onto the plaintiff's right arm, causing serious injuries.

The defendant joined Pitlane Mechanics Pty Ltd (Pitlane), of which the plaintiff and his wife were the sole directors and shareholders, in a cross claim for breach of contract, indemnity and contribution. In turn, Pitlane cross claimed against the defendant, seeking indemnity for payments pursuant to section 151Z(1)(d) of the *Workers Compensation Act 1987* (NSW).

THE DECISION

Of particular importance to this matter was the fact that the loader had been repaired in April 2007. At the time, the plaintiff noticed that the bolts that were to reposition the bash plate were too worn to be reused. The plaintiff requested new bolts, however he was instructed by the defendant to engage another contractor at the site to weld the left side of the bash plate to the loader (without using bolts).

When the loader was to be repaired on 17 September 2007, the plaintiff removed the bolts on the right side of the bash plate, then the welding cracked, and the bash plate dropped onto the plaintiff.

The plaintiff accepted that he was not owed a duty of care as an employee, but argued that the level of interference by the defendant in the manner of performance of the plaintiff's work gave rise to a more limited duty. The court rejected this argument and, more fundamentally,

stated that the exercise of a supervisory role is insufficient to give rise to a duty of care.

The court did find the defendant liable however, as the risk of harm by way of personal injury to persons working on or near the loader was foreseeable because the defendant knew or ought to have known that the bash plate was at risk of separating from the loader (s5B(1)(a) of the *Civil Liability Act 2002* (NSW)). The risk of harm was not insignificant given the size and weight of the bash plate (s5B(1)(b)). A reasonable person in the defendant's position would have installed appropriate bolts soon after the weld was carried out. The probability of serious harm by dislodgement of the plate was appreciable and the burden of taking the necessary precaution to avoid that risk fell to the defendant (s5B(1)(c)). But for the failure by the defendant to rectify the weld over a period of five months, the plate would not have fallen and injured the plaintiff. The defendant was responsible for rectifying any known defect that would expose the plaintiff to the risk of serious injury in carrying out maintenance or repairs. The defendant owed the plaintiff a duty of care in this respect which was breached by the defendant's failure to rectify the weld. The plaintiff suffered serious harm as a result of the breach.

The plaintiff was also found to have been contributorily negligent in the order of 40% for failing to conduct a full visual inspection of the loader or to use proper support for the bash plate.

The cross claim by the defendant failed as the plaintiff's employer (Pitlane) did not know and could not have foreseen the risk of harm to the plaintiff.

The cross claim made by Pitlane succeeded as the negligence of the defendant entitled the employer to indemnity pursuant to s151Z(1)(d) of the *Workers Compensation Act 1987* (NSW).

IMPLICATIONS FOR YOU

This case highlights the importance of an employer or head contractor taking reasonable steps against foreseeable risks of harm which are in their control and how this principle is critical when the risk is known.

Tsoromokos v Australian Native Landscapes Pty Ltd [2018] NSWSC 321

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