

EMPLOYER'S DUTY OF CARE IN THE FACE OF PRE-EXISTING CONDITIONS

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An employer was found liable for the injuries sustained to a worker when he exited the employer's delivery truck whilst facing outwards, rather than inwards, although damages were substantially reduced to reflect a pre-existing condition.

IN ISSUE

- Whether the employer's breach of duty caused injury to a plaintiff where that plaintiff had a history of pre-existing conditions.

THE BACKGROUND

Mr Kelleher was employed by J&A Accessories Pty Ltd, trading as Century Batteries, (the employer), as a battery delivery driver.

Mr Kelleher had a history of back conditions dating back to 2001, including 3 incidents in 2011, the year he commenced with the employer.

It was accepted that no information relating to training or manual handling techniques were provided to Mr Kelleher during an interview and tour of the employer's premises in late 2011.

Ultimately Mr Kelleher was offered a job by the employer, to commence on 3 January 2012 once he obtained the relevant truck license. In order to do so, the plaintiff undertook one truck driving lesson in a Nissan vehicle considerably larger than the vehicle he would drive for the employer, and passed. This lesson included instructions on the 3 contact point method for exiting trucks.

Upon commencing his employment, Mr Kelleher shadowed another employee, for approximately 3 days before working independently. Shortly after, he began to develop back pain again and informed the employer. It was accepted that the employer had awareness of Mr Kelleher's vulnerability. Mr Kelleher alleged that he was not provided with any manual handling training, or training on how to exit a truck during that time. He alleged he was not instructed to exit the truck by reversing out, and was not instructed to not exit the truck by facing outwards, which was his routine way of exiting.

On 21 August 2013, as Mr Kelleher was exiting the truck in his routine way (facing outward and dropping down), he sustained further injury to his spine at the L4/5 level (the incident), resulting in left sciatic pain requiring a discectomy. In the weeks following the discectomy, Mr Kelleher developed painful right sided symptoms for which his treating doctor recommended a further revision discectomy. WorkCover rejected the request for revision surgery on the basis that the right sided symptoms were a product of Mr Kelleher's pre-existing condition and not his work related condition.

Mr Kelleher commenced a claim in negligence against the employer, seeking damages for his lower back injury and a secondary psychiatric injury.

THE DECISION AT TRIAL

The court found that Mr Kelleher had received no manual handling training or assistance in relation to the lifting and carrying of batteries. Mr Kelleher also received no instruction or training about appropriate methods of entering or exiting the delivery truck by the employer. The court further found that the employer failed to caution Mr Kelleher of the risks associated with these activities.

It was the court's view that a reasonable employer would have known that getting in and out of the truck's cabin carried a not insignificant risk of injury, and knowing this, the employer breached its duty to Mr Kelleher by not having in place sufficient training and instruction to ensure a safe system of work.

Although the employer was found to have breached its duty of care, causation was only established on the point of exiting the truck. The court found that had Mr Kelleher used the three-points-of-contact-reversing method of exiting the truck, he would not have dropped to the ground and not been exposed to large compression forces upon his spine.

The court also found that the plaintiff had not established causation in relation to manual handling and the right sided back symptoms. The plaintiff did not establish that had the employer taken a certain manual handling precaution, the injury would not have occurred. The court also found that it was more probable than not that while the right sided symptoms were a result of Mr Kelleher's first discectomy, his pre-existing degenerative condition contributed, in a significant way, to his ongoing symptoms.

Judgement was awarded for the plaintiff in the amount of \$320,865.79 clear of the \$93,498.20 refund to WorkCover Queensland. The court applied a substantial discount (40%) to the claim for past economic loss on the basis that his pre-existing condition made him unsuitable for the job which was noted to have been obtained through a family connection. These factors led the court to conclude that it was unlikely the plaintiff would have been in continuous employment since the date of the incident. Future economic loss damages were reduced even further, by 60%, to take into account the significant pre-existing condition and its contingencies, as well as the unfavourable labour market.

IMPLICATIONS FOR YOU

The case is a clear example that to satisfy its duty of care employers should ensure that all employees are provided with express and specific training and instruction, even where a task appears straight forward with the application of some common sense. Employers and insurers can nevertheless take comfort from the significant damages reduction which was applied in the circumstances of the pre-existing condition.

Kelleher v J & A Accessories Pty Ltd [2018] QSC 227

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