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THE SUPREME COURT OF NEW SOUTH WALES DISCUSSES THE ESSENTIAL ELEMENTS NECESSARY TO DISCHARGE THE DUTY OF CARE OWED BY JOINT-OCCUPIERS TO ENTRANTS OF A BUILDING SITE

23 MAY 2019 | EMPLOYMENT AND SAFETY

The Supreme Court of New South Wales has found for a plaintiff, and his employer, against the joint occupiers of a building site for breach of their respective duties of care owed to the plaintiff, who fell into an uncovered and unmarked 4 metre deep retention pit (pit) concealed only by a wooden pallet.

IN ISSUE

- What reasonable precautions ought to have been taken by the joint-occupiers in response to the foreseeable risk; and
- Whether the negligent conduct of the occupier's agent, could be attributed to the occupier.

THE BACKGROUND

On 24 May 2013 the plaintiff, Mr Brett Harford, fell into a 4 metre deep retention pit at a building site at Homebush West in Sydney (the site), sustaining serious spinal injuries. At the time of the incident the plaintiff was the principal and sole employee of Harford Transport Pty Ltd (Harford Transport), a company through which the plaintiff carried on a business of transporting masonry products. The site was being developed by Hallmark Constructions Pty Ltd (Hallmark). Hallmark had subcontracted bricklaying and block-work to Copeland Building Services Pty Ltd (Copeland). Some of the personnel working for Copeland were employed by ANM Building Services Pty Ltd (ANM), a company that had since been wound up. ANM was insured by Certain Underwriters at Lloyd's and by Berkley Insurance Company (the insurers). Two years prior to the incident, Copeland, engaged the plaintiff to deliver concrete blocks to the site.

On the day of the incident, the plaintiff drove into the site and was directed to unload the delivery in front of where his truck was parked. Using the headlights from his truck to illuminate his surrounds, the plaintiff scanned the area to ensure there was sufficient space to

unload safely, and in doing so observed a single empty wooden pallet. The plaintiff approached the pallet, lifting the nearest edge of the pallet in order to flip it over, and in doing so fell into a 4m deep pit. There was no barrier, sign, marking or any other form of protection or warning around the pit. The Court accepted the entirety of the plaintiff's evidence in relation to the mechanism of the injury.

The first proceeding was commenced by the plaintiff against Hallmark as occupier of the site. The second proceeding was commenced in the name of Harford Transport against Hallmark pursuant to section 151Z(1)(d) of the *Workers Compensation Act 1987* (NSW), to recover from Hallmark the benefits paid to the plaintiff.

THE DECISION

The Court accepted that both Hallmark and Copeland were joint-occupiers of the site and the incident location. The Court held that both Hallmark and Copeland were in breach of their respective duties of care to the plaintiff in failing to take reasonable precautions in response to a foreseeable risk of harm.

Reasonable precautions on the part of Hallmark and Copeland would have required either party to cover the pit with a steel plate or other rigid material, or place a barrier or warning sign in proximity to the pit, with regular watch maintained over it. None of these precautions would have been significantly expensive.

The Court rejected all of Hallmark's arguments in relation to contributory negligence (including inter alia that the plaintiff should have lifted the pallet first to see if there was anything under it), finding that there was nothing to place the plaintiff on notice of the presence of the pit at his feet beneath the pallet. The Court similarly rejected Hallmark's arguments that Harford Transport breached its duty of care to the plaintiff, noting that the plaintiff, being the principal and sole employee of Harford Transport was responsible for ensuring his own system of work, and the incident did not arise out of the absence of a safe system for the same reasons there was not finding of contributory negligence. With respect to ANM's liability, the Court found that ANM maintained no presence at the site and that its employees on site were not acting at ANM's direction, rather at the direction of Copeland. It followed that Hallmark's cross-claims against the insurers were dismissed.

In the first proceeding, the Court held that the plaintiff was entitled to judgment against Hallmark, and Hallmark was entitled to contribution from Copeland pursuant to section 5(1)(c) of the *Law Reform Act* (LRA). The Court found Hallmark and Copeland's respective and serious departures from their duty to the plaintiff were of equal measure. Hallmark as principal contractor held primary responsibility to ensure no part of its works were left in a dangerous condition. Copeland was actively engaged in the immediate vicinity of the incident location and had invited the plaintiff to the site and directed him to his work area. The plaintiff was not warned of the presence of the pit, and this was in breach of Copeland's duty of care. Taking these considerations into account, the Court apportioned the plaintiff's damages 50/50 between the joint tortfeasors Hallmark and Copeland.

In the second proceeding, Hallmark's cross-claim against Harford Transport failed. Hallmark was ordered to indemnify Harford Transport in respect of benefits paid to the plaintiff plus interest. The Court found that Hallmark's cross-claim against Copeland for contribution to the statutory indemnity was inapplicable under section 5(1)(c) of the LRA, as the liability of Hallmark and Copeland in the second proceeding was not for damages, rather statutory

indemnity. Copeland was therefore ordered to pay to Hallmark half the interest on the statutory benefits Hallmark was ordered to pay to Harford Transport.

Implications for you

When considering what will constitute 'reasonable precautions' in response to a plainly foreseeable risk (such as a person falling into an unmarked, uncovered pit within their work area) this decision demonstrates that the Court will take a common sense approach to the principles of occupier's liability. Any attempt by an occupier, joint or otherwise to neglect basic risk prevention will be taken to task by the Court.

Harford v Hallmark Construction Pty Ltd [2019] NSWSC 371

GET IN TOUCH

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