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THE EMPLOYER IS NOT ALWAYS LIABLE: THE COURT OF APPEAL DOUBLES DOWN ON THE NEW SOUTH WALES SUPREME COURT FINDING REGARDING VICARIOUS LIABILITY.

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The New South Wales Court of Appeal has upheld the Supreme Court's finding that an employer is not always vicariously liable for the actions of their employee, in circumstances where that employee is under the control of a third party.

THE BACKGROUND

On 24 May 2013, 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. Mr Harford was the principal and sole employee of Harford Transport Pty Ltd (Harford Transport). Hallmark Constructions Pty Ltd (Hallmark) was developing the site. Hallmark had subcontracted bricklaying and block-work to Copeland Building Services Pty Ltd (Copeland). ANM Building Services Pty Ltd (ANM) was a labour hire company that supplied a site supervisor, Mr Isaia, to Copeland. Two years prior to the incident, Copeland engaged Harford Transport to deliver concrete blocks to the site.

On the day of the incident, Mr Harford drove onto the site with a delivery. Mr Isaia directed Mr Harford to unload the delivery in front of where Mr Harford parked his truck. Prior to unloading the delivery, Mr Harford scanned the area to ensure there was sufficient space to unload safely, and observed a single empty wooden pallet. Mr Harford approached the pallet, lifting the nearest edge of the pallet in order to flip it over. Mr Harford stepped forwards, and fell into the pit.

In the Supreme Court proceedings, Mr Harford pursued Hallmark for negligence. Hallmark alleged that Mr Harford was contributorily negligent for his injuries, and Hallmark also commenced cross claims against Copeland, ANM, and Harford Transport.

THE DECISION AT TRIAL

At trial, the court found Hallmark and Copeland were joint occupiers of the site, and joint tortfeasors and apportioned damages 50/50 between them. The court held that Mr Isaia was negligent in directing Mr Harford to the incident location, without warning him of the presence

of the pit. The court also held that Copeland was vicariously liable for the negligence of Mr Isaia, and dismissed Hallmark's cross-claim against ANM, on the basis Mr Isaia was not acting at ANM's direction, rather at the direction, and under the control, of Copeland.

THE DECISION ON APPEAL

The Court of Appeal re-apportioned liability between Copeland and Hallmark from 50/50 to 75/25 in favour of Hallmark, on the basis that the immediate level of control available to Copeland, and the responsibility of Copeland for the presence of Mr Harford on site, required a greater allocation of responsibility to Copeland, than the equal allocation with Hallmark.

Regarding Copeland's vicarious liability, the Court of Appeal refused to recognise dual vicarious liability between Copeland and ANM and maintained that Mr Isaia was a part of Copeland's workforce and under its control. Copeland was therefore vicariously liable for Mr Isaia's conduct, as opposed to ANM. The Court of Appeal also upheld the findings in favour of Harford Transport and the finding of no contributory negligence against Mr Harford.

IMPLICATIONS

This case highlights the test that is applied by the court when determining who is liable for a worker's negligence. The central issue to be determined is which entity had control over the worker, as opposed to which entity employed the worker.

Hallmark Construction Pty Ltd v Brett Harford; Copeland Building Services Pty Ltd v Hallmark Construction Pty Ltd; Hallmark Construction Pty Ltd v Harford Transport Pty Ltd [2020] NSWCA 41

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