



CONSTRUCTION LAW UPDATE No. 906

Who is liable when one subcontractor negligently injures another?

Introduction

Recently, in *Leighton Contractors v Fox*¹ the High Court of Australia revisited the issue of liability of the head contractor for injury to an independent subcontractor caused by the negligent conduct of another subcontractor.

Background

In 2003, Leighton Contractors (“Leighton”) was the head contractor on the construction site of the Hilton Hotel in Sydney. Leighton subcontracted the concrete work to Downview, who in turn subcontracted the concrete pumping to Mr Still. Mr Still in turn subcontracted the supply and manning of the pumps to other operators. Prior to 7 March 2003, Mr Still had been using a concrete pump operator by the name of Jamie who had brought his own truck and labourer to the site. When the pour scheduled for 8 March 2003 was brought forward by one day, Jamie was unable to attend and a replacement crew was required at short notice.

Mr Still contacted Shark Shire Pumping, a supplier of concrete pump trucks who also operated a labour hire company and made a booking for 7 March 2003.

On that day, Mr Warren Stewart and Mr Fox arrived at the site with a Shark Shire concrete pump. Mr Stewart traded as a company of his own name, Warren Stewart Pty Ltd but worked on site himself. Messrs Stewart and Fox had no previous major multi storey project experience. The largest jobs Mr Fox had previously worked on were limited to two storeys.

Mr Still met the pump truck when it arrived at the site and directed Mr Fox and Mr Stewart to Level 4 which was the access point for the building. The three men then connected the truck’s pipes to pump the concrete to Level 12 through the vertical static pipeline that was connected to one of the building’s columns. During the concrete pour, Mr Fox and Mr Still

worked on Level 12 while Mr Stewart remained with the pump.

After the pour was completed Mr Fox went back down to Level 4 to uncouple the pipes and clean the static line from Level 12 to Level 4. Concrete pump lines are usually cleaned by sending a sponge through the line to clear away residue. In this instance, the sponge went through easily as it was smaller in diameter than the pipe. The end of the pipe was not secured by chains to a fixed point as was the usual custom of other pumping contractors when cleaning the pipe.

Mr Still decided to send down a hessian bag filled with dacron as a substitute for the sponge. The bag became stuck in the pipe. Mr Fox was asked by Mr Stewart to move away from the end of the pipe while Mr Still increased the air pressure to attempt to dislodge the blockage. Mr Fox moved to a position about 30 feet away from the pipe. The pressure was increased and the dacron bag suddenly expelled, but as that occurred, the end of the pipe moved violently sideways and struck Mr Fox causing injury.

At the time of the accident the only persons present on Level 4, apart from Mr Stewart and Mr Fox, were the forklift driver and a labourer. Both of these men were wearing Leighton safety wear and it appears that each was a Leighton employee. The judge found that Mr Still was in charge of the concrete pumping operation and that Mr Stewart followed his directions. No person associated with Leighton or Downview gave any directions in connection with the operation.

The proceedings commence

Mr Fox issued proceedings against Leighton, Warren Stewart Pty Ltd and Downview, seeking compensation for his injury. The trial judge found that the accident was caused by the negligence of Mr Still and Mr Stewart and dismissed the claims against Leighton and Downview on the basis that neither had breached their duty of care. Mr Fox was awarded \$472,000 in compensation.

¹ *Leighton Contractors Pty Ltd v Fox* [2009] HCA 35

Unfortunately for Mr Fox, Warren Stewart Pty Ltd was deregistered and unable to pay. Mr Fox appealed to the NSW Court of Appeal against the dismissal of his claims against Leighton and Downview.

The first appeal

The Court of Appeal allowed the appeals, holding that both Leighton and Downview were subject to a common law duty of care for the benefit of Mr Fox and that they had both breached the duty. Downview was ordered to pay 80% of the compensation.

In reaching this decision, the Court of Appeal agreed that Leighton was not subject to a duty to supervise the concrete pump cleaning. However, the Court of Appeal found that Leighton had a general law duty to ensure safe work practices and to take reasonable steps to ensure that those working on the site were properly trained. The Court said that the relevant OHS&W Regulations extended that duty to include an obligation on Leighton to give Mr Fox training in pump cleaning.

The duty had been breached by Leighton because it failed to give the training and to ensure that Mr Fox and Mr Stewart had undergone OHS&W induction training at the site in breach of the relevant legislation.

In addition, the Court found that both Leighton and Downview had breached their duty to ensure that the pumping operation was performed in accordance with the Pumping Code.

Both Leighton and Downview appealed to the High Court.

The appeal to the High Court

The High Court gave detailed consideration to the duty of care of principal contractors to their subcontractors. The Court referred to the 1986 case of *Brodribb Sawmilling* where the High Court had previously limited this duty to a duty to take reasonable care in organising an activity to avoid or minimise the risks it poses.

The High Court noted that the Court of Appeal had imposed a duty on Leighton to provide induction training to Mr Fox in the safe method of pump line cleaning.

The High Court said this was going too far. The Court agreed that there was an obligation imposed on Leighton by the Regulations to be satisfied that a worker coming on the site has undergone OHS&W based induction training. However the Court said that this did not equate

to a duty to give training in specific areas of expertise such as pump line cleaning.

At the High Court Appeal, Mr Fox made a narrower claim; that Leighton should have taken sufficient steps to ensure that he had done the training before it allowed him on to the site. However, in this instance Leighton had no warning that Mr Fox and Mr Stewart were coming onto the site. The High Court rejected the narrower claim.

The High Court upheld the appeals by Leighton and by Downview.

Conclusion

A head contractor does not owe a common law duty of care to a subcontractor to give training in the specific area of skill for which the subcontractor is employed. The duty of care owed is a duty to take reasonable care in organising an activity to avoid or minimise the risks it poses.

Commercially, multi level subcontracting carries risks that are often concealed by the ad hoc nature of the lower level subcontracts. There is a tension between productivity and the administrative cost of monitoring all these subcontract arrangements. Sound risk management requires at least the consideration of the currency of insurance of all subcontractors.

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