

BREAKING LAW

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Principal's Duty of Care to Employees of Sub-Contractor

***Leighton Contractors Pty Ltd v Fox
Calliden Insurance Limited v Fox***
[2009] 8CA 35
2 September 2009

On 7 March 2003, Fox suffered severe injury in the course of working at a construction site at the Hilton Hotel in Sydney.

Leighton Contractors Pty Ltd ("**Leighton**") was the principal contractor for the project. Leighton contracted with Downview Pty Ltd ("**Downview**") to carry out the concreting for certain works. Downview subcontracted the concrete pumping to Messrs Still & Cook.

Messrs Still & Cook engaged Fox and Stewart Pty Ltd ("**Stewart**") to carry out the concrete pumping.

After the concrete pour was completed, Still, Warren Stewart and Fox commenced to clean the concrete delivery pipes. In doing so, a concrete end pipe swung around and struck Fox on the head.

In the proceedings in the New South Wales District Court, Fox sued Leighton, Stewart and Downview. The trial judge found that the accident was caused by the negligence of Still, Cook and Stewart. She dismissed the claims against Leighton and Downview. She gave judgment for Fox in the sum of \$472,561.95 against Stewart. Stewart was unable to pay the judgment.

Fox appealed against the dismissal of his claims against Leighton and Downview to the New South Wales Court of Appeal. The Court of Appeal allowed the appeal holding that each of Leighton and Downview owed a duty to Fox and each breached that duty. Leighton cross appealed in relation to a cross claim against Downview with the result that Downview was ordered to pay 80% of the judgment debt and Leighton 20%.

Leighton and Downview then appealed to the High Court claiming that the imposition on each of them of a common law duty of care owed to Fox, an employee of an independent contractor,

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extended the liability of principals for the negligent acts of other independent contractors engaged by them.

In a unanimous decision, the High Court (comprised of French CJ, Gummow, Hayne, Heydon and Bell JJ) allowed the appeals by Leighton and Downview.

The High Court approved of the statement of the relevant principles explained by Brennan J in the classic case of *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 47-48 as follows:

“An entrepreneur who organises an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organising the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur’s duty arises simply because he is creating the risk and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. Once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors, competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractor’s respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.”

The New South Wales Court of Appeal found that “Leighton ha(d) owed 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 particulars of negligence in the case against Leighton included the failure to ensure that Fox and Warren Stewart had undergone occupational health and safety (“OHS”) induction training at the site before commencing work in accordance with the Occupational Health and Safety Regulations 2001 (NSW) and the failure to ensure that the operation was carried out in accordance with clause 3.18 of the Pumping Code. The latter particular was repeated in the case against Downview.

The evidence given in relation to site induction training was given by Still who said that it was “*just your average general site induction – tell you all the safety procedures and stuff like that*”.

The Court of Appeal had found that Leighton was negligent in its failure to take steps to ensure that both Warren Stewart and Fox undertook relevant induction training.

As principals, Leighton and Downview were under a duty to ensure that Fox and Warren Stewart had undergone proper site induction training. Further, under the *OHS Act*, as employers and persons in control of premises used as workplaces, they were also under a duty to ensure that all systems of work and the working environment were safe and without risks to health and that they additionally had to provide “. . . *such information, instruction, training and supervision as may have been necessary to ensure the employees’ health and safety at work.*” These were obligations of strict liability subject only to the defences set out in s.28 of the *OHS Act*, proof of which lay on the defendant.

The High Court noted the factors the Court of Appeal took into account in concluding that the older case law had been supplanted and the common law now recognised a duty owed by a principal contractor to subcontractors and others coming onto a construction site “. . . *to provide training in matters of safety to subcontractors working on (the) site . . .*” may be summarised as follows:

“Leighton had the legal authority to control who was admitted to the site; a significant number of tradespeople and other workers were on the site at any one time; construction sites are relatively dangerous work places; and “induction training is now a recognised part of major construction works.”

The High Court considered that the Court of Appeal had imposed on Leighton a duty to provide induction training to Fox and Warren Stewart in the safe method of line cleaning, a function which formed part of the activity of pumping concrete.

The High Court considered that that duty imposed was too onerous an obligation. If Leighton owed a duty to Fox and Warren Stewart to provide induction training to them in a safe method of line cleaning, it owed a duty to provide training in the safe method of carrying on every trade and every specialised activity carried out on the site to every worker on the site. This was simply too much.

An alternate argument that Leighton was negligent for failing merely to “*ensure each person working on a site it controls provides satisfactory evidence of having completed induction training*” was also dismissed by the High Court.

The claim of negligence against Downview failed for similar reasons.

Comment

This decision is a relief for principals against the ever increasing trend widening the liability of principals for the safety of persons on worksites.

Whilst principals are subject to significant statutory duties in relation to the safety of workplaces, the High Court has now signalled that principals will not necessarily be found liable for casual acts of negligence on the part of one subcontractor causing injury to another subcontractor.

There is no special or overriding duty on the part of principals on construction sites which will render those principals liable for the acts of negligence of its subcontractors. The classic distinction between the duty of care owed to a subcontractor and the duty of care owed to an employee is preserved.