

RECENT DECISIONS

Forklift locomotion and questions of causation

Toll Pty Ltd v Harradine [2016] NSWCA 374 (21 December 2016)

[Link to decision](#)

Summary

The NSW Court of Appeal recently upheld an appeal by an employer against a finding that an injury involving the use of a forklift occurred 'during the driving of a vehicle' within the meaning of section 3A(1)(a) of the *Motor Accidents Compensation Act 1999* ('MACA').

The decision on this point in forklift cases is critical to determining which damages regime will apply in assessing the damages payable to the injured worker, being either the MACA which may include allowance for non-economic loss or the more restrictive *Workers Compensation Act 1987* ('WCA') under which damages are limited to past and future economic loss.

Background

Jay Harradine was employed by Toll and on the day in question (16 February 2010) was injured while unloading packages containing cushions from a stillage onto the upper level of a trailer.

A stillage is a rectangular metal stand that has a solid base with wire barriers on two sides and open ends.

Goods for transportation are loaded onto the stillage and attached to the forklift. The forklift is then driven to the waiting trailer where the goods are unloaded from the stillage and then loaded onto the trailer in readiness for departure.

In the present case, the forklift had two tines that were about 10cms wide. The stillage had two clips or sleeves at the base that enabled the stillage to be securely attached to the tines protruding from the forklift.

The forklift driver (Bournes) had conveyed several loads of packaged cushions from the warehouse to the trailer where the worker unloaded them. Bournes used the same stillage on each occasion and had observed that one of the sleeves at the base of the stillage was either missing or broken. He nonetheless decided to proceed using the defective stillage and did so by simply placing the two tines under the stillage so that it rested on the tines by its own weight.

Bournes and Toll accepted that it was dangerous to move the stillage or use it to unload goods if it was not properly attached to the forklift in the correct manner.

On about the fourth or fifth trip back to the trailer, the stillage slipped while the worker was unloading the goods. The stillage struck the worker who was injured.

In giving his evidence, the worker described the operation being undertaken at the time and how the forklift was used to carry the stillage to the trailer where the tines would then be raised or lowered to a position from which he would then unload the goods.

The worker said that while unloading the goods, the stillage had moved off the tines and struck him on the left arm. There was some conflict on the evidence as to whether Bournes had raised and lowered the tines and if the forklift was stationary. The worker said in his evidence that the forklift had started to reverse back to bring the stillage down to the ground so he could go and it was

upon this evidence that the primary judge relied to determine that the forklift was being 'driven' at the time.

Legislation

Section 3A of the MACA relevantly provides that the Act only applies "in respect of the death of or injury to a person that is caused by the **fault** of the owner or driver of a motor vehicle in the **use or operation** of the vehicle and only if the death or **injury is a result of and is caused** (whether or not as a result of the defect in the vehicle) during:

- (a) The **driving of the vehicle**, or
- (b) A collision, or action taken to avoid a collision, with the vehicle, or
- (c) The vehicle's running out of control, or
- (d) A dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision, or the vehicle's running out of control.

This section does not define 'driving' although there was no dispute that the forklift was a 'motor vehicle' for the purpose of the Act and that Toll by the actions of the forklift driver had breached the duty of care that it owed to the worker.

Appeal

Toll appealed from the decision of the primary judge. The appeal was heard in the Court of Appeal on 15 November 2016 and judgment delivered on 21 December 2016. In the leading judgment, Justice Sackville acknowledged the cogent reason behind determining the appropriate regime under which the damages are required to be assessed before going on to consider the reasoning of the primary judge in reaching his decision.

In particular, the primary judge made findings:

'that Mr Bourne, in driving the vehicle in the manner he did, that is, driving it to where the stillages were kept, picking up a stillage which he knew to be dangerous, in that it was lacking in security and was likely to be unstable,

and to be used in circumstances where a person would probably put their foot upon it, contributing to its lack of stability was negligent driving and, in addition, created a situation of danger. To drive any vehicle with such an unstable and insecure load is negligent driving of that vehicle. The question is whether that negligent driving is a contributing factor to the accident that occurred here.'

The reference to the circumstances where a person would probably put their foot upon it was directed to the evidence that the most likely predominant and immediate cause of the injury was the worker's action of stepping onto the base of the stillage and causing it to tilt.

Justice Sackville referred to a number of previous cases that were required to deal with the difficulty with questions of construction that arise from the words of the section and in particular, that the injury must be caused by the fault of the ... driver of a motor vehicle in the use or operation of the vehicle and that the injury must be sustained during one of the events specified in the sub section i.e. the driving of the vehicle.

The driving of the vehicle is the so called 'temporal criterion' so that it is not enough for an injured person to simply establish that his or her injuries were caused by the fault of the owner or driver in the use or operation of the vehicle.

His Honour also noted that a forklift may be used either as a means of locomotion and transportation or as a device for loading and unloading. The use or operation of the forklift exclusively as a loading or unloading device does not normally involve 'driving' of the forklift. Generally, a forklift is being driven when it is subject to actual control and management while it is in locomotion.

His Honour commented that there was not necessarily any 'bright line' separating the locomotion and loading functions of a vehicle such as a forklift.

Relevantly, in the present case, Justice Sackville observed that even a slight movement of the forklift either forwards or backwards while the unloading was continuing would not change the 'exclusive non driving character' of the process. That was, however, to be distinguished

from the situation where the unloading operation had been completed and the forklift was being reversed in preparation to move away from the trailer, in which case, he would be driving the vehicle.

The finding by the primary judge on this point i.e. that the forklift “moved backwards and forwards at the time of the accident, as described by the [‘the Worker’] did not involve a finding that Bournes had commenced to reverse the forklift in order to move it away from the trailer.

The more likely interpretation was that the primary judge intended to accept the worker’s evidence that Bournes had started to reverse back to bring the stillage down to the ground so that he could go meant that the backwards movement of the forklift occurred as Bournes began the process of moving the forklift away from the trailer (and was therefore being driven at that point).

The court considered the conflict between the evidence of the worker and Bournes and the failure by Toll to produce CCTV footage of the incident. To that extent, His Honour felt that the primary judge’s reasons for preferring the worker’s account on a crucial issue of fact did not adequately explain why he reached the conclusion that he did. His Honour determined the result was not that the court should find that the forklift was stationary at the relevant time or that any slight movement occurred in the course of the unloading operation. That would involve an assessment of the reliability of the evidence given, an exercise which the court could not undertake without the opportunity of seeing the witnesses and evaluating their evidence.

His Honour observed that in the absence of any further issues in the case, there would be no alternative but to order a new trial, however, it was first necessary to consider the employer’s argument that even if the accident occurred during the driving of the forklift, the worker’s injury did not occur as a result of the driving of the forklift and did not come within section 3A.

In dealing with this aspect of the appeal, the evidence suggested that the stillage had slipped when the worker placed his foot and his weight upon the base of the

stillage as he was unloading the last of the bags. This posed a difficulty for the worker in establishing the predominant and proximate cause of his injury. The court stated that even if there was considered to be more than one proximate cause there was nothing in the worker’s evidence to indicate that the slight backwards movement of the forklift, which marked the commencement of its locomotion function, contributed in any material way to the displacement of the stillage from the tines.

In the absence of any further evidence as to the proximate cause, the evidence did not establish on the balance of probabilities that the worker’s injuries were a result of the driving of the forklift.

The worker’s damages had been determined by the primary judge for a sum totalling \$1,070,499. That sum was required to be reassessed (by the parties) as damages payable under the WCA with a substantial reduction expected to follow as a result.

Implications

Detailed analysis of the precise circumstances of a worker’s injury broken down step by step can often be critical to any subsequent judicial determination of liability as well as the appropriate regime for the assessment of damages to which the worker is entitled.

Parties must fully consider the requirements of the legislation and whether these are satisfied in light of the evidence adduced by the parties at the hearing given the potential for this to dramatically affect the outcome in terms of the quantum of any award of damages.

POSTSCRIPT:

On 10 April 2017, the court handed down a further decision ‘on the papers’ in *Toll Pty Ltd v Harradine (No 2)* [2017] NSWCA 75. [Link here.](#)

In lieu of orders made by the primary judge, the court entered judgment for the plaintiff (worker) for \$660,898 with the defendant given credit for payments made. The adjustment took account of the calculation of damages under the workers compensation regime and a reduction

of the worker's net weekly earnings from \$1,661 to \$1,350 per week. The end result was an overall reduction of the damages payable to the worker by \$409,601!

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