

Another brick in the wall

Principal builder's failure to inspect brick pillar negligently injures roofer

J-Corp Pty Ltd v Thompson [2019] WASCA 173

David Pitt | December 2019 | General Insurance

Overview

The Court of Appeal of Western Australia has upheld a builder's appeal that the primary judge erred by adopting a 'hindsight' approach in finding a breach of duty to avoid a particular incident. However, the Court went on to also uphold the injured roof carpenter's contention that the facts supported breach of duty even when the correct 'prospective' test was applied.

This case highlights that, on certain facts, a principal's obligations to co-ordinate the activities of trades, and more generally as occupier for the safety of entrants to the site, can give rise to a duty to inspect the work of independent contractors.

Facts

J-Corp Pty Ltd (J-Corp) was the main builder constructing a residential dwelling in 2014. Independent contractor bricklayers had constructed the main walls of the house and several free standing brick pillars (piers) for outside areas such as a patio. Engineering plans required the piers to contain a metal rod 'cast' into the structure (meaning the rod being made as one with the pier), by the void within the pier being filled with concrete/mortar mixed with brick rubble. In fact, the piers contained the metal rod affixed to the concrete slab but were otherwise hollow.

Mr Thompson was a roof carpenter providing his services as a subcontractor to TJO Roofing, which was called onto site by J-Corp to commence roofing once the bricklayers were finished. Mr Thompson was marking up the location of roof beams by standing with one foot on a beam which spanned from the top of a solid wall to an external isolated pier, and the other foot on the pier. As he

stepped off onto another beam, the brick pier collapsed, causing Mr Thompson to fall 2.4m to the ground with the heavy wooden beams landing on him.

Injuries sustained included a fracture of the left wrist and associated cartilage tear requiring four rounds of surgical intervention. Despite undergoing considerable rehabilitation Mr Thompson was left with a 10-20% loss of function of his upper limb, ongoing impact on his work capacity and activities of daily living, and the prospects of degenerative changes and future surgery.

Primary decision

Considerable evidence at trial was focussed on the safety of the system of work adopted by TJO Roofing and Mr Thompson, the availability of trestles and planks, whether Mr Thompson ought to have been able to see the piers were hollow, and the extent to which the roof beams were temporarily secured at either end.

Although J-Corp failed to call its site supervisor employee and an expert builder who had been briefed, the judge found it unnecessary to draw any adverse inferences. This left the evidence of Mr Thompson's expert structural engineer virtually unchallenged – that a hollow brick pier was very weak and not capable of withstanding mild horizontal forces such that it was laterally unstable. The engineer calculated that the normal step off described by Mr Thompson would not have created sufficient force to cause a filled pier to collapse.

The injury did not meet the significant threshold required to join the employer for a common law claim.

The main submissions from J-Corp were that:

- Mr Thompson adopted an unsafe system of work

by marking up from on top of the roof beams, particularly where there were trestles and planks available;

- the pier and metal rod were designed to support the roof and not as a work space for roof carpenters;
- as builder of the house it owed a duty to exercise reasonable care when coordinating the activities of trades at the premises to avoid unnecessary risks of injury and to minimise other risks of injury; and
- it did not breach that duty as they were not liable for the failures of the independent contractor bricklayers.

Bowden DCJ found that the engineering plans called for the metal rod to be cast in the cavity, and on the expert and other evidence this meant it should have been filled with concrete or brick rubble with mortar.

His Honour expressly observed that the question of whether a defendant breached its duty to take reasonable care is approached prospectively - not retrospectively with the benefit of hindsight and without regard to the fact that the relevant risk materialised. He found that a reasonable builder in J-Corp's position should have foreseen that roof carpenters may, in the process of installing the roof, at some stage walk or stand on an isolated pier.

In rejecting the submissions of J-Corp that another common method (planks and trestles) was available, the judge noted that whether a procedure is usual or common does not mean that a different procedure is not reasonably foreseeable, and the evidence showed that some roof carpenters adopted the working method used by Mr Thompson.

Although the bricklayer and roofers were not required to interact, the results of their work did interact, and his Honour found that J-Corp were negligent in failing to exercise a contractual supervisory power to ensure the pier was filled. This failure was found to be a direct cause of the harm and his Honour held that there was no evidence to support a finding of contributory negligence.

As to the builder's obligations as occupier, Bowden DCJ was satisfied that an unfilled cavity pier was a danger to the state of the premises, in that it could collapse and cause injury to those working from it whilst roofing.

On appeal

J-Corp appealed from the judgment entered in favour of Mr Thompson on the basis that the primary judge adopted a hindsight approach and that there was no evidence for the finding that J-Corp ought to have known the unfilled pier was too weak to support loads such as roof carpenters.

Mr Thompson filed a notice of contention to the effect that, even on a broader prospective examination of the duty of the builder, the facts established a breach of duty causing the harm.

The Court of Appeal set out the tests succinctly – *"The question at common law is whether a reasonable person would have foreseen the risk and, if so, what the reasonable person would have done by way of response to the risk. ... the Court must look forward to identify what a reasonable person in the defendant's position would have done, not backward to identify what would have avoided the risk to the plaintiff."*

The unanimous view was that the primary judge's analysis was too narrowly focussed "...entirely on the risks and remedial action presented by the particular pier which collapsed as Mr Thompson stepped off it." and further that a builder with no specialised engineering knowledge could not be expected to know about the horizontal force load bearing capacity of the pier.

Considered prospectively by the hypothetical reasonable builder however, the court decided that *".. a builder/ occupier would appreciate that failure to follow the engineer's structural specifications is likely to compromise the structural strength of the brickwork and create risks as to its stability."*

Therefore the breach of duty was the failure to inspect the work of the bricklayers before the roof carpenters came onto site, and the failure to fill the void in the pier (being the breach identified by the District Court) was the causal omission arising from the breach.

Implications

The proper consideration of the nature and scope of a duty is not straightforward, particularly in construction scenarios with multiple contractors.

Some practical guidance to be gained from this decision includes:

- the risk to be considered is likely to be wider than the circumstances of the incident;
- another method of performing the task, even if more safe, does not mean that the method in fact used was not foreseeable;
- it is not for builders to second guess why have structural engineers have specified certain methods of construction;
- the fact that safety could be improved (or was in fact later improved) is not proof of negligence;
- the function of an item can change over time, such that different considerations might apply at different stages of construction – a capacity to fulfil a construction need might have an interim or secondary safety element as well; and
- even if trades do not interact on site, the results of their services may give rise to a risk of harm to others later, and a principal or main contractor may have to take reasonable steps to minimise that harm by progressively inspecting contractors' works and requiring rectification if needed.

The impact of the decision is not confined to Western Australia or even residential house construction. Insurers of builders and tradespeople, as well as domestic insurers whose policies might cover owner builders, should consider the issues raised in this case as the principles involved will apply in all common law jurisdictions and in any subcontracting scenario.

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