RECENT DECISIONS

It's not the employer's fault

The Workers Compensation Nominal Insurer v Avopiling Pty Ltd [2016] NSWSC 1893 (29 March 2017)

Link to decision

Summary

An employer has been found not liable in negligence for an injury sustained by one of its employees.

Background

Mr Riste Bosevski was employed by Professional Contracting (NSW) Pty Ltd. At the time of his injury, Mr Bosevski was working at the site of Cringila Public School, where a mast on a piling rig was being erected. The provider of the pile driver was Soilmec. Mr Bosevski was responsible for keeping the drilling area clear. Employees of a third party, Avopiling Pty Ltd, were responsible for erecting the mast on the piling rig.

Whilst the mast was being erected, a cable snapped. There was no dispute that the snap occurred as the cable was under extreme tension. In fact, two employees of Avopiling heard 'a tension noise' but nevertheless continued to erect the mast. The snapping resulted in metal objects weighing approximately 25 kilograms being released and striking Mr Bosevski, who was standing about 6 metres away.

Claims of negligence were made against Professional Contracting; Avopiling and Soilmec.

Decision

Justice Rothman of the Supreme Court found that there was insufficient evidence to establish that Soilmec was negligent in supplying the pile driver.

In respect of Avopiling, however, his Honour held that the risk of 'the explosive failure arising from tension was… foreseeable, being a risk that Avopiling and its employees knew or ought to have known.'

Justice Rothman further held that Avopiling failed to take the precautions a reasonable person in its position would have taken to prevent or minimise that foreseeable risk – namely, by taking steps such as 'paying out' sufficient slack in the cable during the erection of the mast, and continuously observing the cable during the process. His Honour noted that these steps were 'without cost and not a burden' to Avopiling.

In relation to Mr Bosevski's employer, Professional Contracting, Justice Rothman noted (at paragraph 277):

> There can be little doubt that an employer owes a non-delegable duty of care to an employee for whom the employer has exclusive responsibility for the provision of appliances, the premises in which work is performed and the system of work to which the employer subjects the employee…

However, Justice Rothman accepted that an employer such as Professional Contracting 'must be in a position to know the risks that are occurring or are likely to occur'. In the current case, the employer was unaware that the work would be carried out without 'due care' by Avopiling. His Honour held that Professional Contracting could not have foreseen 'a failure of this magnitude' on behalf of Avopiling that would lead to an injury to one of its employees in such circumstances.

Accordingly, his Honour held that the employer did not have 'the requisite knowledge to amount to negligence'.

Implications

This Decision highlights the importance of employers making appropriate enquiries when placing their employees at premises or work sites involving third parties. In this case, Justice Rothman found that there was no indication to the employer that the requisite works would not have been conducted without due diligence and skill by the third party. Accordingly, the employer was able to avoid a finding of negligence.

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