



RECENT EVOLUTION OF LABOUR HIRE CASES

Introduction

A recent New South Wales Court of Appeal decision, together with Supreme Court and District Court decisions, in cases where a labour hire employee is injured while working with a host 'employer', demonstrate that the courts are prepared to absolve a labour hire employer of liability in circumstances where a breach of the non-delegable duty did not cause the incident.

This case note provides an update on how the courts are assessing the respective liability of employers and host employers, both in section 151Z *Workers Compensation Act 1987* recovery cases and cases where the employer is joined as a party.

Non-delegable duty of care

Despite the terminology, the duty of care is not delegated. It is the performance that can and is delegated. The effect of a non-delegable duty of care is that the person owing the duty of care is under a more stringent duty of care which cannot be fulfilled by exercising reasonable care in entrusting performance to a competent third party. The duty of care requires that the person ensure that the third party exercises reasonable care, in the sense that the person is liable if the third party does not exercise reasonable care: *Elliott v Bickerstaff* [1999] NSWCA 453 per Giles JA.

It is not in dispute that an employer who operates a labour hire business does not abdicate its non-delegable duty of care simply because its employees are sent to work for a client.

A host employer will also owe a non-delegable duty of care analogous to that of an employer in circumstances where it is found that the employee and the host employer placed themselves in a relationship indistinguishable from that of employee and employer.

The principle the recent decisions highlight is that any breach of duty by the employer must be causative of the injury for liability to be found.

The beginning

The case that gave rise to the rule of thumb that the relative liability split between employers and host employers was 25%/75% was *TNT Australia Pty Limited v Christie and two Ors* [2003] NSWCA 47 (12 March 2003).

In *TNT v Christie*, the plaintiff was employed by a labour hire company, Manpower (**employer**). The employer assigned the plaintiff to work at a brewery operated by TNT (**host employer**). The plaintiff was injured on site by a faulty pallet jack forklift hired from Crown Equipment (**Crown**) by the host employer. The plaintiff sued both his employer and the host employer.

The Court of Appeal held:

- the employer's breach was a failure to properly inspect, maintain and provide appropriate equipment for the plaintiff to undertake his task (notwithstanding it had no knowledge of the faulty equipment).
- the host employer's breaches were a failure to:
 - check on the quality of the maintenance and repair which Crown provided; and
 - take reasonable care to ensure that the pallet jacks provided were in good order and condition.

The Court of Appeal upheld the trial judge's finding that the employer was 25% liable and the host employer was 75% liable. The host employer was then awarded a full contractual indemnity against Crown.

One step forward

After seven years of the 25/75 split, the case of *Hodge v CSR Limited* [2010] NSW SC 27 2000 February (2010) was the first step in a new direction.

In *Hodge v CSR*, the plaintiff was employed by a labour hire company, ADECCO (**employer**). The employer assigned the plaintiff to work at the premises of CSR (**host employer**). The plaintiff sustained an injury when he was required to use a 25 kilogram jackhammer above his head for an extended period of time. The plaintiff sued both his employer and the host employer.

Justice Hislop of the Supreme Court of New South Wales found:

- the employer had delegated its duty of care to the host employer and the duty was not properly performed by the host employer; and
- the employer was found liable for the negligence on the part of its delegate but was not found liable for any direct breach of duty ie. its own negligence.

Hislop J held the employer and host employer were both liable to the plaintiff, but the employer was entitled to a full indemnity from the host employer on the basis that no direct negligence by the employer had been established.

This concept of direct breach, as opposed to being liable for the negligence of the party that the duty of care was delegated to, was not conceded in *TNT v Christie*.

One step backwards

The next year, in the case of *Clarence Valley Council v Macpherson* [2011] NSWCA 422 (22 December 2011) the Court of Appeal declined to overturn a decision that reverted to the principles in *TNT v Christie*.

In *Clarence Valley Council v Macpherson*, the plaintiff was employed by APS Pacific (**employer**). The employer assigned the plaintiff to work at Clarence Valley Council (**host employer**). The plaintiff was injured using a chainsaw without a clutch that was provided to him by the host employer. The plaintiff sued the host employer only and the host employer pleaded a section 151Z reduction.

The evidence at trial was that the plaintiff was supplied with the chainsaw by the host employer at short notice. There was no evidence that the employer was aware or could have prevented the equipment being supplied to the plaintiff. Notwithstanding, the trial judge found that the employer was in breach of its duty of care by failing to provide the plaintiff with safe plant and equipment.

The Court of Appeal declined to overturn the 15% assessment of liability on the part of the employer on the basis that questions of apportionment involved individual choice and discretion and it was not a demonstrable error.

Two steps forward

The following cases show that the courts are prepared to move away from *TNT v Christie* and find that an employer has no liability, in situations where either there is no breach of duty of care or the breach is not causative of the plaintiff's loss.

The most significant of these cases is *Shoalhaven City Council v Humphries* [2013] NSWCA 390 (22 November 2013).

In *Shoalhaven City Council v Humphries*, the plaintiff was employed by a labour hire company (**employer**) and assigned to work for Shoalhaven Water (**host employer**), an arm of the Council. The plaintiff received no particular training for this task, and was instead, under the direction of a Council supervisor in charge of the plaintiff's work detail. The plaintiff was injured lifting a manhole plate. The plaintiff sued the host employer only and the host employer pleaded a section 151Z reduction.

The Court of Appeal held:

- the employer owed a duty of care to ascertain from the host employer the system of work which it had in place to enable its employees to remove manhole covers without injury; and

- although there was no evidence that the employer had enquired about the host employer's system of work for heavy lifting, if enquiry had been made, it would have been told that a safe system was in place.

That is, the employer's failure to make enquiries did not cause the plaintiff's injury. The host employer was found not to have discharged the onus of establishing a breach of duty of care and there was no section 151Z reduction made.

An application by the host employer for special leave to the High Court was refused in August 2014.

Two years later, the cases of *Wormleaton v Thomas & Coffey Limited (No 4)* [2015] NSWSC 260 (20 March 2015) and *Sandra Bernadette Fullick v Jurox Pty Limited* [2015] NSWDC 40 (2 April 2015) both applied the reasoning in *Shoalhaven City Council v Humphries*.

In *Wormleaton v Thomas & Coffey Limited*, the plaintiff was employed by Allstate Labour Hire (**employer**) and assigned to work at Bluescope Steel's Port Kembla steelworks (**host employer**). The plaintiff sustained a severe crush injury as a result of a failure in the system of work. The plaintiff sued the employer and the host employer's operational contractors.

Justice Campbell of the Supreme Court found:

- where an employee was performing his work in a system of work devised by a principal contractor, the employer has an 'independent obligation to satisfy itself of the safety of the system'; and
- had inquiry been made, and the details of the system to be implemented explained, a reasonable employer in the position of Allstate would have been satisfied with the response. If there had been a breach on the part of the employer, it was not causative of the plaintiff's injury.

In *Fullick v Jurox Pty Limited*, the plaintiff was employed by Integrated Group Limited (**employer**) and assigned to work at Jurox Pty Limited's factory (**host employer**). The plaintiff was injured when manoeuvring a 25 kilogram bag. The plaintiff sued the host employer only and the host employer pleaded a section 151Z reduction.

The District Court held that:

- the host employer failed to discharge its onus to prove a breach of the duty of care owed by the employer;
- there was no evidence that a failure by the employer to audit the system of work contributed to the injury; and
- therefore, even if the failure to audit the system was a breach of the employer's duty of care, the breach did not cause the employee's injury.

Conclusion

Whilst the above decisions confirm that determination of the liability split between labour hire employers and host employers is still a discretionary exercise which will turn on the facts of each case, the recent cases of *Humphries* and *Jurox* demonstrate that caution should be taken when assessing the respective liabilities of an employer and host employer and whether there is likely to be a reduction in the damages awarded against a host employer pursuant to section 151Z.

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DISCLAIMER

This paper was prepared by YPOL (Anna Williams).

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