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Insurance insights

The duty of care owed by a principal contractor – is it delegable?

Written by
Rob Crittenden, Principal
T 02 9018 9950
E rcrittenden@meridianlawyers.com.au

Lauren Jefford, Solicitor
T 02 9018 9909
E ljefford@meridianlawyers.com.au

In its recent decision in *Gulic v Boral Transport Ltd*[1] the NSW Court of Appeal has found that the duty of are owed by a principal contractor is delegable even though the principal may have some power to direct the work being pursued.

Factual background

At the time of the incident, Mr Marinko Gulic (the "Plaintiff") was employed as the driver of a prime mover owned by GMG Transport Pty Ltd (GMG), a company of which he was the sole director and shareholder. In April 2008, GMG entered into a Cartage Agreement with Boral Transport Ltd (Boral) to perform haulage services supplying bricks and pavers to building sites throughout New South Wales.

Under the agreement, Boral supplied a body and trailer for installation on GMG's prime mover. The body comprised three gates, approximately 3 metres in length and 1.3 metres high, which were aligned on either side of the body's tray. The gates were hinged at the level of the tray and could be released down from their position to allow access to the tray (enabling loading and unloading).

The force required to lift one of the gates into an upright position was in the vicinity of about 20–23 kilograms. It was not suggested that this weight exceeded recommended guidelines. To lock the gates, it was necessary to align them with posts so that pins could be turned to lock the gates into position.

In early 2009, Boral installed a new locking system on the gates. In July 2009, the Plaintiff complained to Boral about difficulties with the new system, particularly in relation to the weight of the gates and difficulty closing the gate (it was necessary to slam the gate with force to enable the lock to be turned). Boral arranged for repairs to be carried out on the Plaintiff's vehicle in July 2009 and January 2010.

On 4 February 2010, the Plaintiff was attempting to close and lock the gate when he felt a sudden pain in his left shoulder while slamming the gate shut. As a result of the incident, he sustained a partial tear of tendons in his left shoulder.

Trial judgment

The Plaintiff subsequently commenced proceedings against Boral in the District Court of New South Wales claiming damages for breach of duty of care. The Plaintiff alleged that:

1. The design, manufacture and repair of the gates and their locking system was defective; and
2. Boral's response to numerous complaints made by the Plaintiff about the condition of the gates was inadequate.

The trial Judge found that the duty of care owed by Boral was effectively "one of employer/employee relationship because he was under their direction effectively at all times in terms of how the work was carried out".[2]

His Honour also found that there was no medical evidence which identified the cause of the Plaintiff's left shoulder pain. He was not satisfied on the balance of probabilities that any difficulty closing the gate actually caused the Plaintiff's left shoulder pain.[3] On that basis, the Plaintiff's claim failed.

Court of Appeal decision

The Plaintiff appealed to the Court of Appeal. The issues for determination on appeal were:

(a) Whether the trial Judge erred in finding that causation was not satisfied because there was no medical evidence identifying the cause of the Plaintiff's left shoulder pain; and

(b) Whether the trial Judge erred in his findings on breach.

Macfarlan JA delivered the findings of the Court of Appeal with Gleeson JA and Garling J agreeing.

Scope of duty of care

Boral submitted that it owed the Plaintiff "a duty to take reasonable care to provide gates that would not subject experienced, adult users, taking reasonable care for their own safety, to an unreasonable risk of injury when closing the gates".[4] The Court of Appeal accepted Boral's formulation of its duty of care.

The trial Judge had found that an employee/employer relationship existed. However, the Court of Appeal confirmed that this finding was erroneous and Boral's duty was in fact delegable. This meant that Boral's duty was "able to be discharged by engaging another person who was apparently competent and qualified to perform the task".[5]

Breach of duty of care

The court considered s5B of the *Civil Liability Act 2002* (NSW) (CLA), which addresses the issue of breach, and noted that It is first necessary to identify the relevant risk of harm.[6] Whilst it could be said that the relevant risk was a driver losing control of a gate while attempting to close it and being injured when the gate fell on him, the Court of Appeal determined that the risk should be defined more narrowly. The Plaintiff himself stated that the injury occurred not when he was lifting the gate, but rather when he was attempting to slam the gate closed. He was required to slam the gate in that manner due to a bent post. In the circumstances, the Court of Appeal determined the relevant risk of harm was a driver attempting to close and lock a gate with a distorted post.[7]

The next step was to identify whether the relevant risk was "not insignificant"[8] and therefore whether further precautions should have been taken by Boral to reduce or obviate that risk.

Boral had engaged Barker Trailers ("Barker") to design and manufacture the trailer and gate. Boral had some involvement in the design process, which the Plaintiff suggested imposed a higher level of responsibility on Boral.

However, in response, the Court of Appeal stated that "the fact that Boral collaborated with Barker in the design does not preclude Boral from asserting that the design of the new equipment was Barker's responsibility".[9] In other words, Barker had ultimate responsibility for the work that was carried out. The Court of Appeal confirmed that the same may be said for the repair company that was engaged to repair the trailer. There was no evidence suggesting that Barker was not a competent contractor. Therefore Boral was entitled to rely on Barker's competence.

In relation to the various complaints by the Plaintiff, the Court of Appeal noted that his complaints related to how difficult the gates were to close but he did not indicate that this gave rise to any safety issue. In those circumstances, Boral was entitled to assume that the issue was one of inconvenience and delay in loading/unloading, rather than an urgent safety issue to be dealt with immediately.[10]

As such, the Court of Appeal found that a "reasonable person in Boral's position would not at any relevant time have perceived that there was a relevant risk of injury, or at least not one of sufficient significance to warrant precautions being taken beyond the steps to have repairs performed that Boral took." [11]

Causation

The trial Judge based his findings on causation upon the factual finding that the gate was in a vertical position at the time and therefore the Plaintiff would have been bearing little or no weight on his left shoulder. His Honour found that no lifting force would have been required, which led him to conclude that there was no connection between closing/locking the gate and the sudden pain in the Plaintiff's shoulder.[12]

The Court of Appeal observed that the findings of the trial Judge failed to take into account the Plaintiff's own evidence about how the injury actually occurred. The Plaintiff did not allege that the injury resulted from lifting the gate. Rather, the Plaintiff alleged that once the gate was upright it was necessary to slam it closed so that the lock could be turned. This evidence was not challenged.

Based on the Plaintiff's description of the incident, the Court of Appeal found that the action of slamming the gate and the "immediate suffering of an injury was consistent with its causation by that action."[13] Accordingly, the trial Judge's findings on causation could not be sustained.

Regardless of these findings on causation, the Court of Appeal dismissed the Plaintiff's appeal on the basis that there was no breach of duty.

Whilst Garling J concurred with the judgment of Macfarlan JA, he made some brief additional comments. He noted that the facts of this case were quite unusual and thus the extent of the duty of care and the issues surrounding breach of duty are idiosyncratic. Nevertheless, His Honour opined that "there are dangers in assuming that a non-delegable duty of care owed by an employer to an employee can, or ought to, be readily imposed on parties to a contractual arrangement which is not an employer/employee relationship".[14]

Conclusion

The Court of Appeal's decision is important as it reaffirms the way in which courts should assess the duty of care owed by a principal contractor to a subcontractor's employee. The decision confirms that principal contractors do **not** owe a non-delegable duty of care to employees of subcontractors and in fact owe a much more limited duty of care. This is consistent with the principles established by the High Court in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd*[15] and *Leighton Contractors Pty Ltd v Fox*.[16]

The key point to take away from the decision is that principals, by virtue of their duty of care being delegable, can discharge their duty by retaining competent specialist contractors to perform their duties.

Footnotes:

1 (2016) NSWCA 269 (decision date 22 September 2016)
2 Ibid at [30]
3 Ibid at [32]
4 Ibid at [34]
5 See *Bevillesta Pty Ltd v Liberty International Insurance Co* (2009) NSWCA 16; *Laresu Pty Ltd v Clark* (2010) NSWCA 180
6 See *Roads and Traffic Authority of NSW V Dederer* (2007) 234 CLR 330; *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1
7 *Gulic v Boral Transport Ltd* (2016) NSWCA 269 at [41]
8 Section 5B(1)(b) of the *Civil Liability Act 2002* (NSW)
9 *Gulic v Boral Transport Ltd* (2016) NSWCA 269 at [45]
10 Ibid at [55]
11 Ibid at [68]
12 (1986) 160 CLR 16
13 (2009) HCA 35
14 Ibid at [53]
15 Ibid at [57]
16 Ibid at [60]. See also *Adelaide Stevedoring Company Ltd v Forst* (1940) HCA 45; *Military Rehabilitation and Compensation Commission v May* (2016) HCA 19
17 Ibid at [68]
18 (1986) 160 CLR 16
19 (2009) HCA 35

For further information on this update, please contact:
Robert Crittenden, Principal T: 02 9018 9950 E: rcrittenden@meridianlawyers.com.au