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Hallmark Construction Pty Ltd *v Harford* [2020] NSWCA 41

In this matter, Tony Kulukovski (Principal) and Jenna Rich (Senior Associate) of Thompson Cooper Lawyers successfully defended a claim brought by a plaintiff who suffered serious injuries on a large construction site in the course of his employment. Thompson Cooper Lawyers represented Certain Underwriters at Lloyds and Berkley Insurance Company ("Underwriters"), the insurers of ANM Building Services Pty Ltd (deregistered).

The plaintiff was a truck driver who operated his own company, Harford Transport Pty Ltd, which was engaged by Austral Masonry Pty Ltd to deliver bricks to a construction site in Homebush ("the Site"). Hallmark was the head contractor on the Site. Hallmark subcontracted Copeland to perform bricklaying services. Copeland ordered the building materials which were delivered by the plaintiff.

On the day of the incident, at approximately 5:45.am, the plaintiff arrived at the Site with his truck to deliver a load of bricks and was instructed as to where to unload them by Mr Isaia, an employee of ANM who was previously employed by Copeland. The plaintiff proceeded to lift a timber pallet lying on the ground which, unknown to him, was located over a penetration connected to a detention pit. It was still dark at the time and as the plaintiff stepped forward, he stepped into the penetration, falling approximately 4 metres to the bottom of the concrete tank below.

The plaintiff pursued his claim in the Supreme Court of NSW. In addition, related proceedings were brought by the workers' compensation insurer seeking recovery of the benefits it had paid. Damages were agreed at $1.6 million inclusive of workers' compensation payments prior to the Hearing. The Hearing therefore proceeded on the issue of liability only.

Following the hearing in the Supreme Court, Justice Fagan found Hallmark liable as the head contractor, but then found it was entitled to a 50% contribution from Copeland on its cross claim. His Honour found no liability against ANM and therefore dismissed the cross claims against Underwriters.

In particular, Justice Fagan found that as the head contractor, Hallmark ought to have ensured that a metal plate cover had been fixed over the subject pit with reasonable security against it being removed. It was noted in expert evidence that this could have been achieved by bolting the steel cover to the concrete lip of the penetration riser.

In the alternative, His Honour found that if fixation of the plate could not be achieved, then a barricade and warning sign around the penetration would have been required in order to discharge Hallmark's duty of care, as well as a system of regular inspections of the area. In this respect it was noted that the evidence revealed that the level and frequency of inspections was seriously deficient.

Another key finding was that Copeland exercised control over the relevant area at the time of the incident. Further, the Court accepted our argument that Mr Isaia, although an employee of ANM, was an authorised agent of Copeland and was acting under its direction and control when he took delivery of the load of bricks and directed the plaintiff as to where to unload the bricks on the morning in question.

In the judgment of the NSW Court of Appeal dated 17 March 2020, the trial judge's orders were upheld, subject to an adjustment of apportionment between Hallmark and Copeland. Ultimately, Copeland was found to bear 75% of the liability, largely on the basis that it exercised a more immediate level of control over the subject area.

The Court of Appeal made the following key findings:

- Copeland was a joint occupier of the subject area of the Site with Hallmark and owed a duty of care to take reasonable steps for the safety of persons coming onto the Site at its request. A reasonable person in Copeland's position was required to take precautions against the risk of harm arising from the uncovered penetration.

- The trial judge erred in attributing direct liability through agency to Copeland because of Isaia's conduct, as Isaia did not have authority to bind Copeland. The trial judge was correct, however, in the alternative finding that Isaia was acting as a representative of Copeland and under its direction and control at the relevant time so that Copeland was vicariously liable for his conduct.

- The trial judge was correct to apply the single attribution of vicarious liability principle, such that if Copeland was vicariously liable for Isaia's conduct, ANM was not, despite being his employer.

- There was no basis to conclude that a reasonable person in the plaintiff's position would have known or ought to have known that the wooden pallet was covering an open penetration. There was therefore no basis for a finding contributory negligence on the part of the plaintiff.

Key Messages:

- The Court of Appeal reaffirmed the position that the current state of the law does not recognise dual vicarious liability. Therefore, where one party is found to be vicariously liable for the actions of an individual, another party cannot also be vicariously liable.
- Further, an employer will not necessarily be the entity found to be vicariously liable for the acts of an employee. The Court of Appeal confirmed that it is the entity that directs and controls the actions of a worker which is vicariously liable for that worker's negligence.

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