

McGlashan v QBE Insurance (Aust) Ltd (No 2) [2014] NSWSC 486

Key Points

- Generally a duty of care is not owed by a principal to an independent contractor with respect to the safety of the work methods employed by the contractor.
- In this case the plaintiff stated that the principal had undertaken to assist him with his work and had subsequently assumed a responsibility to ensure the work was completed safely. This in turn established a duty of care.
- It was held that the evidence did not support the plaintiff's contention that the principal had assumed a responsibility for the plaintiff's work and therefore no duty of care arose. However, had the evidence been in the plaintiff's favour a duty of care would have most likely been established.

Background

The plaintiff McGlashan was subcontracted by Lidoran Roofing Pty Ltd (**Lidoran**) to undertake roofing work.

Lidoran's production manager, Keen, cancelled work due to the weather.

Mr Keen did not attend the first two repair jobs and he was still not present at the third repair job Mr McGlashan undertook that day at a furniture factory at Marjorie Street, Sefton.

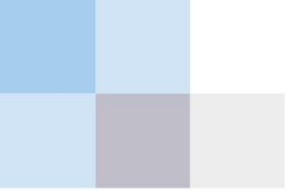
Later that day after the weather cleared, during a job, the plaintiff was descending his ladder when it blew over in the wind and he was forced to jump off falling three or four metres. The plaintiff suffered severe injuries to his ankles and was subsequently declared unfit to continue roofing work.

The plaintiff brought a claim against Lidoran on the basis that it owed him a duty of care and that duty had been breached.

The Law

Duty of Care

Lidoran relied on the principle established in *Leighton Contractors Pty Ltd v Fox* (**Leighton Contractors**) in respect of an independent contractor engaged to perform work by a principal. The Court held that provided the contractor was competent, and provided that the activity was placed in the contractor's hands, the principal was not subject to an ongoing



general law obligation with respect to the safety of the work methods employed by the contractor, or those with whom the contractor sub-contracted.

Mr McGlashan relied on the authority found in *Pacific Steel Constructions Pty Ltd v Barahona (Pacific Steel)*. In this matter the Court held that if evidence revealed that the principal's site foreman assumed responsibility to supervise the independent contractor as to how they did the work there may be seen to be a foundation for a relevant duty of care owed to the contractor. The contractor in *Pacific Steel* was unsuccessful as it was not able to establish that such responsibility was assumed by the principal's foreman.

Conclusion

The Duty of Care Issue

The relevant legal relationship between Lidoran and Mr McGlashan was that of principal and sub-contractor. The plaintiff accepted he was a competent contractor, but argued that the activity of repairing the leaks had not been placed in his hands because Mr Keen had undertaken to provide a second man to assist in the task, namely himself.

In his evidence Mr McGlashan stated that several times on the morning of the accident Mr Keen stated that he would meet Mr McGlashan at the next job site to provide assistance. Mr McGlashan contended that this was because Mr Keen knew that Mr McGlashan was working alone and was aware that roof work required two workers to ensure safety standards are met.

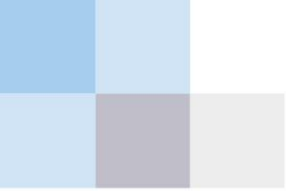
The Judge stated that in the present case that the critical question was whether Mr Keen assumed the responsibility, knowing Mr McGlashan relied upon him, to provide a second man to assist in the performance of the leak-repair work.

The Judge commented that should the evidence of the plaintiff be right the salient feature of vulnerability would permissibly extend duty to meet the circumstances of the present case, notwithstanding that Mr McGlashan was an independent contractor.

Mr Keen denies ever offering help to Mr McGlashan. The Judge stated that he had "difficulty" accepting Mr McGlashan's evidence that Mr Keen repeatedly assured him he would come and help. The Judge subsequently rejected this part of Mr McGlashan's evidence.

In coming to his decision the Judge commented that given the circumstances, principles of legal coherence would require that no duty be imposed on Lidoran. He commented that freedom of contract remains a fundamental value of the common law.

Importantly, the Judge noted that legally Lidoran and Mr McGlashan were entitled to make a contract that Mr McGlashan would undertake leak-repair work alone. Lidoran was entitled to leave it to the judgment of an experienced tradesman, like Mr McGlashan as to whether a particular job could be undertaken safely by him. Mr McGlashan was entitled to decide not to perform a particular repair if he judged it required a second man, even if only for the purpose of "footing" a long extension ladder, notwithstanding the expectation of Lidoran to the contrary.



The Judge concluded that Lidoran did not owe Mr McGlashan a duty of care.

Breach

The Judge was satisfied that but for the availability of a second person to foot the ladder during Mr McGlashan's ascent and descent, his personal injury would not have occurred. In the circumstances, the Judge stated that had a duty of care been established in this matter it is clear that this duty of care was breached by Lidoran.

Lessons Learnt

The established principle is that where an independent contractor is engaged to perform work, provided the contractor is competent and provided that the activity is placed wholly in the contractors hands, the principal is not subject to an ongoing general law obligation with respect to the safety of the work methods employed by the contractor, or those with whom the contractor sub-contracted.

This case recognises that where a principal assumes responsibility for the work of an independent contractor, for instance in this case offering to provide assistance to ensure safety requirements are met, then a duty of care may arise between the principal and the independent contractor. In the event the principal exercises control of independent contractors working systems the question of whether a duty of care is established becomes blurred.

Contact

For more information on this article, please contact:

Mark Birbeck
Partner
T: +61 (0) 8 9265 6002
M: 0448 446 419
mark.birbeck@hbalegal.com
www.hbalegal.com

Melissa Hurt
Solicitor
T: +61 (0) 8 9265 6017
M: 0402 370 263
Melissa.hurt@hbalegal.com

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