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When the Defendant's Witnesses have no good reason to remember – the Importance of Incident Reporting

Hutchison Construction Services Pty Ltd v Fogg; Fogg v Les Quatre Musketeers Pty Ltd (t/as Plastamasta South Coast [2016] NSWCA 135

Key Points

- Absent clear contemporaneous evidence, or a "dramatic event", a plaintiff's evidence about an event will almost always be accepted over others because they have the best reason to remember it.
- Following on from *Leighton Contractors Pty Ltd v Fox* [1], courts will look closely at the specific actions and responsibilities of contractors on construction sites and will not necessarily 'spread the love'.
- Once a contractor directs another contractor to perform even a basic task, they have a duty to ensure that the method for doing it is reasonably safe.

Background

In October 2008, the plaintiff strained his ankle whilst delivering sheets of plasterboard to a construction site at the Kiama showgrounds. The plaintiff refused medical assistance and continued to work for the balance of the day, but by the time of appeal it was accepted that his injury turned out to be a serious one.

The Plaintiff commenced proceedings against Kane Constructions (NSW) Pty Ltd (**Kane**) who was the head contractor, Hutchison Construction Services Pty Ltd (**Hutchison**) who Kane contracted with for the external cladding, and Plastamasta South Coast (**Plastamasta**) who was his employer. The trial judge dismissed the plaintiff's claims against Kane and the Plastamasta but awarded damages of $944,255 against Hutchison.

The Appeal

Hutchison appealed numerous aspects of the judgement and the plaintiff cross-appealed. However, the key issues were whether it was open for the trial judge to find that the incident occurred as alleged, whether Hutchison had breached its duty, and whether there should be an apportionment against the employer. The claims and cross-claims against Kane were not pursued on appeal.

The plaintiff's evidence was essentially that he was directed by a Hutchison employee to

[1] [2009] HCA 35; 240 CLR 1

deliver the plasterboard onto a surface that was uneven, inter alia, because a step had not yet been constructed. Hutchison argued that it was not open for the trial judge to accept the plaintiff's account primarily on the basis that a photo showed that the bottom step was in place was confirmed by three witnesses. Further, that this evidence amounted to an "incontrovertible fact" enabling appellate review.

The court rejected this argument on the basis that there was no "incontrovertible" evidence as to when the photograph was taken and the trial judge had concluded that the evidence of Hutchison's three witnesses was "wholly reconstructed". In determining which evidence the trial judge was entitled to accept, the court found that the photographic evidence and testimony of the three witnesses was not an "incontrovertible fact".

In forming this view, the court referred to the perennial problem for defendants in that "there [was] no good reason why any of the men on site, aside from Mr Fogg himself, would have any clear recollection of any aspect of the incident".

Hutchison also argued that the trial judge erred in his consideration of breach, inter alia, on the basis that Hutchison was "just another contractor" with limited ability to direct the plaintiff and that the everyday experience in carrying bulky items was not one requiring any particular measures to be taken. In rejecting these arguments the court found that the risk posed by the uneven ground was not obvious and that, on its own evidence, Hutchison had the right to direct the manner in which the plasterboard was delivered. Further, that the risk of injury could have been avoided by taking one of two simple measures. In particular by waiting for a temporary loading dock to be available, or delivering the plasterboard to some other place on the site with an even surface.

On the issue of apportionment against Plastamasta, the court found that there was nothing in the evidence to show that another employee "jointly decided where to direct the plaintiff to park". Given the high and non-delegable nature of Plastamasta's duty, it somewhat surprisingly avoided liability.

Conclusion

This case is yet another reminder that unless a defendant's witnesses have very good reason to remember an incident, it will be very difficult for their evidence to be accepted over a plaintiff. Whilst very difficult to justify for seemingly innocuous incidents, the only way around this is to conduct a thorough contemporaneous investigation. More specifically for cases in the construction industry, litigants ought to be careful not to take the 'scatter gun' approach by suing everyone on site. Courts will look closely as to who bore the actual responsibility for the event resulting in injury.

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