

## Employer not liable when it did not know the risk of harm on construction site

### A discount for vicissitudes to be applied to all future economic losses including damages for treatment and care

*Avopiling Pty Ltd v Bosevski; Avopiling Pty Ltd v The Workers Compensation Nominal Insurer [2018] NSWCA 146*

#### Key Points

- Care needs to be taken when commencing proceedings or maintaining proceedings against an employer in circumstances where the risks are not within their knowledge, or they would have no reason to know about the risk. This case highlights that employers, although an easy target due to their non-delegable duty of care, will not always be liable.
- A discount for vicissitudes applies to all heads of damage for future loss including treating and commercial care.

#### The Facts

- In January 2006, the appellant, Avopiling Pty Ltd (“**Avopiling**”), entered into an agreement with the NSW Department of Education & Training to undertake works at a school site in Cringila, NSW (“**the Cringila site**”).
- On 22 September 2006, Mr Riste Bosevski, a labourer employed by Professional Contracting Pty Ltd (“**Professional Contracting**”), was injured at the Cringila site. Two employees of Avopiling were erecting a mast, on a pile driving rig, when an auxiliary cable on the mast snapped, causing metal objects to fall and strike Mr Bosevski, who was standing with his supervisor near the pile driving rig. Mr Bosevski suffered injuries to his head, neck and chest.
- Mr Bosevski commenced proceedings against Avopiling in negligence. Avopiling filed a defence claiming contributory negligence pursuant to ss 5R and 5S of the *Civil Liability Act 2002* (NSW) and also alleged that any liability it had to Mr Bosevski should be reduced under s 151Z(2) of the *Workers Compensation Act 1987* (NSW) by reason of the negligence of Professional Contracting Pty Ltd.
- The Workers Compensation Nominal Insurer, who was responsible for Professional Contracting’s obligations to pay workers’ compensation, commenced proceedings against Avopiling seeking indemnity pursuant to s 151Z(1)(d) of the *Workers’ Compensation Act 1987* (NSW) for payments it had made to Mr Bosevski.



## Supreme Court Decision

In regard to the negligence proceedings, the primary judge found that Avopiling had been negligent and awarded Mr Bosevski damages in the sum of \$2,632,390.93. The primary judge found that Professional Contracting had **not** been negligent, and Mr Bosevski had not been guilty of contributory negligence.

In the indemnity proceedings, the primary judge found in favour of the Workers Compensation Nominal Insurer in the sum of \$919,225.23 and rejected Avopiling's defence that Professional Contracting had also been negligent.

Avopiling appealed in respect of both the negligence proceedings and the indemnity proceedings.

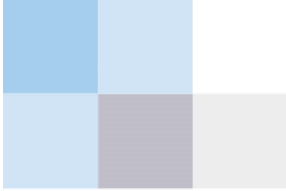
## Appeal

The Court of Appeal considered:

- (i) Whether the primary judge formulated the risk of harm for the purposes of the negligence of Professional Contracting Pty Ltd and the contributory negligence of Mr Bosevski in a way that was impermissible.
- (ii) Whether the primary judge erred in finding that Professional Contracting Pty Ltd was not negligent.
- (iii) Whether the primary judge erred in not making a finding of contributory negligence by Mr Bosevski.
- (iv) Whether the primary judge erred in his assessment of damages.

## Court of Appeal Decision

- In relation to issue (i), the Court held that the primary judge's formulation of the risk of harm was not in error.
- In relation to issue (ii), the Court held that the primary judge was correct to find that Professional Contracting Pty Ltd was not negligent. The evidence established that Mr Bosevski and his supervisor were acting in the scope of their duties by being in the vicinity of the pile driving rig. It was held that Professional Contracting lacked the requisite knowledge to be negligent as it was not demonstrated that it knew, or had any reason to know, of the risk of harm, or that Mr Bosevski or his supervisor could appreciate the risk of harm.
- In relation to issue (iii), the Court held that the primary judge was correct not to make a finding of contributory negligence by Mr Bosevski. Avopiling bore the onus of establishing contributory negligence (*Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34; *Ghunaim v Bart* [2004] NSWCA 28). It failed to prove its case as the



evidence given by two operators of the rig supported the primary judge's finding that Mr Bosevski had a legitimate reason for being in the zone around the pile driving rig when he was injured. Avopiling Pty Ltd did not prove that Mr Bosevski knew or ought to have known of the risk of harm.

- In relation to issue (iv), the primary judge's award of damages should be varied in respect of future losses:
  - Avopiling Pty Ltd failed to show error in the award of damages for past economic loss, loss of future earning capacity and past gratuitous care. *Malec v JC Hutton* (1990) 169 CLR 638; [1990] HCA 20 requires the judge to consider all possibilities and probabilities in relation to further earning capacities, which was undertaken by the primary judge.
  - The primary judge erred in his assessment of damages for future attendant care, lawn mowing, gardening and handyman services and future medical expenses for not applying a reduction for vicissitudes. Section 13 of the *Civil Liability Act 2002* (NSW) applies to damages for future economic loss both in respect of "future earning capacity" as well as "other events on which the award is to be based" which includes damages for future attendant care, lawn mowing, gardening and handyman services, and future medical expenses. Sub-section (2) requires calculating the percentage possibility of a future event occurring but for the injury and then adjusting the award of damages according to that calculation. The Court reduced the award of damages for future attendant care, lawn mowing, gardening and handyman services by 25%, and the award of damages for future treatment expenses was discounted by 10%.

## Lessons Learnt

- A employer will not always be liable, even though they are the obvious defendant in a claim of this kind.
- This case is authority that a discount for vicissitudes will apply to all future losses including treatment and care which could significantly reduce damages.

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