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Calling all witnesses! – The importance of calling key witnesses

Kabic v AAI Limited t/as GIO [2019] NSWCA 247

Key Points

- An appeal and cross-appeal were filed on the basis that the primary judge had erred in his findings of fact, contributory negligence and assessment of damages.
- The Court of Appeal allowed the appeal in respect of the finding of contributory negligence and assessment of damages for past loss of earnings, but otherwise dismissed the cross-appeal.

Background

Mr Milan Kabic was employed by Caringbah Formwork Pty Ltd (Caringbah), a labour hire company, and was hired out to provide services to Calcano Pty Ltd (Calcano), a subcontractor engaged by Deicorp Pty Ltd (Deicorp), to carry out formwork services at a building site overseen by Deicorp.

On 26 May 2011, Mr Kabic slipped and fell approximately two metres from a raised plywood platform that was not fitted with any protective barriers and was wet from rain. Mr Kabic subsequently sued Caringbah, Calcano and Deicorp for damages for personal injury.

Caringbah became deregistered and was replaced by the Workers Compensation Nominal Insurer.

Decision at first instance

Ultimately, only Calcano was found liable for Mr Kabic's injuries.

The primary judge found that Calcano had breached its duty of care owed to Mr Kabic by requiring him to work on a platform that was not enclosed by protective barriers, despite being elevated about two metres above a concrete floor, and which was, or ought to have been, known to be slippery when wet.

The primary judge drew a *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 inference from Calcano's failure to call evidence from the site foreman as to, *inter alia*, the presence of rain or water on the platform, the presence of cross-bracing and where Mr Kabic had been standing.

Mr Kabic was also found contributorily negligent and damages against Calcono were reduced by 33.33%.

Finally, in assessing Mr Kabic's damages for economic loss, the primary Judge took into account:

- Mr Kabic's residual earning capacity from performing light duties of at least $600 per week;
- by the time Mr Kabic was aged 50 he would not have been able to work as a formwork labourer; and

- the negligence of Calcano did not harm Mr Kabic's future earning capacity after age 50 because he would have moved to light duties at that age irrespective of the incident.

The Appeal/Cross-Appeal

Mr Kabic appealed against the primary Judge's assessment of damages and the finding of contributory negligence. Meantime, the insurer for Calcano, AAI Limited t/as GIO (GIO), cross-appealed against the finding of negligence against Calcano.

The following issues were at the centre of the appeal:

- whether the primary Judge erred in his findings of fact, including that Mr Kabic fell from the platform when he slipped on wet plywood and in drawing a *Jones v Dunkel* inference from Calcano's failure to call the site foreman to give evidence as to the presence of rain or water on the platform, whether cross-bracing was installed, and where Mr Kabic was standing when he fell;
- whether the primary Judge erred in finding that Mr Kabic was contributorily negligent; and
- whether the primary Judge erred in his assessment of damages, particularly in regard to past and future economic loss.

The Law

Their Honours were asked to consider the application of the *Jones v Dunkel* principle relating to the drawing of adverse inferences from a party's failure to call a key witness.

Their Honours also dealt with the application of the decision in *Malec v J C Hutton Pty Ltd* [1990] 169 CLR 638 when taking into account future or hypothetical events in assessing damages.

Conclusion

Issue 1 – Primary judge's findings of fact

It was held that it was open to the primary judge to accept the evidence of Mr Kabic as to where he was standing at the time of the incident and whether there were any guardrails in place.

The Court of Appeal also accepted expert evidence that if the platform was wet it would materially increase the risk of skipping, with no other action or inaction given rise to such an increased risk.

Further, the Court of Appeal did not consider that the primary judge erred in drawing a *Jones v Dunkel* inference, concluding that his Honour was entitled to so where the site foreman had been *"in the thick of things"* and ought to have been able to give key evidence.

Issue 2 – Contributory negligence

The Court of Appeal held that the primary judge had erred in finding Mr Kabic contributorily negligent given that his Honour's reasoning for doing so reversed the onus of proof of establishing contributory negligence.

The primary judge had required Mr Kabic to prove that the site foreman could see that the platform was wet and that he knew that the area where Mr Kabic had been directed to work was wet. The primary judge concluded that he was not satisfied, or found it unclear on the evidence, that the site foreman was in a position to see that the platform was wet, therefore Mr Kabic was found contributorily negligent.

The Court of Appeal concluded that in reasonably following orders, being merely inadvertent, thoughtless, inattentive or misjudging the situation, Mr Kabic could not be contributorily negligent in the circumstances.

Issue 3 – Assessment of damages

The Court of Appeal concluded that the primary judge had erred in applying a deduction of $600 per week to reflect Mr Kabic's residual earning capacity as the evidence did not establish that the suitable employment identified was actually available to Mr Kabic or whether he could actually secure that employment in any event.

On the other hand, the Court of Appeal dismissed Mr Kabic's appeal against the primary judge's assessment of damages for loss of future earning capacity as a formwork labourer up to age 50. The Court of Appeal concluded that Mr Kabic's approach of assessing damages on the basis of hypothetical or future events was inconsistent with the decision in *Malec v J C Hutton Pty Ltd* [1990] 169 CLR 638, which held that a plaintiff's loss is to be assessed with reference to the probability of a pre-existing condition affecting the plaintiff in the future. Further, it was determined that applying *Malec v J C Hutton* would not result in a higher award of damages based on the medical evidence.

Lessons Learnt

The decision:

- highlights the importance of ensuring all relevant witnesses are made available for hearing to avoid any adverse inference being drawn for said witnesses not being called to give evidence;
- emphasises that the decision in *Malec v J C Hutton* cannot be used to gain a higher award in damages where the medical evidence does not accord with submissions as to the probability of future or hypothetical events occurring; and
- highlights that a decision is appealable if the Court reverses the onus for contributory negligence.

Contact:

Nathan Hepple
Partner
Direct: +61 (0) 2 9376 8888
nathan.hepple@hbalegal.com

Andrew Gulyas
Associate
Direct: +61 (0) 2 9376 1122
andrew.gulyas@hbalegal.com

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