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Employer Tortfeasor's Liability – a not so simple example

Synergy Scaffolding Services Pty Ltd v Alelaimat [2023] NSWCA 213

Key Points

An appeal and cross-appeal were filed on the basis that the Primary Judge had erred in his interpretation of an employers' liability exclusion clause and findings in relation to contributory negligence, employers' contribution pursuant to Section 151Z of the *Workers' Compensation Act*, and assessment of damages.

The Court of Appeal dismissed the appeal, but otherwise allowed the cross-appeal in relation to damages.

Background

At first instance, Mr Alelaimat brought proceedings for personal injury against Synergy Scaffolding Services Pty Ltd (**Synergy**) in the Supreme Court of New South Wales.[1]

On 10 October 2012, Mr Alelaimat (a truck driver) was directed by Synergy to attend a building site to collect and remove scaffolding. When he arrived at the site, Mr Alelaimat was instructed by Synergy to assist in dismantling the scaffolding. While inspecting scaffolding material in preparation to load them onto his truck, Mr Alelaimat was struck on the back by a falling piece of metal scaffolding and suffered serious injuries.

At the time of the incident, Mr Alelaimat was employed by DJ's Scaffolding Services Pty Ltd (**DJSS**), but his day-to-day work was directed by the Operations Manager of Synergy. He wore clothing and drove trucks with Synergy's name. Mr Alelaimat claimed and was paid compensation pursuant to the *Workers' Compensation Act 1987* (NSW). Ultimately, Mr Alelaimat brought proceedings for personal injury against Synergy and the Workers' Compensation Nominal Insurer (**WCNI**) as the insurer of DJSS, which had been deregistered.

Synergy pleaded, amongst other things, that damages payable to Mr Alelaimat should be reduced under section 151Z(2)(c) of the *Workers' Compensation Act*. Synergy and WCNI each brought cross-claims against one another seeking statutory contribution or indemnity under section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). WCNI also sought indemnity from Synergy under section 151Z(1)(d) of the *Workers' Compensation Act* for compensation that had been paid to Mr Alelaimat.

The Primary Judge held as follows:

1. Judgment for Mr Alelaimat against Sydney Scaffolding in the sum of $1,356,533.39.

2. The award included a sum in respect of past compensation paid by WCNI for medical expenses. Mr Alelaimat would be liable to repay WCNI out of the award under section 151Z(1)(b) of the *Workers' Compensation Act*.

[1] *Alelaimat v Synergy Scaffolding Services* (No 3) [2022] NSWSC 536

3. The claim against WCNI was dismissed on the basis that the DJSS had not been shown to have breached its duty of care to Mr Alelaimat.

4. WCNI's cross-claim for the statutory indemnity under section 151Z(1)(d) of the *Workers' Compensation Act* was upheld.

5. The cross-claims were otherwise dismissed.

6. The application of section 151Z(2)(c) and section 151Z(2)(e) of the *Workers' Compensation Act* did not need to be considered. All parties involved in the initial proceedings agreed that Mr Alelaimat was employed by DJSS. Notwithstanding that DJSS was accepted as Mr Alelaimat's employer, the company had not been shown to have been in breach of its duty of care to him and His Honour entered judgment in favour of WCNI against Mr Alelaimat.

7. Synergy to pay the costs of Mr Alelaimat and that of WCNI.

DJSS was not liable due to its lack of control over the "premises and system of work" at the site where Mr Alelaimat was working, and the spontaneous nature of the tasks assigned to Mr Alelaimat on the day. The Primary Judge concluded that DJSS had "*no opportunity to make its own enquiries about the safety of the system*" and even if it had, it would have been told by Synergy's representative that the dismantling of the scaffolding was "*in the hands of competent scaffolders*".

Synergy appealed the primary judgment as well as the assessment of damages.

The Law

The Court was asked to consider the application of section 151Z of the *Workers' Compensation Act* and the assessment of damages in accordance with the principles in *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312.

Conclusion

Ground 1 of the appeal: The *Limitation Act 1969* defence.

The Court of Appeal considered section 50D of the *Limitation Act*. Their Honours accepted the rejection of this defence from the Primary Judge on the basis that Mr Alelaimat had no realistic means of knowing the intricacies of the *Civil Liability Act 2002* and the *Workers' Compensation Act.*

Synergy was able to prove that Mr Alelaimat was aware that the injury had occurred and the fact that the injury was caused by the fault of Synergy. However, the advice that he received from is lawyers did nothing to inform him of any right he had to bring proceedings at common law (against either Synergy or DJSS).

Grounds 2 & 3 of the appeal: Challenge the finding of the Primary Judge that DJSS was not liable to Mr Alelaimat in negligence.

The Primary Judge accepted DJSS as a labour hire company that supplied labour to entities with which it contracted. It was uncontroversial that an employer was under a duty to take reasonable care to provide safe system of work for its employees. It was equally uncontroversial that duty could not be delegated by engagement of an independent contractor.

The Court of Appeal disagreed with the Primary Judge as previous authorities established that DJSS was under a duty to ensure that Synergy provided Mr Alelaimat with a safe system of work.

The conclusion that Mr Alelaimat's injury was caused by the negligence of Synergy was sufficient to establish, on the application of the principles in *Kondis v State Transport Authority*[2], that DJSS was liable to Mr Alelaimat for that negligence. The Court of Appeal made an order setting aside the judgment in favour of WCNI against Mr Alelaimat. The Court awarded judgment for Mr Alelaimat against WCNI in the sum of $917,686.

Apart from its liability to Mr Alelaimat as his employer, almost nothing was known of DJSS' role and there were gaps in the evidence. In these circumstances, DJSS could not reasonably have considered to direct Mr Alelaimat to stay out of the scaffolding area in order to secure him from danger of injury by falling scaffolding.

The Court of Appeal came to the view that Synergy Scaffolding had not demonstrated its entitlement to any contribution from DJSS. That was not because DJSS discharged its obligation as an employer, nor was the Court was persuaded that DJSS had no opportunity to exercise care in relation to the working conditions. This conclusion was reached based on the onus of proof which Synergy failed to discharge. Whatever arrangements existed between Synergy and DJSS was not revealed by the evidence. Synergy was in the best position to call that evidence, but it did not do so.

For these reasons, Synergy had failed to establish that for the purposes of section 151Z(2)(c) of the *Workers' Compensation Act*, it was entitled to a contribution under section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946,* and to a reduction in the damages awarded to Mr Alelaimat. The Court of Appeal also rejected the argument that by reason of DJSS' liability to Mr Alelaimat, WCNI was also liable to Synergy.

Ground 4: Was WCNI entitled to indemnity under S151Z(1)(d) of the *Workers' Compensation Act*?

There were discussions as to the consequences of the wording of Section 151Z(2)(e), in particular the uncertainties raised "*if the worker … does not accept satisfaction of the judgment against the employer*". The Court of Appeal stated this may be taken to mean "*if the worker [the plaintiff] does not enforce the judgment against the employer*".

Neither condition for the application of section 151Z(2)(e) had been satisfied. Accordingly section 151Z(1) did not apply and an order was made setting aside the previous order that Synergy indemnify WCNI pursuant to section 151Z(1)(d) of the *Workers' Compensation Act*. This conclusion is consistent with the reasoning in *South West Helicopters*[3].

The difficulty arose, at least in part, because in accordance with usual practice WCNI's cross-claim was heard and determined concurrently with Mr Alelaimat's claims. At the time of the determination, it was not known whether Mr Alelaimat would accept satisfaction of judgment against WCNI.

The Court of Appeal accepted that "*these conclusions may have some curious and unexpected consequences*" and invited further submissions with respect to the consequences of the Court's findings.

[2] (1984) 154 CLR 672
[3] [2017] NSWCA 312

Ground 5: Was Synergy Scaffolding liable to pay damages for Mr Alelaimat's medical expenses?

Mr Alelaimat was not otherwise obliged to repay WCNI for the medical expenses paid on his behalf, then the loss for which he was entitled to be indemnified did not include those expenses and the order in his favour so far as it included a component representing medical expenses constituted a windfall. That amount should be deducted from the award of damages.

The Court of Appeal made the following orders:

1. Judgment for the first respondent (Mr Alelaimat) against the appellant (Synergy) in the sum of $1,356,533.39 be set aside.

2. In lieu thereof, judgment for the first respondent against the appellant in the sum of $1,180,691.60.

3. Judgment for the second respondent (WCNI) against the first respondent be set aside.

4. In lieu thereof, judgment for the first respondent against the second respondent in the sum of $917,686.00.

5. The order that the appellant indemnify the second respondent pursuant to s151Z(1)(d) of the *Workers' Compensation Act* in the sum of $246,202.54 be set aside.

Lessons Learnt

An employer owes a worker a non-delegable duty of care.

The Court of Appeal has confirmed the earlier construction of Section 151Z of the *Workers' Compensation Act* from the *South West Helicopters* case that if an employer tortfeasor is found negligent for an employee's injuries, a third-party tortfeasor is not required to indemnify the employer tortfeasor for payments made by the employer or workers compensation insurer if the employer is also negligent.

The Court of Appeal commented that the conclusions reached could have "*unexpected consequences*," even though the possible outcomes were probably not the intention of the legislature.

Contact:

Daniel Bui | Associate
D: +61 (2) 9376 1145
F: +61 (2) 9376 1111
E: daniel.bui@hbacrawford.com.au

Iona Sjahadi | Partner
D: +61 (2) 9376 1128
F: +61 (2) 9376 1111
E: iona.sjahadi@hbacrawford.com.au

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