

### ACCIDENTS ON CONSTRUCTION SITES—BREACHES OF STATUTORY DUTIES AND DENIALS OF INDEMNITY BY INSURERS. WHERE DOES IT ALL END UP?

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Construction sites are often the source of accidents. Personal injury claims are regularly made against multiple parties engaged in construction work. Breaches of Occupational Health and Safety Legislation and other statutory duties often go hand in hand with an accident on a construction site. When an insurer finds there has been a breach of a statutory duty it may decline to indemnify its insured arguing breaches of conditions in the policy that require the insured to take reasonable care and relying on exclusion clauses that abrogate responsibility when there are breaches of statutory duties. A complicated situation—yes. But how does it all pan out.

The NSW Court of Appeal has shed some light on these issues in a recent decision in *Booksan Pty Ltd, Jaymay Constructions Pty Ltd v Wehbe, Elmir & GIO General and others*.

Bilal Wehbe and Salah Eldin Elmir, were young and inexperienced labourers working on a construction site. Booksan Pty Ltd was the owner of the site and Jaymay Constructions Pty Ltd (a related company) the supervisor. They were employees of M K Tiling, which subcontracted to provide tiling work on three blocks of

three-storey home units being constructed on Booksan's site.

Both men were injured when the platform of a materials hoist, on which they were travelling, collapsed and fell to the ground. The hoist was lifting them, two other men and a load of tiles to the third floor of one of the blocks.

The men argued that Booksan, as occupier of the site, and Jaymay, as supervisor of the construction work, owed them a duty of care. They argued that Booksan had breached its duty by inadequately affixing the hoist and Jaymay had breached its duty when its employee operated the hoist whilst it was overloaded.

It was also argued that both companies breached various statutory duties under the Construction Safety Regulations 1950 (NSW) and that contributory negligence could not be argued against a breach of a statutory duty. The original District Court judge did not accept this submission but found there was no contributory negligence.

The District Court judge held both defendants were negligent but the injured were not guilty of contributory negligence. An appeal followed.

The facts of the case depict a relatively common situation in the construction industry. Nevertheless the judgment is a significant one as it has clarified a number of issues that have troubled the legal profession since the introduction of the Civil Liability Act in NSW.

The judgment of the Court of Appeal confirmed:

- The obviousness of a risk does not bear upon the existence of a general duty owed by an occupier.
- The obviousness of the risk and Patrick Sahyoun's conduct in requesting the defendants to get

off the platform are relevant to the reasonableness of the defendants' response to the risk involved. These matters, however, do not detract from the defendants' duty to the plaintiffs.

- Booksan, as occupier of private land, and Jaymay, as employer, had a continuing duty of care to the plaintiffs. This duty was breached when Booksan failed to adequately affix the hoist and when Patrick Sahyoun, as employee of Jaymay, activated the hoist while the plaintiffs were on it.

- The plaintiffs' actions in getting on the lift and disregarding a specific direction by Patrick Sahyoun were foolhardy. The trial judge erred in determining that the plaintiffs were not guilty of contributory negligence. A proportion of 15% responsibility for their own contribution to damages should be attributed to the plaintiffs. This takes into account the fact that the most powerful causative factors in the plaintiffs' injuries were the negligence of Patrick Sahyoun in activating the lift and the negligence of Booksan in not appropriately affixing the hoist.

- That since 6 December 2002 in NSW, irrespective of how a claim is formulated, if—in substance—it is a claim for damages for harm resulting from negligence, a defence of contributory negligence may be raised to that claim even if it is based on a breach of statutory duty.

- Contributory negligence is only available as a defence to a breach of statutory duty claim in NSW where the cause of action accrues after 6 December 2002.

Insurance issues also troubled the Court of Appeal. In the proceedings in the District Court the defendants had sued their liability insurer who had declined to indemnify both defendants for the claims.

GIO General the liability insurer denied that it was liable to indemnify Booksan and Jaymay, joint insureds on the ground that each had failed to comply with General Condition 2 and General Exclusion 3 of the insurance policy.

Condition 2 of the policy provided 'You must take all reasonable care to maintain the premises, structures, fixtures, fittings, furnishings, appliances, machinery, implements and plant in sound condition. You must take all reasonable care for the safety of the Property Insured and to avoid and minimise loss of or damage to property or injury to persons. You must also ensure that only competent employees are employed and that you and they comply with all statutory obligations, by-laws, regulations, public authority requirements and safety requirements'.

Exclusion 3 provided the insurer was not liable for 'Loss or damage or liability caused by or as a result of your failure to comply with any relevant statutory obligations, by-laws, regulations, public authority requirements or safety requirements'.

The trial judge held that Booksan had not breached these conditions and was, therefore, entitled to be indemnified however it was found that Jaymay had not complied with General Condition 2 and General Exclusion 3 and was, therefore, not entitled to any indemnity. Effectively the judge found the words 'you' in the general condition included employees of the insured by virtue of definitions in the policy and therefore conduct by the employee which could be seen to amount to a breach of the condition would be result in a breach of the condition by Jaymay. These finding were challenged in the appeal.

The insurers accepted that an employer's vicarious liability to a third party for the negligence of an employee is not relevant to the obligation of an insured. Thus, the fact that Jaymay's employee, Patrick Sahyoun, was negligent did not establish a breach of General Condition 2 by Jaymay. The insurers also accepted that General Condition 2 would only not be satisfied if the conduct of Booksan and Jaymay were such that it amounted to a deliberate decision to expose persons to a risk of injury, or recklessness on their part. An argument that Booksan had breached condition 2 through the actions of Jaymay's employee was also rejected and found there was no basis on which it can be said that Booksan's conduct amounted to a deliberate decision to expose persons to a risk of injury or recklessness.

The Court of Appeal also held while Patrick Sahyoun was an insured for the purposes of the Public and Products Liability Section of the policy, he was an insured on the basis that a separate Public and Products Liability Policy is deemed to have been issued to him. His conduct affects only his rights under that deemed policy; it does not affect the rights of the other insureds, such as Jaymay, under the policies deemed to have been issued to each of them. The Court of Appeal held the original judge erred in attributing the conduct of Patrick Sahyoun to Jaymay.

The Court of Appeal also held that neither Booksan nor Jaymay breached any statutory regulations and that the exclusion clause in the policy did not impact.

Effectively the Court of Appeal determined that both Booksan and Jaymay were entitled to be indemnified by their liability insurer.

Significantly the court also confirmed that a breach of the NSW Occupational Health and Safety Act did not trigger the exclusion clause for the insurer as that Act specifically precludes the insurer from relying on the breach as the Act provides that any breach of the Act does not confer a right of action in any civil proceedings in respect of any contravention or a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings.

A complicated battle with many twists and turns but an interesting result. One hopes that the next construction of three blocks of threestorey home units does not result in the same minefield of litigation and disputes on the application of the law in NSW that two young and inexperienced labourers working on a construction site experienced when they were injured.

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