benchtv
a benchmark production

Précis Paper

Workplace Injuries: The importance of evidence

A discussion about the recent decision of *Smith v Ulan Coal Mines Limited* (No 2) (2020) NSWSC 416.

Discussion Includes

- Facts
- Key dispute between the parties
- Findings of the Court
- Credibility of the plaintiff
- The alternative case plead by the plaintiff
- Experts
- Operation of the Civil Liability Act
- Foreseeability
- Doctrine of res ipsa loquitur
- Conclusion

Précis Paper

Workplace Injuries: The importance of evidence

In this edition of BenchTV, Malcolm Scott (Barrister, Greenway Chambers, Sydney) and Ashley Cameron (Barrister, Greenway Chambers, Sydney) discuss the recent decision of *Smith v Ulan Coal Mines Limited* (No 2) (2020) NSWSC 416.

Facts

1. The plaintiff was an underground electrical tradesman employed by a labour hire company who used his services for underground coal mine activities.
2. He was working in an underground coal mine for the defendant's coal mine at Ulan in NSW when he injured himself on the back of his left hand.
3. The injury occurred whilst he was in the vicinity of a feeder breaker machine which is a machine that takes coal and processes it underground The injury was a fluid injection injury which is usually caused by fluid at high pressure entering someone.

Key dispute between the parties

4. During the proceedings, the quantum issues were agreed between the parties and the issue between the parties was one of liability.
5. The main issue in this matter was what caused the injury. The injury was a rare injury such that in 31 years of experience by one of the defendant's instructors, they had never seen an injury such as this before.
6. The machine had been in a mode which meant that it was not likely to cause any injury to anyone via its hydraulic system and the way the plaintiff put his case, the defendant determined that the wat which the plaintiff described the way in which the injury occurred was not physically possible.
7. The defendant submitted to the judge, and the judge ultimately agreed that 3 things needed to happen for an injury of this kind to occur
    a. There had to be a leak of hydraulic pressure as without it there would be no injection of hydraulic pressure.
    b. The hydraulic pressure had to be energised as these machines are not constantly full of fluid at a high pressure.
    c. The injury to the plaintiff required him to put part of his body in close proximity to the hydraulic system.

Findings of the Court

8. What his honour found in regard to those three matters was firstly that there was no leak from the hydraulic system. This was ascertained by third party measurement and testing.
9. At paragraph 182 of the judgement, His Honour also found that the energising of the system did not occur. In particular, His Honour found that for the machine to be energised, it required an operator or some other person to hold down two buttons and continue to hold them down for the energy to be created within the hydraulic system. As soon as the buttons were released, the energy in the hydraulic system dissipated immediately.
10. His Honour had found that the plaintiff had stated that he did not energise the machine, there was no reason for him to energise the machine and that there was nobody else present when the plaintiff was injured who may have inadvertently energised the machine. Therefore, the evidence of the machine being energised failed.
11. The third issue was the plaintiff having to put his hand in close proximity to the fittings of the hydraulic system. His Honour found that there was no reason that could be put forward as to why a person who was cleaning the electrical systems would have their hand in that part of the machine.
12. On the basis of these circumstances, His Honour found that the plaintiff had failed to establish those necessary factual ingredients to his case.

Credibility of the plaintiff

13. The plaintiff's explanation as to how the injury occurred was different to the physical evidence that was available at the time.
14. There were also additional credibility issues which became relevant to the plaintiff's evidence itself. His Honour had difficulties accepting the plaintiff's version of events as the plaintiff had also given misinformation to medical practitioners which led to him being able to work in underground mines.

The alternative case pled by the plaintiff

15. With the difficulties that arose in regard to the physical impossibility of the plaintiff's injuries occurring the way he said they occurred, the plaintiff put a separate case.
16. The separate case that the plaintiff put was to ask the court not to have regard to the evidence given by the plaintiff as to how the injury occurred and instead start on the basis that the plaintiff had suffered a frank injury whilst in the proximity to a particular machine and one which could cause such an injury. Upon that basis, the plaintiff's argument was that because the injury had occurred, the machine must have been unguarded or guarded negligently and therefore the defendant was liable for the injury.

17. In his decision, His Honour went through several High Court authorities in regard to this including *Liftronic Pty Limited v Unver* [2001] HCA 24 [2001] HCA 24 and *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422.
18. In *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422, the High Court stated that what has to be found is that a reasonable person had failed to take reasonable steps in regard to a foreseeable risk.
19. Further, the *Civil Liability Act* 2002 (NSW) asks what a reasonable person would do with regard to a risk. Therefore, one can not argue under the *Civil Liability Act* 2002 (NSW) that there is an injury and as a result there must have been a risk and the fact that the risk has become manifest in an injury means there was a failure.
20. His Honour gave careful consideration to the separate case being that the guarding was inadequate and found that there was no foreseeable risk that somebody would put their hand inside the guard of the machine near where the fittings were. As such, the guarding was adequate.

Experts

21. There were three experts in this case; two experts called by the plaintiff and one expert for the defendant. The first expert was an expert in relation to work health and safety legislation. He gave evidence in relation to what he said were breaches of the regulations and the Act.
22. The other two key experts in this case gave evidence in relation to the feeder breaker machine itself, what that machine did and the circumstances in which the plaintiff could or could not have been injured.
23. One of the experts, Mr Koppe's evidence fell into two parts
    a. the investigation he undertook together with one of the senior employees of the mine which were handwritten notes and produced where required by the mine's inspector
    b. a second document being a report that he prepared as an expert
24. Mr Koppe was the investigator who originally came to the mines when the injury first occurred and investigated the leak and prepared a report. Shortly before the hearing there was an interlocutory application in relation to whether he should be entitled to put on evidence as an expert witness in these proceedings given he had already been involved in the investigation and that when he did the investigation he did not acknowledge or agree to be bound by the expert witness code of conduct.
25. This was dealt with by Justice Campbell in the earlier decision and he allowed the report to be put on but limited it in certain respects and found that certain aspects of it could not be relied upon by the plaintiff. He found that in essence, the fact that he had not acknowledged the code of conduct was important but effectively where his Honour found

substantial compliance with the requirements of that code the expert report could be relied upon.

26. HIs Honour found that Mr Koppe's evidence in respect of his investigations was credible and he accepted that evidence however his evidence in relation to his expert report and later at the hearing, His Honour found was partisan and was quite supportive of the plaintiff's case and the plaintiff's explanation.
27. There was evidence that led His Honour to the view that Mr Koppe's evidence at the hearing and as an expert witness was not something that could be accepted and Mr Koppe's evidence at the hearing was speculation in many ways and in particular in regard to how the machine could have been energized.
28. The other expert, Mr Cockbain was an expert in relation to work health and safety regulations and *Work Health and Safety Act* 2011 (NSW).
29. A number of aspects of the Act and *Work Health and Safety Regulations* 2011 were pleaded as part of the plaintiff's case.
30. Whilst section 267 of the *Work Health and Safety Act* 2011 (NSW), s 267 puts a prohibition on using the provisions of the act for the basis of a civil action
31. The regulations are not so constrained however there was a judgement that came down before this matter was heard, which was *D'Arcy v Caltex Australia Petroleum Pty Ltd* [2019] ACTCA 27.
32. The case found that if a person has a regulation which is in effect accepted by the general public as being a duty or a statement of a duty owed by the mine to the worker, then that could be put in as a pleading relevant to a civil case such as this.
33. His Honour found that there were only two possible regulations that could have an effect on the hearing: The *Work Health and Safety Regulations* 2011 and *Coal Mine Health and Safety Act* 2002 (NSW). Neither of those, His Honour found were capable of being relied upon by the plaintiff as distinct causes of action.
34. The report of Mr Cockbain was dealt with by his honour as being very partisan and a way of putting forward all particular suggestions of breach by the defendant of various provisions and regulations of not only the *Work Health and Safety Act* 2011 (NSW) but also the *Work Health and Safety Regulations* 2011 and the *Coal Mine Health and Safety Regulation* 2006.
35. His Honour found that the partisan approach was not one that he could find favour with

<u>Operation of the Civil Liability Act</u>

35. - His Honour found that for the *Civil Liability Act* to be given effect to, one must first know what the facts are that surround the injury, Until one can discover what the risk is, one cannot argue that someone has been negligent in not taking the proper steps to overcome that risk under the *Civil Liability Act* 2002 (NSW).

Foreseeability

36. His Honour found that when the feeder breaker machine was in the sequence mode that it was meant to be in according to the evidence, the hydraulic pipes of the machine were not pressurized. Without any pressure in the pipes, there was no foreseeable risk of injury being caused of the kind that was caused in this case.
37. In addition to this, it was not a place of work.
38. His Honour found given these circumstances, the injury in this case was not foreseeable in the sense that whilst the machine was in sequence mode, being cleaned by somebody who had no reason to be in the area of the hydraulic fittings, there was no real risk that they would suffer a hydraulic injury.
39. His Honour found that there was a risk of a high-pressure injury to a person positioned near the feeder breaker machine however it was small given it was not foreseeable at the time

Doctrine of res ipsa loquitur

40. The plaintiff also argued that the principle of res ipsa loquitur should apply as there was a frank injury, a person in the vicinity of the machine, they were healthy when they went near the machine and injured when they came back from the machine.
41. His Honour referred to the case of *Schellenberg v Tunnel Holding* [2000] HCA 18 where the a res ipsa loquitur claim was considered whereby an individual had been using a welder and the pipe had come away at high pressure and struck the person in the face. In that case, the Court there found that it was not a case to which the doctrine of res ipsa loquiter would apply because the cause of injury was known.
42. Similarly, in the present case the cause of injury was known as a high-pressure fluid injection to the back of the plaintiff's hand and therefore the doctrine of res ipsa loquiter had no application as the explanation was known. Therefore, His Honour found that it was not a case where there was no other explanation except for negligence and therefore the res ipsa doctrine had no application in this matter, and it was dismissed accordingly.

Conclusion

43. Whilst His Honour found that the principles of TNT Australia v Christie and Ors [2003] NSWCA 47 applied with regard to the duty owed to the plaintiff, His Honour did not find in favour of the plaintiff on any aspect of the pleading.

BIOGRAPHY

Malcolm Scott

Barrister, Greenway Chambers, Sydney

Ashley Cameron

Barrister, Greenway Chambers, Sydney

Ashley Cameron was admitted as a legal practitioner in 2014 and called to the Bar in 2019. In 2018 Ashley received both the Ludlows Award (awarded to an individual who receives the highest overall mark in the NSW Bar exams), and the Katrina Dawson Award (awarded annually to one woman who has passed the NSW Bar exams and is committed to starting practice at the Bar).

BIBLIOGRAPHY

Legislation

Civil Liability Act 2002 (NSW)

Work Health and Safety Act 2011 (NSW)

Work Health and Safety Regulations 2011 (NSW)

Coal Mine Health and Safety Regulation 2006 (NSW)

Cases

Smith v Ulan Coal Mines Limited (No 2) (2020) NSWSC 416

Liftronic Pty Limited v Unver [2001] HCA 24 [2001] HCA 24

Vairy v Wyong Shire Council [2005] HCA 62; 223 CLR 422

D'Arcy v Caltex Australia Petroleum Pty Ltd [2019] ACTCA 27

Schellenberg v Tunnel Holding [2000] HCA 18