



Précis Paper

Work Health & Safety

Senior Counsel Ken Read from Hobart discusses the duty of homeowners on their premises to a tradesmen who fell from a ladder. Also interesting issue of proof of accident when plaintiff had no memory.

Discussion Includes

- The facts of *Hendrex v Keating* [2016] TASSC 20
- Important points regarding personal injury claims involving tradespersons
- Breach of statutory duty
- Negligence and breach of contract
- Contributory negligence
- Assessment of damages

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1. In this edition of BenchTV, Ken Read SC (Barrister) and Ian Benson (Solicitor) discuss the recent decision of the Tasmanian Supreme Court (Blow CJ) in *Hendrex v Keating* [2016] TASSC 20 which considered the application of workplace legislation to an accident which involved tradespeople working on a residential home.
2. Mr Read SC successfully acted for the plaintiff, Hendrex, in the Supreme Court action.

Background

3. The plaintiff was a friend of the defendants, Mr and Mrs Keating, and he was asked to help with the work of re-tiling their roof. On the relevant day, Mr Keating provided Mr Hendrex access to the roof via an A-framed ladder, which left half a metre from the top of the ladder to the landing. Unfortunately, as the plaintiff came down from the ladder on one occasion, he fell and his head and parts of his body smashed into the cement of the driveway.
4. At trial there was significant evidence regarding the accident but no evidence of what actually occurred (i.e. this was a circumstantial case). The evidence at trial focused on the nature of the ladder, the distance from the ladder to the roof and evidence the defendant provided that he saw the plaintiff coming down the ladder with his rear end to the ladder, i.e. facing away from the ladder. However, no one saw the fall and the plaintiff had no memory of the incident whatsoever, due to his brain injury.
5. The trial judge accepted the defendant's version of the way the plaintiff descended i.e. that the plaintiff was facing away from the ladder.
6. The defendants, Mr and Mrs Keating, had no personal stake in the proceedings and their insurer defended the matter in their name.

The Proceedings – Breach of Statutory Duty

7. The plaintiff sued the defendants on the basis of (1) a breach of statutory duty, (2) common law negligence and (3) breach of contract.
8. The relevant statutory duty alleged to have been breached was s 15 of the *Workplace Health and Safety Act 1995* (Tas):

SECTION 15:

Persons in control of workplaces

- (1) *A person who has control of any premises, plant, substance or temporary public stand to which subsection (2) applies must ensure so far as is reasonably practicable that the premises and the means of access to or egress from the premises, or the plant, substance or temporary public stand are safe and without risk to health and safety.*
- (2) *This subsection applies to –*
 - (a) *premises which have been made available to persons, other than employees of the person in control of the premises, as a workplace or the means of access to or egress from those premises; and*
 - (b) *any plant, substance or temporary public stand which has been provided for the use or operation of persons at a workplace, other than employees of the person in control of that plant, substance or temporary public stand...*

- 9. The plaintiffs alleged that the defendants, who were in control of the premises, had breached the statutory duty to ensure premises are in a safe condition in respect of the means of access and egress from the roof. This ground was found to be inapplicable on the basis that the defendants had not "made available" the premises per s 15(2)(a) in the sense of an arrangement by way of lease or licence to the plaintiffs (see [123]).
- 10. Moreover, it was alleged the defendants also breached regulation 94 of the *Workplace Health and Safety Regulations 1998* (Tas) in that the ladder was not constructed in accordance with the relevant Australian Standard (AS 1892):

SECTION 94:

Ladders

An accountable person must ensure that any ladder used in the workplace is –

- (a) *used for the purpose it was designed for; and*
- (b) *except as otherwise approved by the Director, constructed in accordance with AS 1892.*

- 11. This ground was quickly rejected by Blow CJ on the basis that even if the ladder should have been erected so as not to be in the A-frame position, this did not mean the ladder was not "constructed" in accordance with the Australian Standard.

The Proceedings – Negligence

12. In order to be successful in an action under the tort of negligence, a plaintiff must:
 - a. Establish a duty of care (I.e, that there was a foreseeable risk of injury);
 - b. Breach of that duty of care; and
 - c. Damage to the plaintiff caused by the breach, which was not too remote.
13. When a homeowner or occupier invites an independent contractor or builder of some kind onto their premises, a duty of care will likely arise in relation to the safety of that person. However, the more significant question is defining the precise scope of the duty. For example, an occupier will not have a duty of care in relation to matters that are in the contemplation of the expertise of the tradesperson. Here, the scope of the duty was to provide safe access and egress from the roof whereas there was no duty which might have been breached if a tradesperson cut himself on a nail on the roof while re-tiling. Importantly, the expertise of the plaintiff did not extend to his access and egress from the roof. This might have been different had the plaintiff brought his own ladder or erected the ladder himself.
14. Significantly, the duty was owed by both the husband and the wife as they were joint owners of the property and had a joint interest in having the roof repaired. The Chief Justice found by inference that the wife owed a duty because the husband was acting on behalf of his wife in masterminding the repairs.
15. In Tasmania, provisions of the *Civil Liability Act 2002* (Tas) are applicable when determining whether a duty has been breached and to the question of causation (i.e. whether the breach caused the plaintiff's damage). However, the presentation did not consider the Act in any detail because it does not differ markedly from the common law or equivalent legislation across the States.
16. Ultimately, the court found there was a breach on the basis that the defendant had provided the ladder, had erected the ladder in such a way as to provide a gap between the top of the ladder and the roof, and thus the defendant had breached his duty to ensure safe access to the roof. Causation was more difficult for the plaintiff to establish because the Chief Justice had determined that the plaintiff had come down the ladder in way that was unsafe, such that it might have been the case that the cause was seen to be the plaintiff's actions alone. Nevertheless, it was found that the defendant's breach of his duty was also a substantial cause of the plaintiff's damage in combination with the plaintiff's contributory negligence.
17. Damage was easily established on the basis that the plaintiff broke both his wrists, sustained a shoulder injury and allegedly suffered a severe brain injury (although there was some

dispute as to whether the subdural haemorrhage had in fact caused brain damage, with medical and surveillance evidence tendered by the defendant designed to show that the plaintiff was not suffering from brain damage. This evidence was unsuccessful). Whether the plaintiff was suffering from brain damage was significant because the plaintiff had sought damages directly linked to this alleged brain injury for (1) his care (see *Griffiths v Kerkemeyer* (1977) 139 CLR 161) and (2) for economic loss, in that he was unable to work.

18. However, because of the contributory negligence of the plaintiff, the damages payable by the defendant were reduced in proportion to the extent to which the plaintiff contributed to the injury. During the analysis on this issue the Chief Justice determined that the defendant and the plaintiff were equally able to work out that the ladder was deficient, in that it should have been in a fully erected position and tied down. Furthermore, his Honour determined that the plaintiff had been further negligent in coming down the ladder in the wrong way (at least in the view of his Honour). As a result, his Honour determined that the damages payable to the plaintiff would be reduced by 60% to reflect the plaintiff's own contribution to his injury. Accordingly, the damages were reduced from around \$2.5M to \$1.1M.
19. Mr Read SC comments that if the same injury had arisen in the context of an employee/employer relationship as opposed to the one here involving an independent contractor, the contributory negligence of the plaintiff would have only resulted in a damages reduction of 20-30% because the scope of the duties of an employer extend beyond between a homeowner and a contractor.

The Proceedings – Breach of Contract

20. The court determined there was a contract between the plaintiff and the defendants although it was not a written contract. No term of safety was found to have been expressly within the oral contract (i.e. based on whether there had been discussions as to safety) however an implied term that the defendant had to reasonably ensure the plaintiff's safety was arguably implied per *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.
21. Ultimately, the question of whether such a term could be implied was left unanswered by the Chief Justice on the basis that such a term would not result in any further relief to the defendant than would flow from the successful common law negligence action.

Implications

22. The presenters note that homeowners should be aware that workplace legislation will apply to them when they hire people to perform work on their residences.

BIOGRAPHY

Ken Read SC

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Ken Read was admitted as a solicitor in 1978 before being called to the Bar in 1999 and appointed a Senior Counsel in 2012. Before coming to the Bar, Mr Read was a partner at Jennings Elliot for over 20 years.

Ian Benson

Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Focus Case

Hendrex v Keating [2016] TASSC 20

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_composite/benchmark_22-04-2016_weekly_civil_law_review.pdf

Judgment Link

<http://www.austlii.edu.au/au/cases/tas/TASSC/2016/20.html>

Cases

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266.
Griffiths v Kerkemeyer (1977) 139 CLR 161.

Legislation

Civil Liability Act 2002 (Tas).
Workplace Health and Safety Act 1995 (Tas).
Workplace Health and Safety Regulations 1998 (Tas).