Legal Alert

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The Standard of Care owed by Respondents in Personal Injury Claims

Baden Cranes Pty Ltd v. Smith; Brambles Australia Limited v. Smith [2013] NSWCA 136 (27 May 2013)

Background

The Plaintiff/Respondent, Mr Smith ("the Plaintiff") was injured whilst operating a mobile crane ("the crane") in November 2002. The upper deck of the crane toppled from the base, throwing the Plaintiff to the ground resulting in him suffering significant injuries.

The Plaintiff commenced proceedings against three parties, namely the crane manufacturer Liebherr which was not part of the Appeal to the New South Wales Court of Appeal, and the two Applicants/Respondents, Baden Cranes Pty Ltd ("Baden") and Brambles Australia Limited ("Brambles").

The crane had been designed to be transported in two parts. Brambles had purchased the crane from Liebherr which had manufactured it. Brambles then engaged Baden to modify the crane so that it could be transported in one piece.

Mr Smith was employed by Brambles and drove the crane in its modified form for a number of months.

Approximately three months prior to the incident, another Defendant in the initial matter, Gillespies, purchased Brambles. The purchase included the crane driven by the Plaintiff. The Plaintiff's employment was also transferred to Gillespies. Gillespies was therefore the owner of the crane as well as the Plaintiff's employer at the time the incident occurred.

For the Plaintiff to drive the crane safely, he was required to release a "slew lock" which held the crane base and its superstructure together.

Releasing the slew lock required moving three external levers and activating a switch inside the driver's cabin. If these steps were not followed, then there was a risk that the pins connecting the two parts of the crane would shear if a turn were attempted. The incident occurred as a result of the Plaintiff failing to activate the relevant switch and the foreshadowed risk materialising.

Importantly, the Plaintiff was not aware of the potential consequences of driving the crane in one piece without releasing the slew lock.

The matter proceeded to trial with the Trial Judge finding Mr Smith ought to have been warned of the possibility of the pins shearing if the slew lock was not released correctly. For that reason, the Trial Judge found against all three Defendants apportioning liability against Baden at 45%, Brambles at 35% and Gillespies at 20%.

The Appeal

Baden and Brambles appealed on the following grounds:

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1. Whether each had breached a duty owed to the Plaintiff;

2. Whether factual causation was established in circumstances where there were three consecutive negligent acts by three different parties;

3. Whether the causal link was broken by the intervening tortious conduct of another party;

4. Whether there was any contributory negligence on the part of the Plaintiff; and

5. How damages ought to be apportioned between the parties.

Basten JA, Tobias AJA and Ward JA of the New South Wales Court of Appeal stated in the one Judgment in response to the five grounds of Appeal as follows.

Ground No 1

Baden had been negligent and owed a duty to the Plaintiff. This was because it had modified the crane, knew how the modified mechanism operated, what was required of a crane operator and that the operator might inadvertently fail to release the slew lock. Therefore, Baden ought to have enquired of Liebherr as to the possible consequences of the operator failing to release the slew lock. If Liebherr had advised that damage was likely, or not overtly recognisable, then Baden's duty would have extended to considering a failsafe mechanism to prevent the crane being moved in one piece where the slew lock had not been released.

Baden's negligence was therefore due to its failure to provide a failsafe mechanism rather than a failure to warn Mr Smith of the consequences of failing to release the slew lock before operating the crane.

Whilst Brambles did not modify the crane, it was the "crane operator" and had sufficient understanding as to the way in which the crane would be driven. Brambles therefore ought to have realised that an inadvertent failure to release the slew lock would significantly stress the crane structure.

For these reasons, Brambles owed a duty to the Plaintiff for his injuries and subsequent loss resulting from the crane failure due to the lack of a proper safety mechanism.

Ground No 2

Section 5D of the *Civil Liability Act 2002* (NSW) must be applied separately to the negligent conduct of each of the Defendants. Whilst a breach of duty by any one of the Defendants (Brambles, Baden and Gillespies) would not have caused the Plaintiff's injury without the intervening negligent actions of the other Respondents, each act of negligence was a necessary element in the circumstances which, together, caused the Plaintiff harm.

In Queensland, Section 9 of the *Civil Liability Act 2003* (Qld) is drafted in similar terms to Section 5D of the *Civil Liability Act 2002* (NSW). Therefore, there is no reason to expect that a Court in Queensland might apply Section 9 of the Queensland Act differently to how Section 5D was applied in this instance.

Ground No 3

Each of the three Respondents should not escape liability for the sole reason that one or both of the other Respondents proceeded or followed after it and were also negligent. Where subsequent negligence is a reasonably foreseeable consequence of earlier negligence, this will not break the chain of causation. In such circumstances as what occurred in the Plaintiff's case, subsequent negligent acts of the same kind will be readily

foreseeable consequences of the first negligent act.

Baden therefore had no reason to believe the risk it created would be removed by the owner of the crane and so there was no reason not to treat its negligence as causative of the harm suffered by the Plaintiff.

Whilst Brambles had no control over the crane when the incident occurred, its failure to ensure that safety mechanisms were implemented and to train or warn its operators of the risks of failing to release the slew lock remained a significant cause as to why the incident occurred.

Ground No 4

The Plaintiff did not contribute to the incident occurring through his own negligence. This is because he did not know of the risk that the crane could fail should he not release the slew lock and there was no reason why he ought to have discovered that risk. Had he been informed of this risk, the direction presumably would have been to return the crane to the yard to be checked in the event that he moved the crane without releasing the slew lock. Without any such instruction, the Plaintiff was not negligent in his operation of the crane.

Ground No 5

When determining the degree of responsibility of each tortfeasor (Respondent) to a claim for personal injuries in circumstances where there are multiple Respondents, the degree as to which each tortfeasor is responsible depends upon the relationship between each tortfeasor/Respondent and the Plaintiff. Another factor to consider is the relationship between of the tortfeasor/Respondents themselves.

In this instance, insofar as is relevant to this matter, Baden as manufacturer of the crane was in a position to discover which parts were likely to be stressed by transporting it without releasing the slew lock.

Brambles had sought the modifications which created the risk and operated the crane in its modified form.

Since neither of these two parties (Baden and Brambles) had any control over the crane at the time Mr Smith's incident occurred, "it was just and equitable" for liability to be apportioned between the parties as follows:

1. Baden, the company which modified the crane, 40% (the Trial Judge had apportioned 45%);

2. Brambles, the original crane operator and the company which engaged Baden to modify the crane, 20% (the Trial Judge had apportioned 35%); and

3. Gillespies purchased Brambles' business prior to the incident including the crane. Gillespies therefore was the Plaintiff's employer and owner of the crane at the time the incident occurred and so was found to be 40% liable (the Trial Judge had apportioned 20%).

Comment

Whilst the New South Wales Court of Appeal did not consider any new or outstanding issues with respect to how the principles behind Section 5B of the *Civil Liability Act 2002* (NSW) ought to be applied (in Queensland, the equivalent provision is Section 9 of the *Civil Liability Act 2003* (Qld)), the decision in this case is of some significance in that the New South Wales Court of Appeal has considered how liability ought to be addressed in circumstances where:

1. There is more than one respondent to a claim for a personal injuries; and

2. Each of the respondents to that claim for personal injuries is responsible for a distinct act separate from each of the other respondents.

As an observation, it seems somewhat surprising the two Applicants to the Appeal, Brambles and Baden, sought a decision from the New South Wales Court of Appeal as to the extent to which the Plaintiff contributed to the incident occurring through his own negligence. On face value, whilst the Plaintiff failed to disengage the slew lock, he was not aware of the ramifications of his failure to do so and so in that context, it seems clear that he did not contribute to the incident occurring.

What is of some interest is that the apportionment to the Third Respondent, Gillespies, was increased to 40% even though Gillespies was not a party to the Appeal. This does however, seem a reasonable result given the New South Wales Court of Appeal adjusted the apportionment of liability attributable to the two Respondents, Baden and Brambles.

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