



RANKIN ELLISON CASE NOTES

NAIL GUN SHOOTING NOT AN “OBVIOUS RISK”

Wharekawa v AEA Constructions Pty Ltd; Building Partners Pty Ltd v AEA Constructions Pty Ltd [2018] NSWSC 684

The Supreme Court of NSW recently determined liability relating to a personal injury claim by a worker in the course of his employment, but where the injury was caused by the negligence of an employee of another entity working in an adjoining premises.

Material Facts

The Plaintiff, Mr Raymond Wharekawa (“Wharekawa”), was employed by Building Partners Pty Ltd (“BP”) as a labourer. Wharekawa was working on a BP building site which was neighboured by an AEA Constructions Pty Ltd (“AEA”) building site. The two sites shared a double brick party wall.

An AEA employee was attempting to affix a timber block to the party wall using a high powered nail gun, on the AEA work site. A nail that was discharged from the nail gun passed directly through the timber block and the party wall before forcibly striking Wharekawa (who was on the BP work site) and penetrating his skull.

Wharekawa subsequently developed neurological symptoms, including gait impairment and loss of muscle power in the lower limbs, and was totally incapacitated for any type of employment.

Litigation History

Wharekawa successfully claimed workers compensation benefits from BP.

Wharekawa also commenced civil action in negligence against AEA, claiming that AEA breached its duty of care to protect him from harm. AEA denied that it was negligent and contended that it was BP’s negligence and/or Wharekawa’s contributory negligence that caused the relevant injury.

BP initiated proceedings against AEA under Section 151Z(1) (d) of the *Workers Compensation Act 1987* (“1987 Act”) to recover workers compensation benefits paid to Wharekawa.

AEA made a cross-claim against BP, claiming indemnity from BP in respect of any damages awarded against it in favour of Wharekawa.

The Supreme Court joined all of the above claims and heard the matters together.

Supreme Court Trial

In respect of Wharekawa’s claim against AEA, the pertinent question was whether AEA owed a duty of care to protect Wharekawa from harm. The prerequisites to that question were whether AEA knew of or ought to have known the risk of a nail passing through the party wall and causing harm to Wharekawa.

The operator of the nail gun had regularly worked with that tool during his 9 year engagement with AEA. Accordingly, he was deemed to have full knowledge of the tool’s capacity and that knowledge was attributed to AEA as his employer. The Court found that since the nail gun was capable of driving nails into timber and brick, it logically followed that the nail gun was capable of driving nails directly through light material. Evidently, a nail so fired could cause injury to any person in its path.

The Court was satisfied that AEA had knowledge through its employee that the wall was constructed of low density masonry which incorporated mortar joints of even lower density. It was determined that AEA knew or ought to have known of the relevant risk.

The Court accepted that the likelihood of a nail passing through both a timber block and a brick wall before continuing with such velocity so as to cause personal injury was quite low. In fact, the risk was so low that the site foreman stated “no one would have expected [it]”. However, Court distinguished between ‘expectation’ and ‘real risk’ stating that “expectation” was not a part of the relevant

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legal test. Despite the risk of injury being unlikely and/or unexpected, the Court determined that the risk was nevertheless “not insignificant”. Accordingly, it was established that AEA did owe a duty of care to Wharekawa to protect him from harm.

With respect to breach of duty of care, the Court considered AEA’s failure to implement precautionary measures. The Court determined that AEA ought to have posted a “spotter” whose job it was to ensure that persons were not in the line of fire of the nail gun. Further, it was found that AEA could and should have utilised an alternative and less dangerous method for carrying out the relevant work. In failing to implement those precautionary measures, the Court concluded that AEA breached its duty of care to Wharekawa.

AEA made a number of submissions in its defence.

Firstly, AEA contended that Wharekawa’s injury resulted from the realisation of an “obvious risk” in the context of Sections 5F, 5G and 5H of the *Civil Liability Act 2002* (“CLA”). Pursuant to the CLA, persons are presumed to be aware of obvious risks and therefore, there is no duty to warn them of same. The Court rejected that submission, determining that the risk of a nail being fired through the party wall was in no way obvious to a reasonable person in the position of Wharekawa. Even if the risk was obvious, only AEA’s duty to warn Wharekawa of the risk would be obviated. As noted above, the scope of AEA’s duty well exceeded simply warning Wharekawa of risk of harm.

AEA argued that the risk was “inherent” in the context of 5I of the CLA and that it was not liable for Wharekawa’s injury since the injury could not have been avoided even if it had exercised reasonable care. Disagreeing with AEA, the Court found that if the risk of that injury was truly unavoidable, then AEA ought to have abandoned the method of work, namely the use of the nail gun.

AEA submitted that Wharekawa contributed to AEA’s negligence by failing to wear a construction safety helmet. Rejecting this argument, Court determined that since the risk was neither obvious nor inherent, Wharekawa, who was acting reasonably, was entirely unaware of the risk to which he was exposed by AEA’s activity. Further, Court found the building activity being performed on BP’s job site was not of a

nature which would warrant him wearing a construction safety helmet. Accordingly, the Court found that Wharekawa did not contribute to his injury.

Finally, AEA argued that BP was wholly liable for the accident and its contribution as a joint tortfeasor was 100%. Section 151Z(2) of the *Workers Compensation Act 1987* provides that the amount of damages recoverable by an injured worker from a negligent third party is to be adjusted to reflect the employer’s contribution as a joint tortfeasor. The Court rejected that submission on the basis that the relevant risk was not reasonably foreseeable by BP as BP had no knowledge that the nail gun was being discharged in the direction of its work site and could not have known the capacity of the nail gun or the density of the materials which it was being discharged into. In the absence of any warning by AEA, the mere possibility of the relevant incident occurring would not cause a reasonable person in BP’s position to take safety precautions.

The Court found in favour of Wharekawa and BP’s respective claims against AEA, and dismissed AEA’s cross-claim against BP.

Practical Implications of this Decision

This authority serves as a valuable example of the following statutory rules and common law principles of negligence:

1. The “not insignificant” risk test imposes a relatively low threshold. Even in circumstances where the risk of harm is unlikely and/or unexpected, it is not necessarily “not insignificant”.
2. Pursuant to Section 5H of the CLA, a person is not obligated to warn others of any obvious risk of harm. However, the “obvious risk” defence will not obviate other positive obligations imposed on a person under their duty of care.
3. In the event that performance of an activity carries a genuinely unavoidable risk of harm, exercise of reasonable care requires an entity to abandon that activity altogether.

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