FROM THE TOP DOWN

LIABILITY OF PRINCIPALS FOR INJURIES ON WORKSITES

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INTRODUCTION

1. The topic requires some definition first. “Principal” is a relative term and is used in the context of various relationships. Principal and agent is one, and perhaps the most important, but the subject matter of this paper is the relationship of principal and contractor. In this relationship the principal engages the contractor not to act on the principal’s behalf but to execute some defined work which the principal wishes be undertaken.

2. In this context “principal” is not necessarily restricted to the owner of an enterprise but can also mean a contractor which engages another contractor, the subcontractor, to do work for which it has contractual responsibility itself. Relatively speaking they are principal and contractor too and the focus of this paper is largely, but not exclusively, upon relationships of this sort.

3. In recent times there has been heightened interest in the liability of these principals particularly for personal injury claims by injured workers. Legislative changes in almost all of the Australian jurisdictions, particularly in NSW, have reduced the availability and attractiveness of claims for damages in workplace injuries against employers.

4. It is no surprise that injured workers have tried to implicate their principals and other contractors in liability in order to obtain the benefit of the more generous damages regime. However the principal/contractor umbrella covers a wide range of varying relationships and the scope of the principal’s duty tends to vary accordingly.

5. The 2009 decision of the High Court in *Leighton Contractors Pty Ltd v Fox*[1], required the court to consider a novel basis for imposing upon a principal obligations relating to its contractors' and subcontractors' methods of work. The contention failed and the High Court affirmed the continuing application of the conventional analysis of principals' liability to injured workers but the decision is an instructive one and will be discussed in detail below.

GENERAL PRINCIPLES

6. Undoubtedly the statement of principle most often cited in this area is that of Brennan J, as he then was, in *Stevens v Brodribb Sawmilling Company Pty Limited*[2]. It is quite lengthy but repays careful analysis and we will take it step by step. Firstly:-

> "*An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organizing the activity to avoid or minimize that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he is creating the risk …*"

7. In other words anyone who undertakes a business activity which might give rise to injury to those involved in its execution owes a duty to care to those people. On the face of it, although Brennan J used the term "entrepreneur" there is no reason to confine it to a strictly business operation. The owner of land who proposes to build a residential house would be creating similar risks which would give rise to similar duties.

8. Interestingly, although the passage above is cited by the High Court in *Leighton v Fox*[3] the court also expressed the view[4] that "*the relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care …*". Strictly speaking that is accurate but, in practical terms, only if the principal's activity involves no risk of injury. Once

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[1] (2009) 240 CLR 1, [2009] HCA 35
[2] (1986) 160 CLR 16, [1986] HCA 1 (at paragraph 2 of His Honours reasons)
[3] at paragraph 20
[4] at paragraph 48

risk is involved – as it nearly always is in practice – a duty arises. The extent, if any, to which the High Court in *Leighton v Fox*, refined the principles it had laid down in *Brodribb Sawmilling*, is discussed further below.

9. Brennan J went on:-

> "*and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organizing an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimize other risks of injury.*"

In other words the principal's duty is a conventional one, to exercise reasonable care, rather than the non-delegable duty imposed upon an employer to ensure reasonable care is taken.

10. The next matter is of critical importance and follows from the previous point:-

> "*It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur*".

11. If the principal can organise for the risk-affected activity(ies) to be undertaken wholly or partly by competent contractors then its duty is, subject to qualifications below, discharged. The risks posed by the execution of those activities are transferred. The contractors assume the duty to take reasonable care in their execution to avoid injury to the workers involved in them, to other workers and to members of the public.

12. To successfully transfer the risk the principal must engage competent contractors. In practice this requirement is satisfied if the contractor is experienced in the execution of the activity.

13. Next, the qualifications:-

> "*The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury.*"

14. The circumstances which make it necessary for the principal to retain and exercise a supervisory power include those cases involving quasi employment relationships in which the principal in reality exercises direct control over the execution of the activities despite the absence of a subsisting employment relationship with those undertaking them.

15. Other circumstances which make it necessary to supervise or to prescribe independent contractors' respective areas of responsibility are where a sufficient risk of injury arises from the interaction between contractors' activities to require the intervention of the principal. The need for supervision or delineation of the respective responsibilities is usually described as a duty to co-ordinate. Such a duty was held to arise in the *Brodribb* case itself.

16. Similarly where the principal, as occupier of the premises upon which the activities are undertaken, may attract some supervisory responsibility in relation to the execution of the contractor's activities, by virtue of its peculiar knowledge of the risks posed by features of the premises themselves.

17. It is also argued from time to time that the particularly hazardous nature of some activities attracts obligations on the principal's part tantamount to a non-delegable duty of care. With one notable exception these arguments have failed.

18. The passage continues:-

> "*But once the activity has been organized and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur.*"

19. Vicarious liability can arise in this context on ordinary principles of agency. If the principal directs or authorises some tortious act by its contractor then it faces a vicarious liability for the consequences of the act.

20. The point made by Brennan J however is that the principal will not, under normal circumstances, be vicariously liable for the contractor negligently undertaking some act which is not tortious in itself but merely carries the risk of injury. It will not be liable for the "collateral negligence" of the contractor. Vicarious liability in such cases is a burden borne exclusively by employers.

QUASI EMPLOYEES

21. It is logical enough that if a principal – independent contractor relationship bears sufficient similarity to that of an employer and employee then the same principles of liability will apply to the principal as to the employer.

22. Cases of this sort most commonly, but not exclusively, involve employees of labour hire providers. Recent times have seen a significant increase in their numbers in Australian workplaces. The principals, sometimes referred to as "host employers", will normally assume the duties, and face the liabilities, of employers.

23. So in *TNT Australia Pty Ltd & ors v Christie & ors*[5], a case most well known for its decisive affirmation of the labour hire provider's duty of care, the plaintiff, Mr Christie, was an employee of Manpower Services (Aust) Pty Ltd but worked at a brewery operated by TNT moving pallets with a motorised pallet jack. The court was in no doubt that TNT, as Mr Christie's host employer, was subject to the duties of an actual employer to provide a safe system of work and safe plant and equipment[6].

24. Moreover the equivalence between host employer and employer proper on the facts of that case, although not necessarily it seems, was sufficient to give rise to a duty of care on TNT's part of a non delegable nature[7]. This would

[5] [2003] NSWCA 47
[6] at paragraph 41
[7] at paragraphs 37 – 41

appear to be an extension of the principal's liability to a contractor (or contractor's employee) confined to labour hire cases.

25. Duties analogous to those of employers are not only recognised in labour hire cases. In *Rockdale Beef Pty Limited v Carey*[8] the plaintiff was a stockman working at the appellant's feedlot. He had been employed as such from 1992 until 1997 when his employment had been terminated at which point he was immediately engaged, undertaking the same work, as an independent contractor.

26. The plaintiff was injured while attempting to round up a steer within the confines of a very long race (ie a corridor for movement of stock between one enclosure and another). This required him to overtake the steer. As he did so the steer blocked the path of the plaintiff's horse causing him to be thrown to the ground suffering injury.

27. The trial judge's unchallenged finding was that the race, as many other such races were, could have been fitted with gates which would have enabled the plaintiff to overtake the steer outside the confines of the race and shutting the gate on it to pen it in and enable it to be safely corralled.

28. Ipp JA, with whom Mason P and McColl JA agreed, stressed that the *Brodribb Sawmilling* decision should not be misunderstood as laying down fixed criteria for the existence of a duty of care on the principal's part in favour of the contractor. Where factors such as the principal's exclusive control over the contractor's working conditions, the contractor's vulnerability to injury from failings in provision of a safe working environment[9] are present then so are the conditions for a duty of care analogous to that of an employer.

29. The previous history of employment with no change of conditions after re-engagement as contractor was also a factor in the decision as was the fact that his position was not that of a skilled tradesman or professional[10]. This latter factor can be an important consideration on the issue of scope of the

[8] [2003] NSWCA 132
[9] at paragraph 84
[10] at paragraphs 87 - 90

duty even if the injured contractor is able to persuade the court that he/she should be treated as a quasi employee.

29. *Van der Sluice v Display Craft Pty Ltd*[11] concerned a claim by a contractor for injuries suffered from falling from a ladder while working at heights. The ladder had been supplied by the principal for the plaintiff's use. He was experienced in the task he was undertaking. It was contended by him that he was the principal's employee but this was rejected.

30. The NSW Court of Appeal went further however saying "*Even if the appellant was an employer, there was no breach of duty - the cause of the injury was solely the appellant's failure to take care … any causative fault was within an area of responsibility allocated by the law to the appellant.*"

31. *Unilever Australia Ltd (t/as Streets Ice Cream) v Pahi*[12] illustrates the limits of quasi-employer liability on the part of principals. The plaintiff was employed by ESP Techforce Pty Ltd, a labour hire company. ESP provided a team of workers for the task of repackaging Streets Ice Cream products or retail sale. The repackaging operations were carried out at the premises of Streets' cold storage provider Swire.

32. The plaintiff sustained a repetitive strain injury from the nature and conditions of the repackaging work. She alleged both Streets, which controlled the volume and hence the priority of the work, and Swire, which exercised control over the premises, had breached duties of care to her in failing to take steps to mitigate the demands of the work.

33. The Court of Appeal held that, although a labour hire provider, ESP in fact devised and controlled the system of work. The appeal, although not the trial, was heard after *Leighton Contractors v Fox* and the case will be referred to in that context below.

CO-ORDINATING CONTRACTORS' ACTIVITIES

34. In the *Brodribb Sawmilling* case itself, Brodribb carried on a sawmilling business in eastern Victoria which it fed by local forestry operations. It

[11] [2002] NSWCA 204
[12] [2010] NSWCA 149

employed a “bush boss” who selected appropriate areas of forest to be harvested and appropriate trees within those areas. The felling of these trees and transportation of the timber were undertaken by teams of individuals comprising a feller, a “snigger” responsible for loading the logs onto a truck and a truck driver who delivered them to the sawmill.

35. Mr Stevens was one of the truck drivers. His role in the loading operation would typically be simply to park his truck alongside a ramp constructed by the snigger but sometimes would assist the snigger in the loading itself. The snigger operated a bulldozer and would carry out the earthworks to shape the ramp positioning 2 logs parallel to one another on the ramp with the space between them wide enough to accommodate the bulldozer.

36. The parallel logs were known as skids and the bulldozer would push the felled timber up the skids with its blade and over the top of the ramp onto the tray of the truck parked alongside the apex of the ramp. This system worked well provided that the logs were long enough to straddle both skids but less well with shorter logs.

37. On the occasion in question Mr Stevens was assisting the snigger, Mr Gray, with one of the shorter logs. He had chained the log to the bulldozer blade and was moving away to allow Mr Gray to attempt to move the log onto the truck. However Mr Gray moved the bulldozer too soon dislodging the log which then rolled down the ramp and hit Mr Stevens.

38. There was no doubt as to Mr Gray’s negligence. For practical purposes however the question was whether Messrs Gray and Stevens, who were no doubt uninsured, were employees of Brodribb in which case the latter would be vicariously liable for the injuries suffered by Mr Stevens. It was held unanimously that they were contractors. The question was then whether Brodribb as principal owed a duty of care to Mr Stevens as contractor in relation to the execution of the loading of his truck.

39. All of the members of the High Court held that such a duty did arise. As Mason J, as he then was, characterised it[13]:-

[13] at paragraph 26 of His Honour’s judgment

> "*The interdependence of the activities carried out in the forest, the need for co-ordination by Brodribb of those activities and the distinct risk of personal injury to those engaged in the operations, called for the prescription and provision of a safe system by Brodribb ... Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work ... Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines*".

40. On the facts however only one member of the court, Deane J, found Brodribb in breach of the duty. The main difficulties standing in the way of such a finding appear to have been the absence of evidence to suggest any practical alternative to leaving the operation to the skill and experience of those involved using the equipment at their disposal, and the causal inefficacy of attempting to prescribe more stringent rules for safe conduct of the operation.

41. It is fair to say that the duty to co-ordinate is invoked by plaintiffs more often than it is applied in their favour. Even if the operation out of which the injury arises can properly be characterised as one which requires co-ordination of different contractors' activities, establishing breach of the duty is not straightforward as the *Brodribb Sawmilling* case itself demonstrates.

42. The risks which the contractor's activities pose to others on the worksite or to the public at large are matters to which the competent contractor has regard in devising and implementing a *modus operandi*. In terms of those risks it may be that the contractor's knowledge and expertise surpasses the principal's.

43. The duty of co-ordination was recently invoked in a familiar factual situation. In *Dargham v Kovacevic*[14] the plaintiff worked on a construction site as a labourer either employed, or engaged as a subcontractor, by one of the owner/builder's contractors. He fell down a stairwell which had not been properly guarded during the completion of the works.

44. Hislop J held the owner/builder liable on the principles laid down in the *Brodribb Sawmilling* case as more recently affirmed in *Leighton v Fox*, noting also that the owner/builder's occupancy of the site was an alternative basis for his liability for the plaintiff's injuries[15].

45. Another example was the decision in *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton*[16] in which the head contractor, Australand Constructions Pty Ltd, was held liable for injuries sustained by a formwork subcontractor's employee caused by negligent erection of scaffold by another subcontractor, Erect Safe.

46. The trial judge's finding of liability on the part of Australand, which was not itself challenged on appeal, also occurred against familiar background circumstances as explained by McClellan CJ at CL[17]:-

> "*The building which was being constructed by Australand at the time of Mr Sutton's accident was large and comprised of multiple levels. Australand was required to engage many subcontractors whose independent activities had to be coordinated if there was to be a timely completion of the building. On such a project many safety issues will arise, making it necessary to put in place a plan by which those issues can be effectively addressed. In the present case that plan, as is common on complex building sites, provided for a Work Safety Committee. Comprised of delegates of each of the subcontractors and chaired by a representative of the Head Contractor, the Committee carried out regular inspections during which safety issues were identified and recorded. The minutes of the meeting of the Work Safety Committee were circulated and the subcontractor responsible*

[14] [2011] NSWSC 2 Hislop J
[15] at paragraph 50
[16] [2008] NSWCA 114
[17] at paragraph 119

for a particular problem was required to remedy the defect and report that any matter which was its responsibility had been remedied."

47. In addition to the negligent erection of the scaffolding in the first place the relevant negligence causative of the plaintiff's injury was the failure to minute a decision of the Work Safety Committee to require Erect Safe Scaffolding to rectify the unsafe protrusion of scaffolding ties, into one of which the plaintiff had bumped. As head contractor which had set up the committee system Australand, along with Erect Safe, was liable for the consequences of this failure.

48. Having regard to His Honour's reference above to the need to co-ordinate the activities of subcontractors it seems likely that McClellan CJ at CL characterised this breach as a breach of the *Brodribb* duty of co-ordination in his discussion of Australand's liability although this is nowhere made explicit.

49. There is little doubt however that a multiplicity of trades on a building site will frequently give rise to a duty of co-ordination on the head contractor's part in relation to activities the execution or finished product of which will put workers at risk[18]

OCCUPIER CASES

50. Both the *Dargham* and *Erect Safe* cases could as readily be explained, as indeed Hislop J did explain the former, on the basis of breach of the principal's duty of care as occupier of the worksite[19]. A building site represents somewhat "dynamic" premises for purposes of the occupier's duty of care but the scenario is clearly one of the principal exercising control over those premises with a view, among other things, to promoting safety.

51. In the *Dargham* and *Erect Safe* cases however the occupier's duty arose after the risk of injury had been created. Arguably in *Dargham* the principal might have been subject to a pre-existing duty to consider the need for guarding of a floor penetration during the works and allocate appropriate contractual

[18] See also *Maricic v Dalma Formwork (Australia) Pty Ltd* [2006] NSWCA 174
[19] As did the NSW Court of Appeal in holding the head contractor liable on similar facts in *Maricic v Dalma Formwork (Australia) Pty Ltd*

responsibility for fencing it. On the other hand it might be that guarding would naturally be part of the relevant contractor's scope of works in any event.

52. These cases may well be more accurately viewed as instances of principals attracting occupiers' duties "after the event" ie in relation to risks of injury on their premises once created by their contractors. By contrast, principals attracting a duty of co-ordination in perhaps a "classic" *Brodribb* sense assume the duty at an earlier point based on their proposed use of 2 or more contractors interacting to achieve an outcome.

53. *Tolhurst v Cleary Bros (Bombo) Pty Ltd*[20] was a case in which the principal's occupancy of the site in the circumstances imposed upon it a duty of care to the contractor and its employees in relation to the contractor's work methods.

54. The plaintiff was an excavator operator employed by Cleary Bros at a coal mine owned and operated by Endeavour Coal Pty Ltd. He would load trucks from coal stockpiles at the mine. Some of the stockpiles would over time compact from a granulated pile into a coherent mass. These stockpiles would be excavated somewhat like a coalface, leaving "cliffs" considerably higher than the excavators.

55. From time to time the top areas of the cliffs would weaken and fall while undergoing excavation. The plaintiff and his colleagues were aware of this and would keep alert for signs of imminent collapse, taking evasive action by reversing rapidly. On one of these occasions the plaintiff was allegedly injured when he could not reverse fast enough and his excavator was hit by a large mass of falling coal.

56. The trial judge noted Endeavour's Coal's reliance on the *Kolodziejczyk*[21] decision for the proposition that having contracted the extraction and loading of the coal to a skilled organisation it owed no duty of care to Cleary Bros and its employees to take steps to ensure it could be carried out safely. The trial judge rejected this argument citing specifically Endeavour's Coal's occupancy of the mine.

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[20] [2008] NSWCA 181
[21] See above paragraphs 29 and 30

57. The Court of Appeal referred to the trial judge's reasons in that regard without apparent criticism. However it ultimately upheld His Honour's decision on the ground, not inconsistent with the occupier analysis, that the evidence suggested Endeavour Coal did in fact exercise control over the stockpiles. Having regard to its knowledge of the dangers they posed the court considered that Endeavour Coal assumed a duty to take reasonable steps to ensure the extraction/loading process was undertaken safely. This case seems a more genuine example of the principal's occupancy of the work premises imposing a duty in relation to the contractor's own *modus operandi* than those involving multiple participants on building sites.

58. There have certainly been decisions in which a principal has been held liable for breach of duty of care in its capacity as occupier of work premises. For example in *State Rail Authority of NSW v Mohamad*, *Leighton Contractors Pty Ltd v Mohamad*[22] both the ultimate principal, State Rail Authority of NSW and the head contractor, Leighton Contractors Pty Ltd were held liable for injuries suffered by a welding contractor's employee. The worker had fallen down an embankment concealed from view by long grass in close proximity to railway tracks which he was modifying.

59. In that case SRA was the occupier of the land and Leighton Contractors had assumed similar duties by its management of the project. Most importantly the plaintiff's injuries arose out of the static condition of the premises – indeed a concealed danger, not from any unsafe aspect of the means of execution of the welding subcontract.

60. By contrast, in the *Tolhurst* case, the risk of injury arose out of the means of execution of the contract/subcontract works which were unsafe having regard to features of the premises best known to, and under the control of, the principal.

EXTRA HAZARDOUS ACTIVITIES?

[22] [2001] NSWCA 453

61. From time to time it is argued that a principal owes third parties a non delegable duty of care in relation to activities conducted by independent contractors which are "extra hazardous" or "inherently dangerous".

62. Although the argument finds some support in pre WWII English authorities (and some notable resistance) it does not ever appear to have been accepted in Australia[23]. It appears to gain support from the decision of the High Court in *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13 in which the port authority was held liable for negligent welding activities of its contractor which set fire to the authority's building and spread to the plaintiff neighbour's premises.

63. In *Transfield Services (Australia) Pty Ltd v Hall* Campbell JA explained that the non delegable duty of care found to exist on the facts of the *Burnie Port Authority* case was unique and recognised by the High Court in order to assimilate the body of law surrounding the historical strict liability under *Rylands v Fletcher*[24] for escape of fire from premises. Outside that context the non delegable duty of care of the principal for extra hazardous or inherently dangerous activities appears not to exist in Australian law.

LEIGHTON CONTRACTORS v FOX

64. In this case Leighton Contractors was again the head contractor – this time of refurbishment works on the multi-storey Sydney Hilton. It had subcontracted the concreting works to Downview Pty Ltd. Downview in turn subcontracted an integral part of those works – the concrete pumping – to a Mr Quentin "Quincy" Still. Mr Still, in turn, relied on another contractor, "Jamie" who provided a concrete pumping truck and operators.

65. This contractual chain operated on the project without incident until one day Jamie was unable to attend when a concrete pour on Level 12 was scheduled. Mr Still hurriedly acquired a truck from a Mr Martin trading as Aggforce Concrete and Sharks Shire Pumping who in turn arranged for the truck to be driven by a Mr Stewart and for the plaintiff to attend as Mr

[23] See generally the discussion of Campbell JA in *Transfield Services (Australia) Pty Ltd v Hall* [2008] NSWCA 294 at paragraphs 58 – 107.
[24] [1968] UKHL 1

Stewart's offsider. There was no issue that they were independent contractors to Mr Martin.

66. Although experienced in domestic concrete pumping Mr Stewart and the plaintiff had no high rise experience. Nor, unlike Jamie, had they ever attended the Hilton site before let alone undergone the induction process which was a requirement of Leighton Contractors' management of the project, for entry to carry out works on the site.

67. Nonetheless they gained entry to the site and parked the truck on the street level, level 4. They then attached the truck's pump lines to the static line which conveyed the concrete to the upper floors and the level 12 pour went ahead without incident.

68. The next step was the cleaning of the residual concrete from the static line. This involved reverse blowing of a sponge through the line with air from a compressor on level 12 so as to discharge the residue into a waste bin on level 4. For this purpose a pipe was attached to the static line and directed into the bin.

69. The forces generated by the compressed air can be considerable and sudden movement of the pipe or hose is a known risk. Jamie had adopted orthodox concreting practice by chaining the pipe to the bin but Mr Stewart did not do so. In the course of the "blow back" the sponge, in this case a very makeshift one, became stuck. The extra compressed air applied to dislodge it resulted in the pipe whiplashing and striking the plaintiff, who in fact had stood some distance away, heavily in the head.

70. At first instance Mr Stewart, or rather the $2 uninsured company through which he traded, was held liable but both Leighton Contractors and Downview were exonerated. The trial judge found, among other things, that the accident occurred in the course of a discrete operation – line cleaning – under the control of Mr Stewart and which did not involve co-ordination of trades on the site. That finding may be open to doubt having regard to Mr Still's involvement but it was not subsequently challenged.

71. The plaintiff's appeal focused on the failure on the part of both Leighton Contractors and Downview to induct Mr Stewart and the plaintiff. This, it was said, was negligent and resulted in the line cleaning operation being

undertaken in an unsafe manner. This contention was upheld by the Court of Appeal[25].

72. Basten JA, with whom McColl and Giles JJA agreed, accepted the plaintiff's contention that the provisions of *Occupational Health and Safety Regulation 2001* (NSW) made under the *Occupational Health and Safety Act* 2000, while not creating a cause of action for breach, were nevertheless relevant to the existence and nature of any duty of care to the plaintiff on the part of Leighton Contractors and Downview and could inform the content of such a duty.

73. In particular the regulations imposed obligations upon principal contractors to provide to, or to ensure the provision of, 3 types of induction to workers on their projects - general, work activity based (ie task-specific) and site-specific. On its reading of these regulations it held, despite a finding by the trial judge to the contrary, that the failure to require Mr Stewart and the plaintiff to undergo task-specific induction resulted in a loss of opportunity for them to be trained in proper line cleaning procedures including tying down the end of the discharge hose.

74. Basten JA's reasoning was flawed in that respect as there was no basis in the regulations, or on the evidence, for concluding that the content of task-specific induction for concreting trades included such matters as line cleaning.

75. However against the background of the regulations and the following general factors:-

- the extent of the control which Leighton Contractors exercised over the site including having regard to its employment of a gatekeeper and its requiring and checking subcontractors' work method statements;
- the numbers of tradespeople and other workers on site at any given time;
- the risks of injury in such a workplace; and
- the fact that induction is now a recognised part of major construction works,

the Court of Appeal found the basis for a new duty in addition to those canvassed in the "older case law".

[25] *Fox v Leighton Contractors Pty Ltd* [2008] NSWCA 23

76. The duty was one of ensuring a reasonable level of safety, and of providing training, if necessary, in matters of safety to subcontractors[26]. Leighton Contractors' breach lay in failing to ensure that Mr Stewart and the plaintiff underwent the work activity based induction.

77. The High Court dealt with this decisively but briefly[27] as follows:-

> "*No justification for recognising a duty to train. If Leighton owed a duty to Mr Fox and Mr Stewart to provide induction training to them in the safe method of line cleaning, it owed a duty to provide training in the safe method of carrying on every trade and conducting every specialised activity carried out on the site to every worker on the site. There is no reason in principle to impose a duty having this scope on a principal contractor. The latter is unlikely to possess detailed knowledge of safe work methods across the spectrum of trades involved in construction work. And a duty to provide training in the safe method of carrying out the contractor's specialised task is inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and of principals to independent contractors*".

78. The plaintiff however made a "narrower" case for upholding the Court of Appeal's decision in his favour[28]. This was that Leighton Contractors had breached a duty to ensure that "each person working on a site it controls provides satisfactory evidence of having completed induction training".

79. The High Court rejected this narrower formulation on a number of grounds[29]. One was the causation issue, namely that the Court of Appeal had erred in holding that task-specific induction would have involved instruction of Mr Stewart and the plaintiff as to safe methods of line cleaning.

80. Furthermore, a proper reading of the regulations indicated that the principal contractor's obligations were satisfied if the relevant worker had undergone

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[26] It is not clear whether the duty extended beyond ensuring workers underwent induction
[27] at paragraph 52
[28] at paragraph 53.
[29] at paragraphs 54 - 57

work activity based induction on a previous occasion. There was no evidence that Mr Stewart and the plaintiff had not done so.

81. Another reason for rejecting the narrower formulation was that the Court of Appeal had treated the obligations concerning induction as absolute. Such a duty, if it existed, could not be absolute but could only require the exercise of reasonable care. There was insufficient evidence to support a finding of negligence on Leighton Contractors' part having enabled Mr Stewart and the plaintiff to begin their work without induction.

82. As far as Downview was concerned the Court of Appeal's reasons for holding it liable were less clear to the High Court[30]. One ground appeared to be the imposition of a duty to train similar to that imposed upon Leighton Contractors. Downview's "haphazard" contract management allowed Mr Stewart and the plaintiff to enter the site and undertake the work without the induction. That ground fell with the alleged duty.

83. There also appeared to be a discernible reliance on Downview's failure itself to engage a competent concrete pumping contractor but this flew in the face of the trial judge's findings on this aspect which the Court of Appeal did not overturn. On a conventional analysis Downview had thereby discharged its duty of care to those who might foreseeably suffer injury as a result of the pumping operations (including line cleaning) being carried out.

IMPLICATIONS OF *LEIGHTON CONTRACTORS v FOX*

84. The obvious implication is the rejection of the existence of any alleged duty on the part of the principal to "ensure a reasonable level of safety" or to "provide (or ensure the provision of) training in matters of safety to subcontractors".

85. There was no outright rejection of the plaintiff's narrow formulation based on alleged breach of duty by way of letting uninducted workers onto the site and allowing them to work. However this is of no great significance as such a case could be accommodated, assuming it was properly pleaded and supported by evidence, under the existing law. A principal's duties as occupier or co-

[30] at paragraphs 58 - 62

ordinator of multiple trades would clearly be breached by allowing onto the site workers whom the principal knew or should have known to be 'cowboys".

86. Did *Leighton Contractors v Fox* simply affirm existing principles as stated in *Stevens v Brodribb Sawmilling* and developed in subsequent cases then or did it modify those principles in some way?

87. The decision's implications were discussed by the NSW Court of Appeal in *Pacific Steel Constructions Pty Ltd v Barahona*[31]. That case involved a successful claim by Mr Barahona against his employer Pacific Steel but an unsuccessful claim against the head contractor Jigsaw Property Group. The circumstances were that he had injured himself while undertaking work at heights using a ladder.

88. The court noted[32] the High Court's rejection of the new duty contended for. It described *Leighton Contractors v Fox* as a recent affirmation of the differing duties of care owed on the one hand to contractors and on the other to employees[33]. However it noted the High Court's own reservations from a policy perspective that although the distinction in this respect between independent contractors and employees has been criticised, "the concept of distinguishing between independent contractors and employees is one too deeply rooted to be pulled out"[34].

89. As to the ongoing vitality of this distinction the Court of Appeal commented[35]:-

> "*There can be results which might be thought curious. A head contractor such as Jigsaw may owe to its employees on the site a duty to take reasonable care in relation to sub-contractor A's system of work if there is risk of injury to the employees (see for example Leighton v Fox at [21]). It may owe a like duty of care to sub-contractor B if organisation of activities on the site is necessary to avoid or minimise the risk of injury. So, if Mr Barahona's unsafe use of the ladder brought risk of injury to a Jigsaw employee, or to sub-contractor B, through Mr Barahona falling onto the employee or the sub-*

[31] referred to above - [2009] NSWCA 406, joint judgment of Allsop P, Beazley and Giles JJA
[32] at paragraph 79
[33] at paragraph 80
[34] *Leighton Contractors v Fox* at paragraph 21
[35] *Pacific Steel Constructions v Barahona* at paragraph 86

contractor, Jigsaw could be obliged to exercise some control over the system of work being followed by Mr Barahona. But the risk of injury to Mr Barahona himself in the fall may not oblige Jigsaw to exercise control over that system of work. These results, however, flow from the ingredient in a duty of care of the person or class of persons to whom it is owed, and the maintenance of the differential duties of care owed to employees and independent contractors."

90. *Leighton Contractors v Fox* might then be seen as the most recent in a series of decisions of the High Court which reaffirm conventional principles of liability for the acts of others[36] necessarily accepting the sometimes unsatisfactory consequences of doing so.

91. The Court of Appeal's judgment went on however[37] to consider the status post *Leighton Contractors v Fox* of some of its own decisions since *Stevens v Brodribb Sawmilling*. It noted that *Leighton Contractors v Fox* "stands against the adoption of a general law obligation (ie upon a principal) of a more extensive kind than that recognised in *Stevens v Brodribb Sawmilling*" (quoting from paragraph 59 of the *Leighton Contractors v Fox* judgment).

92. The Court of Appeal then noted that "in a number of decisions of this Court, it has been held that a principal owes to an independent contractor, or to the independent contractor's employee, a duty beyond the alleviation of risk of injury arising from a need for direction and co-ordination of activities on a site".

93. The judgment then goes on to suggest[38] that the grounds held to be sufficient for supporting the principals' duties of care in *Rockdale Beef v Carey* and *Tolhurst v Cleary Bros (Bombo) Pty Ltd* must now give way to the principles articulated in *Leighton Contractors v Fox*[39].

94. The suggestion of inconsistency between those decisions and *Leighton Contractors v Fox* appears to be based on paragraph 59 of the High Court's

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[36] *Scott v Davis* [2000] HCA 52, *Hollis v Vabu Pty Ltd* [2001] HCA 44, *NSW v Lepore* [2003] HCA 4 and *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19

[37] at paragraphs 89 - 91

[38] at paragraph 91

[39] See also *Unilever Australia Ltd (t/as Street Ice Cream) v Pahi* [2010] NSWCA 149 at [47]

decision concerning the issues as to Downview's duty of care. That may be overstating the High Court's intentions in the paragraph which said:-

> "*It is not clear whether the Court of Appeal was stating a general law obligation to which Downview was subject of a more extensive kind than that recognised in Stevens v Brodribb Sawmilling Co Pty Ltd. Had Downview failed to engage a competent contractor, it may not have avoided liability for the negligent failure of the contractor to take reasonable care to adopt a safe system of work. However, provided that the contractor was competent, and provided that the activity of concrete pumping was placed in the contractor's hands, Downview was not subject to an ongoing general law obligation with respect to the safety of the work methods employed by the contractor or those with whom the contractor subcontracted*".

95. Arguably all the High Court was saying was that the activity of concrete pumping did not give rise to a duty to co-ordinate and in the absence of any basis for a higher obligation Downview discharged its duty of care merely by engaging a competent contractor.

96. In *Tolhurst v Cleary Bros (Bombo) Pty Ltd* Giles JA said[40]:-

> "*It was said by Heydon JA in Kolodziejczyk v Grandview Pty Ltd at [53] that the duty recognised by Mason J in Stevens v Brodribb Sawmilling Co Pty Ltd "only arises in the category of cases discussed by Mason J, namely where there is a need for directions to be given as to when and where work is to be done and for the coordination of various activities". That was an adequate statement on the facts of that case, but, with respect, the need to take care that there is a safe system of work may call for something more, and so there may be a duty of care beyond the category of cases involving coordination of activities.*"

97. In *Maricic v Dalma Formwork (Australia) Pty Ltd*[41] Basten JA with whom Beazley and Ipp JJA agreed said:-

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[40] at paragraph 63
[41] at paragraph 42

> "*the duty of a head contractor is sometimes discussed by way of exceptions to the general rule that a principal is not liable for the negligent conduct of its independent contractor: see, eg, Almeida v Universal Dye Works Ltd [2000] NSWCA 264; (2000) 103 IR 433 at [148]- [150] (Santow AJA). An alternative approach is to address the duty of care owed by the head contractor as a separate issue, regardless of the roles of any independent contractors or sub-contractors, which may also be involved in the conduct in question. The latter approach was adopted in Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132, Ipp JA (Mason P and McColl JA agreeing).*"

98. Those two statements seem more consistent with the statement of Brennan J in *Stevens v Brodribb Sawmilling* with which we began the discussion. The starting point is the principal's creation of a risk by conducting an activity. Only where there are no factors present supporting a duty of co-ordination, an occupier's duty or that of a quasi employer can the principal discharge the prima facie duty of care arising out of creating the risk merely by delegation to a competent contractor.