MILLS OAKLEY

Labour hire employees – the good, the bad and the ugly

Labour hire employees

- Labour hire employees are employed by labour hire recruitment companies.
- They are sent to work on another's premises (the host employer).
- They are subject to the direction, control, supervision, equipment and system of work of the host employer.
- Wages, including superannuation and leave entitlements, are paid to the worker by the labour hire recruitment company.
- The host employer pays a fee for the worker's services to the labour hire recruitment company.
- The worker is not an employee of the host employer.

Labour hire employees

- If a labour hire employee is injured whilst working with the host employer:
  - They can lodge a workers' compensation claim against their employer (the labour hire recruitment company).
  - They are not eligible to lodge a workers' compensation claim against the host employer.
  - They are entitled to sue the host employer in negligence and claim damages pursuant to the *Civil Liability Act* 2002.

Negligence and the CLA

Section 5B of the *Civil Liability Act* 2002

(1) A person is not negligent in failing to take precautions against a risk of harm unless –

(a) The risk was foreseeable;

(b) The risk was not insignificant;

(c) In the circumstances, a reasonable person in Council's position would have taken those precautions.

Section 151Z *Workers' Compensation Act* 1987

- The worst piece of legislation ever drafted.
- The labour hire recruitment company, as the employer, owes a non-delegable duty of care to its employees.
- Section 151Z allows us to plead in the defence the damages which the plaintiff might be awarded as against Council are to be reduced by the percentage amount which the employer ought be liable for.

Macpherson v Clarence Valley Council

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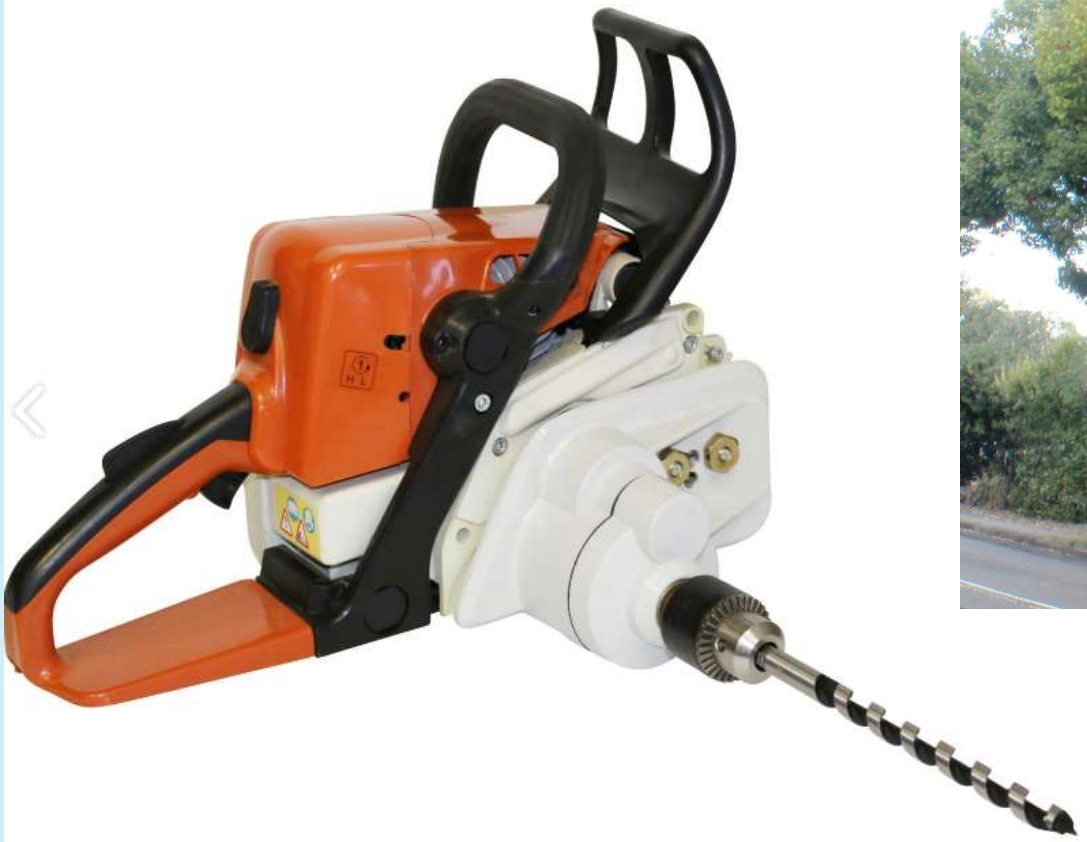

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Macpherson v Clarence Valley Council

- The claim against Council:
  - The auger attachment did not have a torque limiting clutch.
  - In giving Mr Macpherson a chainsaw without a torque limiting clutch, Council exposed him to an unnecessary risk of injury.
  - Reasonable care required Council to provide a chainsaw that had such an arrangement fitted.

Macpherson v Clarence Valley Council

- Council's defence:
  - Providing Mr Macpherson with the equipment it did was reasonable because there was no law or standard that mandated to the contrary.
  - Unreasonable to expect Council to replace its equipment in those circumstances.

Macpherson v Clarence Valley Council

- Trial judge found:
  - The risk of harm was foreseeable and not insignificant.
  - Council knew or ought to have known there was a real risk of injury to a person who used one without a clutch.
  - Council breached its duty of care to Mr Macpherson.
  - Liability of the employer (APS - the labour hire recruitment company) was assessed at 15%.
  - Awarded damages against Council in the sum of $536,880.47 plus costs.

Macpherson v Clarence Valley Council

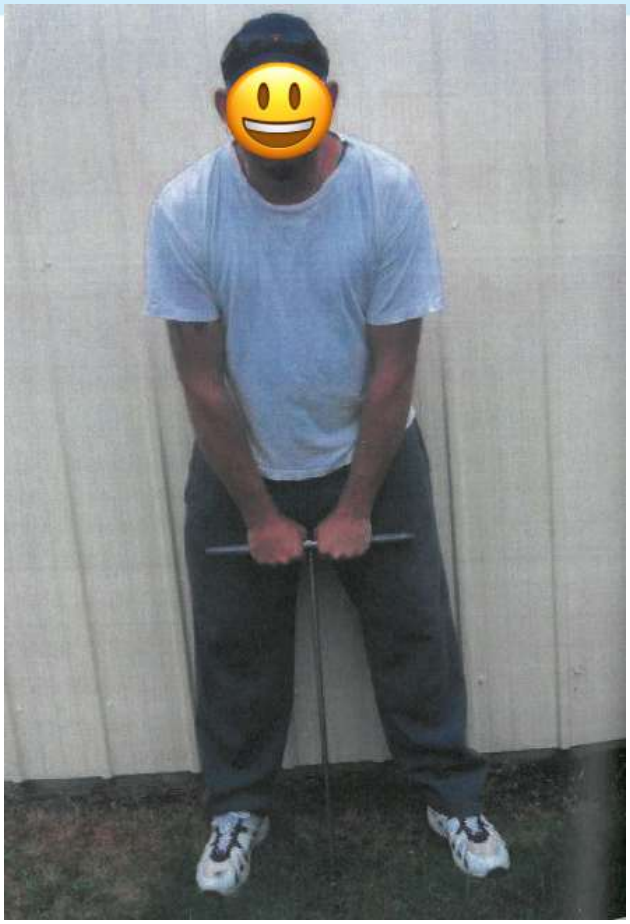
- Appeal:
  - No law against using a chainsaw/auger without a torque limiting clutch.
  - Unreasonable to require Council to do so which was not required either by any law, regulation or Australian Standard.
  - The trial judge failed to determine the probability the harm would occur if care was not taken.
  - The liability of APS should be greater than 15%.

Macpherson v Clarence Valley Council

- Court of Appeal:
  - Agreed with the trial judge Council breached its duty of care to Mr Macpherson.
  - Did not find any error in the liability of APS apportioned at 15% by the trial judge.
  - Damages were reduced from $536,880.47 to $414,207.94.

Humphries v Shoalhaven City Council

Humphries v Shoalhaven City Council



Humphries v Shoalhaven City Council

- Trial judge considered:
  - Did Council owe Mr Humphries a duty of care?
  - If yes, did Council breach its duty of care to him.

Humphries v Shoalhaven City Council

- 15 allegations of negligence pleaded against Council which were summarised by the trial judge as a failure to:
  - Maintain a safe system of work;
  - Provide adequate manual or mechanical assistance or a related failure to warn of the risk of injury involved in lifting the manhole without adequate manual or mechanical assistance;
  - Train Mr Humphries in safe manual handling techniques and a failure to ensure such systems were in place;
  - Carry out a risk assessment;
  - Ensure the safety of Mr Humphries and a related failure to protect him from injury; and
  - Correctly mark the manhole cover and related failure to provide a tool that was not defective.

Humphries v Shoalhaven City Council

- Trial judge found:
  - The risk of harm was foreseeable and not insignificant.
  - A reasonable person in Council's position would have taken the precautions against the risk of harm.
  - Liability of the employer (Campbell Page - the labour hire recruitment company) was assessed at 0%.
  - Awarded damages against Council in the sum of $753,369.59 plus costs.

Humphries v Shoalhaven City Council

- Appeal lodged on behalf of Council:
  - Error in failing to find Campbell Page was negligent.
  - Failing to reduce Mr Humphries damages in accordance with the provisions of section 151Z.

Humphries v Shoalhaven City Council

- Court of Appeal found:
  - Campbell Page ought to have been aware Mr Humphries would have been required to lift manhole covers.
  - Campbell Page should have ascertained from Council the system of work it had in place.
  - Given Campbell Page made no enquiries, it breached its duty of care to Mr Humphries, but that breach was not causative of the injuries.
  - It agreed there ought to be no apportionment of liability on the part of Campbell Page.

Why are these claims so hard to defend?

- Council's duty, as a host employer, is analogous to that of the duty of care owed by an employer to an employee.
- *Czatyrko v Edith Cowen University* [2005] HCA 14 at [12]

  "*An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work.*"

Lessons

- Do not use labour hire employees.
- Be very specific about what tasks they will be performing with you when you request labour hire employees from the labour hire employer.
- Find out what training they have received from the labour hire employer.
- Make the labour hire employer satisfy itself as to the adequacy of Council's premises, systems of work and equipment.
- Treat them as you would your own employees because you owe the same duty of care to them.

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