

LEICHHARDT MUNICIPAL COUNCIL v MONTGOMERY (S188/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 8 December 2005

Date of grant of special leave: 19 May 2006

This appeal involves the question of whether a road authority owes a duty of care to road users, including pedestrians, which is "non-delegable" so that the road authority must ensure that reasonable care is taken by any sub-contractor who works on the road.

The respondent commenced proceedings against the appellant ("the Council") and another in relation to injuries he sustained on 7 April 2001 when he fell into a pit in a footpath in Leichhardt. The Council had engaged Roan Constructions Pty Ltd ("Roan") to perform work on the footpath. When the respondent walked over the carpet covering the pit his left leg fell down and he injured his knee.

The Council contended that in the circumstances of the case it owed no duty of care to the respondent as it contracted with independent contractors to perform the work therefore it did not relevantly occupy the footpath at the relevant time. The trial judge rejected this submission. At the time of the accident the footpath was open to all users of the footpaths in the area and there was no doubt that the Council was the relevant road authority and occupier of the footpath at the relevant time. Whilst the Council did not direct Roan as to the exact manner in which they were to physically perform the re-paving work, there were clear directions as to the hours of the work, the work to be carried out and that carpet or artificial grass was to be used to cover the work. The Council had not given control to Roan in the relevant sense and pedestrians had neither the right nor the opportunity to exercise control over the footpath. The Council in these circumstances had a particular responsibility for the care of pedestrians involving a high standard of care which it was unable to delegate to an independent contractor. There was no evidence that the respondent was not taking reasonable care for his own safety. The trial judge concluded that a non-delegable duty of care was owed, that it had been breached and that the respondent's injuries arose as a result of that breach.

The Council appealed. The Court of Appeal was constituted by Mason P, Hodgson & McColl JJA. Hodgson JA gave the main judgment of the Court. In relation to the non-delegable duty argument, the Council submitted that according to this Court in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, a road authority's duty was to take reasonable care, not to ensure that reasonable care was taken. Hodgson JA referred to English authority to the effect that where a road authority engages a contractor to do work on a road used by the public such as to involve risk to the public unless reasonable care is exercised, such an authority has a duty to ensure that reasonable care is exercised and will be liable if the contractor does not take reasonable care. Further, his Honour noted that a road authority undertaking work on a road involving a risk to road users was so placed in relation to such users as to assume a particular responsibility for their safety. Such an approach was not inconsistent with *Brodie*. His Honour observed that the general duty of road

authorities was to take reasonable care but that in a particular circumstance where the authority undertakes work involving a risk to road users (a circumstance not considered in *Brodie*), the general duty was overlaid by a more extensive duty arising because of the risk created by the undertaking of those works. As such, a non-delegable duty of care was owed.

The respondent seeks leave to file and rely on a Notice of Contention. The proposed Notice contends that the Court of Appeal should have found that the appellant was negligent other than through its non-delegable duty of care in that the appellant (inter alia) failed to deny pedestrians access to the footpath whilst construction work was in progress.

The grounds of appeal are:

- The Court of Appeal erred in holding that the duty of care owed to the respondent by the appellant was a non-delegable one, namely a duty which obliged the appellant to ensure that reasonable care was taken for the safety of the respondent as a road user.
- The Court of Appeal ought to have held that the duty of care owed by the appellant to the respondent was one which obliged it to take reasonable care that the exercise of its statutory powers did not create a foreseeable risk of harm to the respondent as a road user.
- The Court of Appeal erred in holding that there was any breach of duty on the part of the appellant.