



Inside this Issue:

FALLING TREE CLAIM SUCCEEDS

Falling tree claim succeeds
Pages 1–2

COOTE -v- FORESTRY TASMANIA
High Court of Australia
13 June 2006

Falling fridge door claim fails
Pages 2–3

FACTS

Falling volleyball player's appeal succeeds
Pages 3–4

The Appellant, Graham Coote, an experienced tree feller, was injured in September 1998 when working in a State Forest in Northern Tasmania. Shortly before he sustained the injury, which rendered him a paraplegic, he had felled two sawlog trees, each of which, as they descended, had brushed a pulpwood tree. Coote later walked under that pulpwood tree and a branch fell and hit him.

exercise its statutory powers so as to minimise those risks. The risk of injury being caused when severed branches later fell from trees was known and was reasonably foreseeable.

He found Forestry Tasmania negligent "*in failing to instruct the appellant to fell any trees that potentially posed a danger*".

His Honour observed that Coote's decision not to fell the tree that injured him was "*consistent with obedience to Mr Johnstone's instructions*".

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FIRST INSTANCE

Coote's felling work was governed by the *Forest Practices Act 1985 (Tas)*. The Act gave certain powers to forestry officers to ensure that harvesting was conducted in accordance with a timber harvesting plan. Section 21 of the Act made it an offence for Coote to fail to comply with the provisions of a timber harvesting plan. This plan required Coote not to fell pulpwood trees. The essence of Coote's claim was that he left standing a tree which injured him because of the instructions given to him by Forestry Tasmania. Forestry Tasmania submitted that Mr Coote could and should have felled that tree and that his failure to do so was an error of judgment on his part, for which it was not responsible.

"...The essence of Coote's claim was that he left standing a tree which injured him because of the instructions given to him by Forestry Tasmania..."

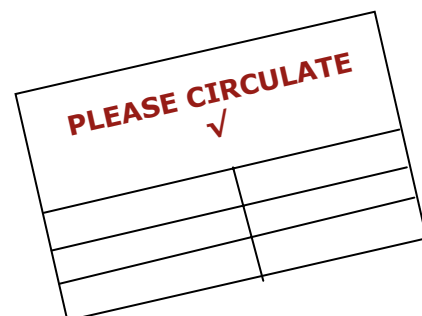
He found Forestry Tasmania was liable to Coote, however, damages recoverable were reduced by one-sixth because of Coote's contributory negligence. He found that Coote, in walking under the damaged pulpwood tree only minutes after it had been brushed, "*went beyond misjudgment and inadvertence and amounted to contributory negligence*".

Scope of Services:

Construction risk
Contractual + commercial litigation
Directors' + officers' cover
Discrimination law
Employment contracts
Employment law
Equal opportunity
Financial services
General insurance
Life insurance
Medical defence
OH+S
Policy drafting + interpretation
Professional indemnity
Public + products liability
Self insurance
Superannuation
Trade + transport + aviation

FULL COURT

Forestry Tasmania's appeal to the Full Court of the Supreme Court was upheld and Coote's claim was dismissed.



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Underwood CJ held that the reason why Mr Coote failed to fell the pulpwood tree from which the branch fell was not because he had been instructed not to do so, but because the danger posed by leaving the tree standing was not sufficiently high.

HIGH COURT

Coote successfully appealed to the High Court. In an unanimous decision, the High Court comprising of Gleeson CJ, Kirby, Hayne, Gummow and Heydon JJ, found that the Full Court had made an error in assuming that Coote had greater freedom to remove pulpwood trees than was found by the trial judge.

"...The High Court confirmed the importance of findings of fact to the conclusion of negligence..."

The High Court found that the direction given to Coote by Mr Johnstone was not disturbed by the Full Court and it followed that Forestry Tasmania, had directed Coote to work in a manner different from his normal pattern of work. Forestry Tasmania was negligent as its direction resulted in Coote not felling a tree that was a potential source of danger.

CONCLUSION

All members of the High Court found the Full Court of the Supreme Court of Tasmania fell into error by holding that Coote was free to fell any tree that posed a danger. The High Court confirmed the importance of findings of fact to the conclusion of negligence.



**Anne-Maree Hunt
Lawyer**

FALLING FRIDGE DOOR CLAIM FAILS

**MARIA SWEENEY -v- BOYLAN NOMINEES P/L
T/AS QUIRKS REFRIGERATION
High Court of Australia
16 May 2006**

BACKGROUND

On 2 August 2000, Sweeney was at a convenience store in suburban Sydney and went to the refrigerator to get a carton of milk. As she opened the door, it came off its hinges and fell on her, striking her on the head. She sustained injuries to her neck, head and hand.

Proceedings were commenced in the District Court of NSW against the convenience store and the refrigerator company, (respondent). The convenience store was found not to be liable. The convenience store had contacted the respondent some four or so hours before the accident to report that the door in question was not closing properly. A mechanic was despatched, who repaired the door. Sweeney attended the store approximately one and a half hours later. The convenience store was found to have done all they could reasonably be expected to do in the circumstances.

The NSW District Court found the respondent was vicariously liable for the negligence of the mechanic and awarded damages in the amount of \$43,392.

"...The mechanic had his own workers' compensation and public liability insurance policies, through a company of which he was a director. He was not provided with any tools, equipment or uniform by the respondent..."

The NSW Court of Appeal upheld the respondent's appeal. It held that the mechanic was not an employee of the respondent. However, was he a representative or agent of the respondent?

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They applied the reasoning in *Hollis v Vabu P/L (2001) 207 CLR 21* and *Colonial Mutual Life Assurance society Ltd v Producers and Citizens Co-Operative Assurance Co of Aust Ltd (1031) 46 CLR 41*, and held that the mechanic was not presented to the public as "an emanation of the respondent" and that he was, in essence, doing nothing more than acting at the request of the respondent in repairing the refrigerator. Vicarious liability could not therefore attach to the respondent.

HIGH COURT DECISION

The High Court by majority of (6-1) with Kirby J. dissenting dismissed Sweeney's appeal. It held that the mechanic was an independent contractor and not an employee. The majority applied the principles outlined in the *Hollis* and *Colonial Mutual Life* cases.

They also held that the mechanic was not an agent or representative of the respondent.

The mechanic was not an employee of the respondent, but rather an independent contractor. He performed duties for the respondent only on request, and there was no formal contract between them. He would invoice the respondent for the time worked and the parts required. The mechanic had his own workers' compensation and public liability insurance policies, through a company of which he was a director. He was not provided with any tools, equipment or uniform by the respondent.

"...She should have required the respondent to fully outline its defence before the trial..."

Kirby J. found that the mechanic was a representative of the respondent. He was of the view that the mechanic was performing the respondent's functions and advancing its economic interests and was, therefore, essentially a part of its enterprise.

OVERVIEW

No explanation is provided for why Sweeney did not pursue the mechanic. There is a suggestion in

the judgment that, at first instance, the respondent did not properly spell out its defence until the trial and then asserted that responsibility lay with the mechanic. Sweeney probably did not appreciate the significance of this evidence at that time. She should have required the respondent to fully outline its defence before the trial.

The decision confirms that for a principal to be vicariously liable for the negligence of a subcontractor/agent, the relationship between the two must closely reflect the relationship between an employer and employee.



Steven Notarianni
Lawyer

FALLING VOLLEYBALL PLAYER'S APPEAL SUCCEEDS

PALTIDIS -v- THE STATE COUNCIL OF THE YONG MEN'S CHRISTIAN ASSOCIATION OF VICTORIA INC.

**Victorian Court of Appeal
8 June 2006**

FACTS

Paltidis was injured while playing beach volleyball at a YMCA facility in Melbourne. He was aged 37 at the time of his injury. He and a friend joined in a social beach volleyball game that had already commenced.

"...Paltidis sued the YMCA alleging they were negligent occupiers of the facility in that they had failed to provide a safe court and failed to warn him of the possible danger posed by the tyres..."

The YMCA court was located outdoors. The court floor comprised of sand. The court boundaries were marked by car tyres that were largely embedded into the ground. There was conflicting evidence as to how Paltidis injured himself but it was accepted that he had lunged towards the ball during play and had not allowed himself time to protect his chin, from making contact with a tyre.

Paltidis had been playing for about three minutes before the accident occurred. In his evidence, he maintained he *"hadn't even considered the tyres a risk"* at the time he joined the game.

COUNTY COURT

Paltidis sued the YMCA alleging they were negligent occupiers of the facility in that they had failed to provide a safe court and failed to warn him of the possible danger posed by the tyres. In its defence, the YMCA alleged that Paltidis had voluntarily assumed the risk of being injured as the partly submerged tyres were clearly visible. Further, they alleged that he was guilty of contributory negligence in the manner in which he played the game and sustained the injury.

The jury rejected the defence of the voluntary assumption of risk. They awarded Paltidis damages of \$580,000 which they reduced to \$174,000 (30%) by reason of contributory negligence.

COURT OF APPEAL

Paltidis appealed the verdict.

In his judgment, Ashley J. A. (with whom Chernov and Nettle JJA concurred) allowed Paltidis's appeal and reapportioned the damages awarded to him.

The Court affirmed that for a Defendant to make out the defence of voluntary assumption of risk it must *"obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."* The test is a subjective one. The trial judge had erred in directing the jury that it was an objective test.

"...The Court held that marking the boundaries with

raised and unyielding tyres was an extraordinary thing to do..."

Ashley JA. also found the trial judge was in error in directing the jury in respect to contributory negligence.

The Court considered the submissions put on behalf of Paltidis, namely that he was a relatively inexperienced player, he had only been playing for a very short while for the first time on this particular court, in a social or friendly game, and that his lunging towards the ball and tyres was a spur of the moment act during the course of play. However, they held that the partially submerged tyres were a very unusual way to mark the boundaries of a court and arguably a reasonable person would have taken some steps to modify his play to avoid the danger created by the tyres.

The Court was critical of the YMCA and held that *"marking the boundaries with raised and unyielding tyres was an extraordinary thing to do"*.

The quantum of damages was not in dispute and affirmed at \$580,000, however, it reduced contributory negligence from 70% to 25% and made orders for a judgment to Paltidis in the sum of \$435,000.00.



**Kirsty Symons
Articled Clerk**

Not for the faint hearted!

In October 1998, Mark Attard purchased a junior burger from McDonalds. He didn't eat it. Today it lives in his office. To view the junior burger, refer to our website. Follow the link from the publications page.

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