

**RECENT DECISIONS**

## Section 151Z: Worker succeeds in damages claim against occupier

*Benton v Historic Houses Trust of NSW* [2017] NSWDC 324 (17 November 2017)

[Link to decision](#)

### Summary

The worker was injured when she fell into a ravine on the property premises surrounding Vacluse House ('the premises') in the course of her employment as a venue manager.

The worker brought a claim for damages against Historic Houses Trust ('HHT') as the occupier of the premises alleging that it had failed to take reasonable steps to ensure that she wasn't exposed to a foreseeable risk of injury.

The Court was required to consider whether HHT owed any duty of care to the worker as occupier, the nature of any such duty, and whether there was any breach.

The Court found that HHT owed a duty of care that it breached in the circumstances of the worker's injury entitling her to an award in the order of \$1,125,000.

### Background

The worker had mistaken a bricked drainage culvert leading into the ravine for a walking footpath that led to her falling several metres below to the embankment sustaining injury.

The worker was travelling in darkness, using a path that she was not familiar with and was relying upon a co-worker who she lost sight of.

The worker commenced proceedings against HHT alleging negligence due to:

- (1) Failure to warn of the danger of falling down the embankment;
- (2) Failure to ensure, including by inspection for safety purposes, that there was adequate lighting of pathways at night in the immediate vicinity of the embankment;
- (3) Failure to provide and maintain, including by inspection for safety purposes, a safe and adequately illuminated walkway within the grounds and in the immediate vicinity of the embankment;
- (4) Failure to provide sufficient edge protection to the embankment, including by the provision and the maintenance of sufficiently dense "soft barrier" plantings;
- (5) Failure to develop and implement an appropriate risk management process.

## Findings

His Honour Judge Levy held that HHT owed a duty of care to take reasonable care to avoid foreseeable risk of harm to lawful entrants onto the property.

He considered that upon reasonable contemplation by HHT, there was an identifiable risk of harm to persons walking near the creek embankment.

His Honour noted that HHT did not supervise or implement access controls for the premises after hours, did not illuminate the area in question, did not place signs or barriers that would have prohibited or restricted walking access to areas that posed a risk of falling into the ravine.

Judge Levy decided that HHT had breached its duty of care in relation to the premises and was negligent in the circumstances that resulted in the worker's fall.

His Honour found the employer to be 20% responsible for the accident taking account of the non-delegable duty of care that it owed to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury.

## Conclusion

The workers compensation payments made to and on behalf of the worker will be required to be repaid to the employer. Given that the employer was 20% responsible for the accident, the worker's damages were also reduced by the same amount as the worker was not entitled to any contribution from the employer (by not having a WPI assessment of 15% or greater), pursuant to the provisions found in section 151Z of the *Workers Compensation Act 1987* (the '1987 Act').

However, a full recovery is still available to the employer as the worker did not overcome the 15% WPI threshold and as such there was no liability for damages which would have otherwise reduced the recovery.

Workers often sustain injuries in the course of their employment while on third party premises, sites and venues. The location of the injury should be noted on any claim in order to determine whether the injury may have been due to the culpability of a third party that may attract a potential right of recovery under section 151Z of the 1987 Act.

## For more information, please contact:

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