
Liability of Owners and Operators for Injury to Persons Onboard – Are Owners and Operators Liable for Obvious Risks?

CSL Australia Pty Ltd v Formosa [2009] NSWCA 363

How far does the obligation of a duty of care regarding safety onboard a ship go?

In this decision of the Court of Appeal of the NSW Supreme Court it was held that the owner and operator of a ship can be jointly liable for breach of duty of care to a stevedore unloading the ship, even where the stevedore was the party primarily responsible for the unloading operations and their safe conduct and was aware of the risk of injury.

The Facts

The vessel in question was a self-unloading bulk carrier equipped with a water spraying system to suppress cargo dust. When mixed with the dust during discharge, the water spray developed into a slurry on deck. Pursuant to Marine Order Part 32 the stevedore was responsible for unloading the ship and ensuring that the subsequent loading was carried out safely, including as to the conditions of the deck. The stevedore was aware of the risk of the combination of water and slurry resulting in an unsafe deck surface and continued to work the vessel regardless, as a result of which he slipped on deck and suffered significant injury to his knee.

At first instance the Court held that the owner and operator of the ship had breached their duty of care by failing to sweep a path on deck to remove the slurry and failing to instruct the stevedore not to walk on the deck after it became covered in cargo slurry. The damages awarded against the owner and operator were reduced slightly in recognition of the contributory negligence of the stevedore.



The Appeal Decision

The Court of Appeal affirmed the findings of the primary judge; namely that pursuant to the *Maritime Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) and/or the common law, the owners and operators of a ship owe a duty to exercise reasonable care in respect of the safety of stevedores coming onboard to undertake their tasks and to avoid exposing such persons to risk of injury.

The Court rejected the argument that, by expressly imposing an obligation on the stevedore as the “person in charge” of unloading to “ensure that the unloading was carried out in a safe and orderly manner”, Marine Order Part 32 discharged the owners and operators from their duty or lessened the extent of the duty of care owed to the stevedore. The Court held that any obligations imposed on any person under the Marine Orders could not act to deprive the *Maritime Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) of application or terminate any common law duty of care that was otherwise owed to the stevedore.

The Court did recognise that the characterisation of the scope and content of the duty of care owed by the owners and operators must reflect the reality of the situation and the expertise, experience and skill brought to bear by persons such as stevedores, but ultimately decided that such considerations cannot absolve an owner or operator who fails to provide a safe working environment for persons onboard.

Implications

This decision should alert owners and operators as to their statutory and common law obligation to exercise due care for the safety of those coming onboard a ship, even where such persons are independent experts and are themselves responsible for directing operations onboard the ship and are or ought be aware of the risk involved.¹

Where unsafe situations are intrinsic to the nature of the activity being conducted (which the Court found was the case here) and cannot be avoided, owners and operators may seek to avoid any liability by issuing onboard workers with appropriate warnings as to safety, which the Court found that the owners and operators did not do in this case.

It may also be possible to attempt to allocate responsibility for the safe performance of onboard operations to stevedores through negotiation in the terms of any stevedoring services agreements, depending on the ability in effect to contract out of all or part of the relevant OH&S legislation within each relevant Australian jurisdiction.

Contact

If you have any questions or comments about the matters raised in this newsflash please do not hesitate to contact:

Robert Wilson | Partner

T: +61 4 9230 9475

E: robert.wilson@nortonwhite.com

Nathan Cecil | Partner

T: +61 2 9230 9450

E: nathan.cecil@nortonwhite.com

Ilka Frischen | Solicitor

T: +61 2 9230 9412

E: ilka.frischen@nortonwhite.com

www.nortonwhite.com

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¹ such as stevedores, surveyors or cargo superintendents, for example.