

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Liability For Injuries Caused To Delivery Drivers

As is often the case persons injured during the course of their employment whilst delivering products to premises will seek to blame both their employer and the owner of the premises when they are injured delivering products. Even where the injured person only sues the occupier, negligence on the part of the employer will impact on the damages payable by the occupier. Courts will be called upon to apportion liability between the employer and the occupier where both parties have been negligent. It is important to remember employers may have little or no control over the premises where products are being delivered to and there will be an issue as to what would be a reasonable response by the employer to the risk that was present at the premises.

An employer has a duty to adopt safe systems of work and to provide proper plant and equipment. However, the NSW Court of Appeal has recently confirmed that that duty will operate differently on premises and in circumstances over which the employer has full control as opposed to those which are under the control of others.

In *Dibb Group Pty Limited trading as Hill & Co. v Cole*, the Court of Appeal considered a claim by Mr Cole who was delivering fuel to premises occupied by Dibb. After returning to his truck after adjusting valves which were required to be open to discharge the fuel into tanks, Cole stepped on a cover over an inspection pit. The general area was covered in gravel, and the cover was surrounded by sections of pine log raised approximately 4" above the gravel surface. At some point in time, the edges of the concrete on which the cover rested had been chipped away so as to grant easier access to the pit. When Cole trod on the pit cover it moved resulting in him falling into the pit and suffering a fracture to his ankle. He brought proceedings in the District Court against the occupier of the premises and was successful in the claim receiving damages in excess of \$300,000.00. Cole did not sue his employer. If the employer was negligent the damages recovered by Cole would have been reduced by a percentage reflecting the employer's responsibility for the accident. The trial judge found that the employer had not been negligent. Dibb appealed challenging that finding.

The Court of Appeal noted that the employer's duty to take reasonable care for the safety of its employees can often be identified by reference to the following questions:

1. "Did the circumstances which give rise to an employee's injury require some antecedent conduct on the part of the employer which was not taken?"
2. If so, did the conduct fall within the scope of the obligation:
 - a. to provide proper and adequate plant and equipment;
 - b. to engage reasonably competent workers or contractors; and
 - c. to provide a reasonably safe system of work?
3. If so, and the circumstances were within the immediate control of the employer, did the employer fulfil those requirements, either itself or through its employees, agents or contractors?
4. If the circumstances were not within the immediate control of the employer, did the employer take such steps as were reasonable in all the circumstances, to provide reasonable protection to its employees?"

There are numerous cases which refer to an employer's duty as "stringent" and "non-delegable".

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
Michael Hayter mkh@gdlaw.com.au
Nicholas Dale nda@gdlaw.com.au

Michael Gillis mjg@gdlaw.com.au
Marcus McCarthy mwm@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
David Collinge dec@gdlaw.com.au

August 2009
Issue

Inside

Page 1

Liability For Injuries Caused To Delivery Drivers

Page 2

Parent's Liable For Fall From Bunk Bed

Page 4

Personal Responsibility In Pedestrian Accidents

Page 5

Limitation Periods

Page 6

National Code Of Practice For The Building And Construction Industry

Page 7

OH&S Roundup

Page 9

Christmas Parties and Workers Compensation

Page 10

Workers Compensation Payments for Directors of Corporations

Page 11

Unsuccessful Unfair Dismissal Claim - Employers Can Recover Costs

Page 11

Employer's Obligations Not To Disclose Employment Records

**Gillis Delaney
Lawyers**

Level 11,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

However, the application of these principles has given rise to different views in cases where the employer is not in control of the premises or places at which the worker is injured. Justice Basten noted the concept of control has a number of different facets and on one hand evidence of control may justify imposing a liability on a non-employer, on the other hand, absence of control need not form a basis for removing liability from an employer.

There will be a tension between a duty, limited to reasonable care, and non-delegability which arises when an employer sends an employee to work at premises not under the employer's control or using equipment other than that supplied by the employer. This is often an issue for businesses involved in the labour hire industry.

In this case Justice Basten noted that in line with English authority:

"Employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety. The employers still have an over-riding duty to take reasonable care not to expose them to unnecessary risk. They must, for instance, take reasonable care to devise a safe system of work ... and if they know or ought to know the danger on the premises to which they send their men, they ought to take reasonable care to safeguard them from it. What is reasonable depends, of course, on the circumstances."

The Court of Appeal determined that:

"The employer's duty, however effected, to adopt safe systems of work and to provide proper plant and equipment, will operate differently on its own premises and in circumstances over which it had full control, as compared with premises under the control of others and circumstances over which it does not have control. When the safety of premises is at stake, as in this case, it is appropriate to ask specific questions with respect to what may be expected of an employer exercising reasonable care for the safety of its employees. For example, is it reasonable for the employer to request or require access to premises to carry out its own safety inspection? Is it necessary (and sufficient) if the employer enquires of the occupier what steps it has taken to conduct such an assessment? Is it necessary (and sufficient) for the employer to enquire in specific terms of its own employees as to the nature of the conditions they encounter at other premises?"

Applying these principles to the case the original trial judge found that the employer was under a duty to carry out an inspection of the premises before requiring employees to attend the premises but the inspection would not have revealed the risk arising from the unstable pit cover. In those circumstances the employer was not negligent. The Court of Appeal agreed with these findings.

Interestingly, the Court of Appeal determined that an employer's duty will operate differently on premises over which it has no control. However, that is not to say that the duty is any different as the employer is still under an obligation to provide a safe system of work and provide proper plant and equipment. However, the employer's duty may be one to inspect premises and/or make enquiries. If those enquiries and/or inspection would not have revealed the risk at the premises the employer may escape liability.

In this case the occupier was found to be solely liable for Cole's injury and Cole's damages were not reduced for any negligence on the part of the employer.

Parents Liable For Fall From Bunk Bed

It is every parent's nightmare - your child's friend comes over to stay the night and is badly injured. Not only do you feel responsible but 5 years down the track you find yourself in the Supreme Court of NSW in relation to the incident - and are found liable.

Cameron Thomas claimed damages against William and Susan Shaw the parents of his friend Joel as a consequence of serious head injuries sustained in a fall on 23 April 2004 when he was ten years old. Cameron had been staying with his friend Joel at Joel's home on the north coast of New South Wales. Joel's parents were the owners and occupiers of the home.

There were two versions as to what Cameron was doing before he fell. The fall occurred in Joel's bedroom which was a small room on a carpeted concrete slab floor. There was a bunk bed in the room. This bed and another bunk bed that was identical had been purchased by the Shaws in 1998 when they lived in Victoria. At the time of purchase each bunk bed was fitted with a ladder and a guard rail. The ladders and guard rails had been removed from each bed about a year after purchase. Mrs. Shaw gave evidence that the guard rail was removed because it had broken not long after the bed was purchased. The

ladders had also been removed in the first year of purchase.

On the morning of the accident, Joel had been sleeping on the top bunk and was still in bed. Cameron climbed up the back of the bed and sat next to Joel with his legs dangling over the side. Next to the bunk bed there was a chest of drawers in front of the window and directly beneath the pillow of the top bunk.

A significant issue was exactly how Cameron got down from the top bunk. Cameron's evidence was that he was endeavouring to slide down from the top bunk because he was too scared to jump. He had placed one foot on the chest of drawers and was searching with the other foot for the lower bunk. He then fell although could not recall the fall. This version of events was supported by Cameron's parents who claimed to be repeating what Joel had said to them.

The evidence given by Joel was quite different. Joel's evidence was that Cameron had dropped both feet onto the chest of drawers and then stood up, turned towards the centre of the room and jumped and as he did so he shouted a word which sounded like "Geronimo". Joel did not see Cameron land but heard Cameron cry out and knew something was wrong.

In essence based on Joel's version of events the Shaw's argument was the accident had little or nothing to do with the bunk bed.

Justice Kirby of the Supreme Court who heard the case accepted Cameron's evidence and preferred his evidence to that of Joel. The Judge noted that the account given by Joel and that by his mother were very different. Mrs. Shaw had said that Cameron slipped as he jumped whereas Joel had described a jump. Cameron's evidence was also supported by his parents who had spoken to Joel on the day of the accident.

Mrs. Shaw gave evidence that children used to stay quite often on sleep-overs and she was of course aware the bunk had no ladder or guard rail. The Judge commented he would accept it was foreseeable a young child of Cameron's age would climb onto the top bunk and may improvise in getting down. The Shaws ought to have known that without a ladder and guard rail there was a risk that injury could be sustained. Justice Kirby in his judgment stated:

"It cannot be said that, absent a guard rail and ladder, harm was probable each time a child climbed up and down. No doubt many such journeys could be made without incident. But the risk of a fall from a height onto a hard floor remains, awaiting misjudgement or mishap. Cameron was young. As a ten year old he was just outside what may be termed 'the vulnerable age bracket' (5 to 9 years). But he was, I believe, still vulnerable. It was highly predictable that a child on the top bunk may improvise in getting down, absent a ladder. Indeed, a child of his age, sitting on the side of the bed, chatting to his friend, would be likely to improvise in getting down when seated in that position. The alternative was to climb back up onto the bed, walk the length of it, and climb down the back. More often than not, a child could be expected to get down successfully. However, there was the real possibility of harm, as recognised by the mandatory Standard."

Justice Kirby continued:

"There were a number of solutions to the potential hazard. Obviously the ladder and guardrail were safety features which the Shaws chose to remove, rather than address the issues which they saw in relation to them. Various possibilities were identified, including the replacement of the bolt securing the guardrail, as well as lashing the ladder to prevent movement. I infer that a handyman could have dealt with the issue, without significant cost. And if that be thought onerous, it was open to the Shaws, especially when young children slept over (such as Cameron), to arrange for them to sleep in the lounge room on mattresses. That in fact was done when a number of children were sleeping over. In the circumstances, I believe that a reasonable person in the position of the Shaws would have taken such precautions."

There was no deduction for contributory negligence.

So what was the end result? The injuries to Cameron were significant and damages awarded to Cameron approximated at \$850,000.00.

So what is the effect of the case? Contrary to submissions made on behalf of the Shaws the case does not signal the end of childhood sleep-overs or anything that extreme. Parents should, however, take care when something is obviously wrong, as in this case where clearly the bunk beds were not safe.

Personal Responsibility In Pedestrian Accidents

In personal injury claims the damages recovered by an injured person will be reduced where the injured person's negligence has caused and/or contributed to their loss. The damages will be reduced by an amount which reflects the injured person's contribution to the incident. Motor vehicle accidents involving pedestrians often involve fault on the part of pedestrians and damages can be substantially reduced as was recently seen in a decision in the NSW Court of Appeal in *Turkamani v Visvalingam*.

A pedestrian was fatally injured at the intersection of Fox Valley Road and Comenarra Parkway in Wahroonga at an intersection governed by traffic lights. A vehicle was travelling in Comenarra Parkway through the intersection and the traffic lights were green for traffic moving in that direction. There were vehicles in the lane of traffic continuing to turn right into Fox Valley Road and the first vehicle in line was quite a large white van. The pedestrian came from in front of the van within the pedestrian crossing over Comenarra Parkway and struck the motor vehicle which was entering the intersection. The pedestrian ran into the right side of the vehicle just behind the front wheel. The pedestrian died as a result of the accident. The driver of the vehicle was travelling at between 40 and 50 kilometres per hour and the pedestrian was jogging. The pedestrian was disobeying a Don't Walk signal at the time of the accident. A number of witnesses saw the pedestrian jogging briskly along the footpath and onto the pedestrian crossing. One driver travelling in the opposite direction in Comenarra Parkway flashed his lights a number of times to warn the approaching vehicle of the pedestrian's movement and he noted the approaching vehicle's speed decreased.

A claim for damages was brought by the deceased's relatives pursuant to the Compensation of Relatives Act against the driver of the vehicle and a District Court Judge found the driver failed to keep a proper lookout and was negligent. However, the damages award was reduced by 60% for the contributory negligence of the pedestrian. After a reduction of 60% the damages award was \$958,168.00. The CTP insurer appealed.

The Court of Appeal agreed with the trial judge's findings on the issue of negligence and Hodgson J A noted that it is a matter of law that:

"the driver of a vehicle on a public road, was under a duty, to other persons on and in the vicinity of the road on which he was driving, to exercise reasonable skill and care with a view to avoiding the causing of injury to those persons. The question of whether the Appellant failed to exercise the reasonable requisite skill and care, and if so whether this caused injury to the deceased, are questions of fact. ... a person driving a motor vehicle on a public road, should, as a reasonable person, appreciate that there is a significant risk of causing serious and catastrophic injury to other persons; and for that reason, should as a reasonable person, exercise quite a high degree of vigilance especially in the presence of other traffic in the vicinity of the intersection."

The original trial judge found that the driver had failed to keep a proper lookout and this was causative of the accident because if he had exercised the appropriate degree of vigilance he would have seen the deceased in time to avoid the accident.

The Court of Appeal noted a number of facts supported the finding that the driver was not keeping a proper lookout and those facts included:

- The driver did not know what he had hit which would support the view he was not keeping a proper lookout.
- One witness saw the pedestrian 70 metres back from the intersection at about 4 seconds before the accident and this time the driver of the vehicle which collided with the plaintiff was 45 to 50 metres back from the intersection and the pedestrian was just about to step off the footpath onto the road. The driver did not see the pedestrian step off onto the road and had a clear line of sight, notwithstanding the presence of the vehicles turning right ahead and nevertheless did not see the pedestrian.

In all the circumstances the driver was found to be negligent for failing to keep a proper lookout. Consequently the Court of Appeal determined that the plaintiff's claim should succeed. Nevertheless, it was necessary for the Court to review the finding of contributory negligence. Two judges determined it was appropriate to increase the percentage reduction for contributory negligence to 80% whilst one judge concluded the original trial judge's finding of 60% was appropriate. Accordingly the damages award was reduced by 80% in line with the finding of the majority view of the Court of Appeal.

As can be seen, personal responsibility of a pedestrian will have a substantial impact on damages even where claims are brought by relatives of a deceased injured in a motor vehicle accident, however, the personal responsibility of the pedestrian will not abrogate the overall duty of a driver to keep a proper lookout.

The duty owed by road users is an extremely high one as can be seen by the finding of negligence in this case, nevertheless a pedestrian's fault still has a substantial impact.

Limitation Periods

In one of our recent editions of GD News we discussed the decision of New South Wales Court of Appeal in *Baker Morrison v State of New South Wales* in which the Court of Appeal considered the amended provisions of the Limitation Act, 1969.

On 6 December 2002 the Civil Liability Amendment (Personal Responsibility) Act, 2002 commenced which amended the provisions of the Limitation Act, 1969. Now, if proceedings are commenced more than three years after the date of the accident, the issue to be considered is when was the cause of action "discoverable".

The Court of Appeal has recently had the opportunity to consider this issue again in the recent decision of *Bostik Australia Pty Limited ("Bostik") v Liddiard & Anor*.

Warren Liddiard was injured on premises that were owned and occupied by Bostik. Bostik carried out a packaging business in a factory at the site. Liddiard was employed by Brolton Industries Pty Limited ("Brolton") who operated an engineering business in part of the factory. Brolton would supply labour to Bostik and would use Bostik's equipment as and when needed. Bostik and Brolton did not have a written agreement. When Liddiard was injured his services were being provided to Bostik by Brolton. Liddiard was injured when he lifted one of the rubbish bins, which was a 44 gallon drum placed in a small open shed on the site during meals and other work breaks. Liddiard had carried out this task approximately twice a week over the previous six to eight months. Liddiard had not received any instruction as to how to perform the task. Liddiard sued both Brolton and Bostik and the trial judge found in favour of Liddiard and apportioned liability 40% to Brolton and 60% to Bostik.

Bostik appealed. Bostik argued that it had no liability to Liddiard and if any liability was found it should be less than the 60% apportioned to it by the trial judge. Bostik also argued that Liddiard's claim was statute barred.

So what did the Court decide? In relation to the limitation issue, Liddiard was injured on 30 January 2003 and filed the Statement of Claim on 13 June 2007. It was therefore necessary for the Court of Appeal to consider whether or not Liddiard's cause of action was "discoverable" by Liddiard on or before 13 June 2004.

The Court noted that on 3 November 2006 Liddiard's solicitor received a letter dated 31 October 2006 from Bolton's solicitors enquiring whether or not Liddiard had commenced or was considering commencing proceedings against Bostik. This letter attached statements from Liddiard taken in March 2004.

The Court concluded:

"In my opinion, it is not correct to assert that it was likely that Mr Liddiard knew the work he was doing was partly for the benefit of Bostik. He understood his employment was with Brolton. Indeed, in these questions, Bostik identified this aspect of Mr Liddiard's employment as being referable to Brolton's area of responsibility. Those questions undoubtedly had a tactical basis, with Bostik seeking to sheet responsibility for Mr Liddiard's injury home to Brolton. Nonetheless, the evidence elicited in response demonstrates the unlikelihood that Mr Liddiard would have had any understanding for whose benefit the work was intended. His Honour's factual findings and, in particular, his finding that Mr Liddiard simply understood that he worked for Brolton and saw no relevance in Bostik's role in the work he performed, were well-based.

It follows that the trial judge was correct in concluding that Mr Liddiard did not know the fact that the injury was caused by the fault of Bostik until after his solicitor had received a copy of Mr Lynch's 23 March statement, as he did not know of the relationship between Bostik and Brolton. It follows that Mr Liddiard's cause of action was not discoverable until November 2006. Accordingly, his action was commenced within the limitation period."

The Court therefore determined that the claim was brought within the limitation period. Further, in any event, in 2004 the plaintiff underwent surgery and it was not until some time after November 2004 it was evident that the operative treatment did not provide the results anticipated. The earliest date the cause of action was otherwise discoverable was therefore some time after November 2004.

In these circumstances it is certainly tough for a defendant to establish that the claim was not filed within the limitation period.

What of the liability of Bostik? Bostik attempted to argue that it did not owe Liddiard a duty of care as even though it used the services and employees of Brolton, there was a distinction between services of employees engaged in the factory that were paid for at an hourly rate and who were under Bostik's direct supervision and control, and persons such as Liddiard, who

performed work for Bostik, but also performed work for Broilton and remained under the direct control of Broilton. Bostik also argued that the rubbish bin removal was carried out for the benefit of both Bostik and Broilton as employees of both companies used the shed.

The Court disagreed with Bostik. The Court found that Bostik owed Liddiard a duty of care akin to a duty owed to an employee.

The appeal by Bostik therefore failed. Interestingly the Court also found a 40% liability on the part of Broilton a significant increase on the usual 20% liability found on the part of labour hire companies.

National Code Of Practice For The Building And Construction Industry

The Federal Government has recently released new implementation guidelines for the National Code of Practice for the Building and Construction Industry. The Guidelines will apply to expressions of interest or tenders called for after 1 August 2009 and do not apply to expressions of interest prior to this time.

Construction companies who intend to tender for Commonwealth construction projects are required to continue to comply with the current National Code of Practice for the construction industry and the Guidelines issued under the Code. Substantial changes have been introduced by the Guidelines. Those changes include:

Restrictive Work Practices

Previously the Code prohibited the inclusion of certain types of provisions dealing with restrictive work practices in industrial agreements. Industrial instruments which included those types of provisions were not Code compliant. Industrial agreements could not include provisions on:

- all in payments;
- ratios of employees;
- last-on / first-off provisions in redundancy situations;
- use of sub-contractors.

The restrictive work practice prohibitions have been removed and unions will now seek to negotiate inclusion of these type of provisions in industrial agreements as such provisions will no longer result in industrial instruments being non-Code compliant.

Sham Contracting

Contracting arrangements where an employment relationship is portrayed as one of an independent contracting relationship will not be Code compliant. Careful attention will need to be paid by businesses to ensure that proper contracting arrangements are in place particularly where sub-contractors are individuals.

Freedom of Association

The following practices are inconsistent with the Code:

- providing the names of new staff, job applicants, contractors or subcontractors to unions other than as required by law;
- 'no ticket, no start' signs or 'show card' days;
- discriminating against or disadvantaging elected employee representatives;
- using forms requiring the employee to identify their union status or employers and contractors to identify the union status of employees or subcontractors;
- refusing to employ, or terminating an employee, because of their union status;
- employers refusing a reasonable request from a workplace delegate to represent employees in relation to grievances and disputes or discussions with members;
- the imposition, or attempted imposition, of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate or to hire an individual nominated by a union; and
- any requirement that a person pay a 'bargaining fee' however described, to an industrial association of which he/she is not a member, in respect of services provided by it.

Unregistered Written Agreements

The use of unregistered written agreements, (other than common law agreements made between the employer and an individual employee) will be inconsistent with the Code and Guidelines

Right of Entry

The Guidelines in relation to right of entry have been changed to provide that strict compliance with provisions under the Fair Work Act, 2009 is necessary and that failure to allow entry when entry is properly permitted under the Act will be a breach of the Guidelines. In addition prosecution for breaching right of entry provisions will be a breach of the Code. The changes alter the situation from imposing an obligation on the business to ensure that the right of entry was not abused to requiring that a business must not overstep the mark and attempt to prevent valid rights of entry.

Dispute Settlement

There will no longer be a requirement that dispute resolution provisions in industrial instruments contain graduated steps for dispute resolution or that there is provision in the agreement for an arbitrated outcome of a dispute.

Good Faith Bargaining

The Guidelines provide that all parties must demonstrate good faith when bargaining consistent with the Fair Work Act, 2009.

Security of Payments

The new Guidelines provide that parties must make payments in a timely manner and settle any payment disputes in a reasonable, timely and co-operative manner.

Preferences to Companies

The Government will be able to make preferences to businesses that demonstrate a commitment to training or commitment to increasing the participation of women and indigenous employees in the construction industry.

Project Agreements

Project agreements will only be appropriate for major contracts as defined by the Funding Entity (and funding recipient for indirectly funded projects). Other than in exceptional cases, project agreements will not be permitted on projects worth less than \$100 million.

Conclusion

The new Guidelines herald a substantial change to the requirements for those in the construction industry who tender for Commonwealth projects. The focus of the Government has clearly changed and the construction industry can anticipate that unions will use the Code as a tool to drive reform of industrial instruments.

OH&S Roundup

Fatality During Cross City Tunnel Work Leads To Substantial Penalties

The NSW Industrial Commission has recently delivered a judgment imposing substantial fines on Baulderstone & Hornibrook, Bilfinger Berger and Cross City Tunnel Pty Limited ("CCT") for breaches of the Occupational Health and Safety Act arising out of a fatality which occurred during the course of the Cross City Tunnel project. The project consisted of the planning, design, construction and commission of the Cross City Tunnel connecting east and west Sydney beneath the central business district.

The incident occurred during the course of construction of a ventilation tunnel which was not included in the original design of the tunnel but was instigated to increase ventilation in the tunnel. During the course of excavation the roof of the tunnel collapsed. Mr Shores, a tunnel and road header operator working on a work platform on the boom of the road header and drilling a hole to install a rock bolt was fatally injured as a result of a rock fall. There were four other workers were in the

vicinity of the rock fall. Three of the workers were employees of CCT. One was an employee of Boulderstone Hornibrook.

Effectively the three defendants were prosecuted for breaches of the Occupational Health and Safety Act relating to inadequate roof support and the failure to install a fall from an overhead protection system and failure to install guard rails on the work platform as the guard rails had been removed to allow for excavation. Multiple charges were brought against each company for their involvement as a virtue of risks to their own employees and to others, effectively employees of other venturers in the project. Three charges were brought against Boulderstone Hornibrook, two charges against Bilfinger Berger and two charges against CCT. Each company pleaded guilty to all charges. The Court noted that there are a number of factors which tend to establish the existence of an objective serious offence. Those factors include:

- the degree of foreseeability of a risk to safety which must be taken into account when assessing the level of culpability;
- the seriousness of the injury suffered or which may be suffered also impacts on the seriousness of the offence;
- a further factor in assessing the gravity of the offence is the availability of simple and straightforward remedial measures to avoid or minimise the risk.

In this case the risk was a risk of a roof-fall and to minimise the risk the defendants failed to provide sufficient roof support to avert the risk of roof failure or rock fall and failed to protect employees by means of overhead roof support from that risk.

The defendants in this case accepted that their responsibilities were equal. However, Bilfinger Berger was a first offender and faced a lower maximum penalty. At the end of the day the Court imposed two fines on Bilfinger aggregating to \$257,400, three fines on Boulderstone Hornibrook aggregating to \$380,437 and two fines on the CCT aggregating to \$203,775

Traffic Management Failure Results In \$300,000 Fine

Abi Group Pty Limited was recently fined \$300,000 by the Industrial Relations Commission for a breach of the Occupational Health and Safety Act to which the company pleaded guilty following a fatal injury to a contractor's employee when that employee was crushed between the tail gate of his truck and a concrete place spreader machine which came into contact with the tail gate of his truck.

Abi Group was the principal contractor at the site and had control of the work site and had a fleet of trucks and drivers to deliver concrete for the Hume Freeway Project. BKM was a contractor engaged to supply a truck with an operator for concrete cartage and earth works. Abi Group operated a spreader machine and its function was to place its spread and smooth out the concrete forming the new road pavement. Whilst the spreader machine was operating there was a spotter and it was the spotter's role to keep an eye on the operation of the spreader whilst trucks were delivering material.

An incident occurred at the end of the day after the BKM employee had delivered the last load for the day and the employee of BKM had moved his truck away from the spreader machine to clean the remnants of concrete from the tray and/or lugging lugs of his tail gate. In order to perform this task the driver situated himself between the tipper tray and the tail gate of the truck and the tipper tray was in an elevated position when the tail gate was opened to a vertical position. Unfortunately the spreader machine which had completed its work was being driven to be cleaned. Visibility for the operator on the spreader machine was limited. The spotter had moved away from his position as the spreader had ceased operations and was being moved to be cleaned. The spreader machine came into contact with the truck which was being cleaned with the end result that BKM's employee was fatally injured.

The safe work method statements of Abi Group required the spotter to be present whilst the spreader machine was operating. The Court found that as part of the Occupational Health and Safety Management Plan Abi Group completed a safety risk assessment of pavement operations with a concrete spreader and its contractor undertook a safe work method assessment for tipper truck concrete delivery. The risk assessment process was deficient in that there was a failure to identify and/or adequately control a number of risks, including first, the additional speed of the spreader when travelling to its wash down area after the last delivery of concrete for the day, and secondly the design and implementation of safe working distances from the spreader machine when travelling to the wash down area at the end of the day and thirdly, the identification of an area of isolation area which drivers could park their trucks to and remove loose material from their trucks before returning to the batch plant.

It was also noted that although the spotter was to be present when the trucks were delivering their load onto the conveyors, there was no requirement for the spotter to continue his or her duties once the spreader began to travel. Abi Group conceded

that it had overlooked the spotter's role when the spreader machine was travelling as opposed to when it was undertaking normal operations. The seriousness of the offence was demonstrated by the simple and straightforward steps that Abi Group was able to implement and meet its obligations which included:

- requiring a spotter to be present whenever plant is operating or travelling and in particular the spotter is to guide plant when moving into position for wash down;
- designating an area for the mandatory clean down by the truck drivers of their trucks and delivery;
- designating safe work distances between the spreader or paver and the area where the work drivers are cleaning down;
- development of a proper vehicle movement plan.

At the end of the day, having regard to the maximum penalty of \$825,000, a fine of \$300,000 was imposed. The judgment clearly sounds a warning to all construction companies that traffic management is a primary concern on all construction sites.

Christmas Parties and Workers Compensation

Christmas parties should always be a cause for concern for employers particularly where alcohol is readily available and the party proceeds into the evening as the journey home from the party may well result in a workers compensation claim if an employee is injured whilst on the journey. Nevertheless the conduct of the employee will be an important issue as will the purpose of the journey after the party ends.

There are effectively two bases for claims for compensation in these circumstances- a claim pursuant to the journey provisions in the workers compensation legislation and or a claim based on the contention the worker was injured in the course of their employment. However, the journey provisions do not apply if the personal injury is attributable to the serious and wilful misconduct of the worker and a personal injury received by a worker is to be taken to be attributable to the serious and wilful misconduct of the worker if the worker was at the time under the influence of alcohol or other drug (within the meaning of the Road Transport (Safety and Traffic Management) Act 1999), unless the alcohol or other drug did not contribute in any way to the injury or was not consumed or taken voluntarily. So what happens to an intoxicated injured whilst driving home from a Christmas party?

This issue was recently determined in the appeal decision of *The Red Rock Company Pty Limited - v - Scharrer*.

Scharrer was employed by Red Rock as a sales representative. Red Rock was involved in the wholesale of beverages, both alcoholic and non alcoholic. Scharrer's duties involved her attending customers in metropolitan Sydney and a motor vehicle was provided to transport the various products sold. As part of the employment contract Scharrer was entitled to retain possession of the vehicle outside working hours and use it for personal transport.

In December 2001 Red Rock arranged a Christmas party for staff members to be held at the Slip Inn in Sydney. Scharrer completed her duties at Red Rock's Miller Street premises on that day, following which she drove, in her work vehicle, to the party arriving at approximately 7.00 pm. She remained there until approximately 2.00 am the following morning, consuming a quantity of alcohol. She then proceeded to drive her vehicle. She was involved in a motor vehicle accident at 3.00 am. She sustained significant injuries. Scharrer lodged a claim for weekly compensation benefits on the basis the injury arose out of or in the course of her employment and alternatively on the basis she was injured in a journey from a work place to her place of abode.

Scharrer initially succeeded in her claim for benefits. Red Rock appealed.

Scharrer's blood alcohol reading was .124, over twice the legal limit. The Deputy President found that Scharrer was in the course of her employment up until she left the staff party. Upon leaving the party she got into her vehicle and proceeded to drive. Her employer had forbidden her to drive in light of the fact she was intoxicated. Disobeying Red Rock's instructions and driving whilst intoxicated prevented the characterisation of her subsequent conduct up until the point of impact and injury as being in the course of employment as defined by Section 4 of the Act. The Deputy President concluded therefore that Scharrer was not in the course of her employment when she elected to drive off in the staff motor vehicle following the party against Red Rock's instructions.

The Deputy President noted that it was not argued by the employer that the journey of the worker was not for the purpose of a trip home but the employer did argue that the intoxication of the worker triggered the preclusion provisions for journey claims

in that the worker's injury was attributable to the serious and wilful misconduct of the worker. The Deputy President agreed.

Another issue discussed is the effects of Section 14(2) of the Act. No compensation is payable under this section if it can be proved an injury to a worker is solely attributable to the serious and wilful misconduct of the worker unless the injury results in death or serious and permanent disablement.

The reason that the worker argued that the injury arose out of or in the course of employment was that section 14 of the legislation provides:

"(a) Compensation is payable in respect of any injury resulting in the death or serious and permanent disablement of a worker, notwithstanding that the worker was, at the time when the injury was received: acting in contravention of any statutory or other regulation applicable to the worker's employment, or of any orders given by or on behalf of the employer, or acting without instructions from the worker's employer, if the act was done by the worker for the purposes of and in connection with the employer's trade or business.

(b) If it is proved that an injury to a worker is solely attributable to the serious and wilful misconduct of the worker, compensation is not payable in respect of that injury, unless the injury results in death or serious and permanent disablement.

(c) Compensation is not payable in respect of any injury to or death of a worker caused by an intentional self-inflicted injury."

The injury caused serious and permanent disablement and the worker argued the injury was not solely caused by the serious and wilful misconduct. However Scharrer could not rely on Section 14 as it was found she was not injured in the course of her employment after leaving the party and her only recourse was pursuant to the journey provisions. Scharrer was not doing what was reasonably required, expected or authorised to do in order to carry out her duties. She was expressly prohibited by Red Rock to not drive in her state of intoxication. On the basis she was found to be acting outside the course of her employment, she could not obtain any benefit from relying on Section 14 of the Act.

So intoxication is a real issue for workers injured on the way home from Christmas parties. In this case the worker could not establish the alcohol or other drug consumed did not contribute in any way to the injury. If she did she would not have been precluded from a journey claim. It must be remembered that the onus is on the worker to prove that the alcohol or other drug consumed did not contribute in any way to the injury and if they fail to establish that the journey claim will fail as the injury will be seen to have been caused by the serious and wilful misconduct of the worker.

Workers Compensation Payments for Directors of Corporations

The recent NSW Workers Compensation Commission Presidential decision of Lawrence-Plant v J&S Plant Pty Limited trading as Bluey's Hire examined the relationship of working directors and their eligibility to claim workers compensation benefits. Very often in small proprietary limited companies the shareholders/directors of the company will disperse their time between the role of employee and that of a director. Evidence of this dual role will be required and a simple bald assertion that an injury carried out whilst in the role of an employee is not sufficient to attract the benefits payable under the workers compensation legislation. The factual scenario in this matter was that Mr Lawrence could not produce any evidence that he had received wages or salary for his role as an "employee" of the company. The tax returns and company returns only evidenced payments for directors fees and loan repayments from the company to the director. Although it was claimed by the "employee" he received a salary of \$750.00 per week for working as an employee of the company there was no documentary evidence to support his purported status as an employee.

As per the longstanding decision of the High Court decision of Stevens v Brodribb Sawmilling Company Pty Limited (1986) a number of indicia need to be present to determine the essential feature of a worker, that is, is there a contract of service. The onus always remains on the purported employee to show the relevant contract is one of employment. Even though Mr Lawrence adduced some evidence in the form of a statement from an independent witness that he had often engaged in taking orders at the company's premises or delivering equipment to hirers, this in itself was insufficient indicia to indicate a contract of employment.

The own personal assertion of the director that he was a part-time employee of the company was immaterial. There must be evidence of the relevant contract of service in order to establish an employment. Furthermore, the critical element of control was missing in these factual circumstances.

The decision is a timely reminder that insurers and scheme agents must carefully examine the financial remuneration of the purported working director. Whilst it is not uncommon for so-called working directors to seek the benefits of the workers compensation legislation, there should be a declaration on the workers compensation policy or renewal documents they are at least a part-time employee. In order to minimise taxation liability and reduce workers compensation premiums, the directors attribute remuneration received for their role as a "worker" as either directors fees or loan repayments. Unfortunately when it comes time to claim workers compensation benefits these strategies act as indicia in demonstrating there is no contract of service.

As a final passing comment in this appeal, Deputy President Moore made some comments regarding exceptional circumstances in lodging appeals in the Commission. An appeal to the President of the Workers Compensation Commission must be lodged within 28 days of the decision of the Arbitrator unless there are exceptional circumstances which would allow for leave to file the appeal out of time. Mr Lawrence's solicitor attempted to rely upon inadvertent administrative errors and, more particularly a delay by counsel in providing timely advice as exceptional circumstances warranting leave to appeal. Deputy President Moore commented that delays by Counsel in providing advice were regularly encountered. This in itself will not allow a practitioner an extension of time as it does not constitute exceptional circumstances.

Unsuccessful Unfair Dismissal Claim - Employers Can Recover Costs From The Workers Representative

The Australian Industrial Relations Commission in a recent decision in *Dircks v Jim Roy Pty Limited* has confirmed that an employer can recover costs from an unsuccessful claimant and/or their representative as a result of unreasonable conduct in an unfair dismissal claim brought against an employer.

Natasha Vukadinovic made an unfair dismissal claim under the Workplace Relations Act against her employer after her employment was terminated. The employer's reasons for the dismissal were that the applicant had lied to the employer on numerous occasions. The most serious of these lies involved a claim for compassionate leave (paid) for her mother's death despite the fact that her mother is still alive and in fact attended the conciliation conference. Vukadinovic appointed Dircks as her representative who brought the claim and Dircks entered into a contingency fee agreement with Vukadinovic for payment of fees upon success.

The Commission found Mr Dircks became aware of the detail of the allegations concerning the fraudulent taking of leave, when he was provided with material by the employer. The Commission noted that an inference should be drawn that once Mr Dircks saw the employers material he could have been in no doubt that his client was lying and that the employers allegations of dishonesty were highly likely to be made out. The Commission noted Mr. Dircks who appeared on his own behalf and on Ms. Vukadinovic's behalf failed to put a cogent argument which supported the actions of himself and his client in continuing the claim and was satisfied that he was well aware of the hopelessness of his client's case.

The Full Bench of the Industrial Relations Commission determined that the application had no chance of success and Mr Dircks' dragging out of the matter with his continual attempts to extract money from the employer were wrong actions in the face of the knowledge he had of the employee's actions. Effectively the Commission determined that Dircks had an obligation to take immediate steps to ensure the application went no further once he became aware that it was bound to fail and actions taken by him after this time to extract a payment from the employer were unreasonable.

The Workplace Relations Act provides that costs can be awarded against an employee and/or their representative for unreasonable acts or omissions. In this case a cost order was made against both the employee and Dircks and they are jointly and severally liable for the costs of the employer incurred as a consequence of the unreasonable conduct in the claim.

Employees cannot simply battle on with a claim knowing that it is costing the employer money to defend the claim. Unfair dismissal claims that have no merit where representatives of the worker know that the claim has no merit will expose those representatives to a liability to pay the employers costs if the representative continues to pursue the claim on behalf of the worker.

Employer's Obligations Not To Disclose Employment Records

The National Privacy Principles 2.1 provides that an employer must not use or disclose personal information about an employee for a purpose other than the primary purpose of collection unless an exemption contained in the National Privacy Principles 2.1(a)-(h) applies. Principally, where an employer has collected information about an employee or former employee it cannot disclose that information to another organisation without the consent of the employee unless there is an exemption.

In *B v Cleaning Company (2009) Priv Cmr A 2* the complainant was formerly employed by a large cleaning company for several years. He resigned from the position. After his resignation the complainant owed a sum of money to another organisation. The complainant entered into a repayment arrangement with that other organisation. Ultimately the complainant defaulted on the repayment arrangement.

The organisation that was owed money by the complainant contacted the complainant's former employer seeking information as to the complainant's whereabouts. It is alleged the employer provided personal information to the organisation including the employee's address and financial details.

The complainant lodged a complaint with the Privacy Commissioner alleging his former employer had inappropriately disclosed information in breach of the Privacy Act, 1988.

The Privacy Commissioner was of the view the complainant's personal information had been disclosed by the employer. The Commissioner found that personal information was held in an employment record by the cleaning company and the disclosure of the complainant's personal information to an organisation to which the complainant was personally indebted was a disclosure not related to the complainant's employment. Consequently, the Commissioner found the disclosure was an act unrelated to the administration of the complainant's employment with the cleaning company and as such the Commissioner found the employer must comply with the National Privacy Principles 2.1.

The cleaning company agreed to a conciliation. It apologised to the complainant and agreed to develop and implement a privacy code for staff and the management of personal information. The Commissioner closed the complaint on the grounds the cleaning company had dealt adequately with the matter.

Employers should have regard to the Privacy Act, 1988 as to when and why they can disclose their current and former employees' personal information without the employee's consent. In essence, the exemptions relate to government agencies requesting information from an employer. All other requests, in the normal practice, would require the consent from the current or former employer to disclose that information to another organisation.

Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.

Gillis Delaney Lawyers specialise in the provision of advice and legal services to businesses that operate in Australia. We can trace our roots back to 1950. The name Gillis Delaney has been known in the legal industry for over 40 years. We deliver business solutions to individuals, small, medium and large enterprises, private and publicly listed companies and Government agencies.

Our clients tell us that we provide practical commercial advice. For them, prevention is better than cure, and we strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service. The changing needs of our clients are met through creative and innovative solutions - all delivered cost effectively. We make it easier for our clients to face challenges and to ensure they are 'fit for business'.

We look at issues from your point of view. Your input is fundamental to us delivering an efficient, reliable and ethical legal service. We like to know your business, and take the time to visit your operation and develop an in depth understanding of your needs. Gillis Delaney is led by partners who are recognised by clients and other lawyers as experts in their fields. Our service is personal and 'hands on'.

Our clients receive the full benefit of our ability, knowledge and effort in our specialist areas of expertise. We provide superior and distinctive services through a team approach, drawing the necessary expertise from our specialists. Our mix of professionals ensures that clients enjoy high level partner contact at all times.

We are committed to delivering a quality legal service in a manner which will exceed your expectations and we maintain a focus on business and commercial awareness whilst delivering excellence in legal advice.

We have a proven track record of delivering commercially focused advice. Whether it is advisory services, dispute resolution, commercial documentation or education and training, a partnership with Gillis Delaney offers:

- practical innovative advice
- timely services
- expert insight
- accessibility
- cost effective solutions

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtm@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.