

Welcome to our latest edition of **quaynews** that brings to you information on new trends and issues that impact on the employment and insurance market in Australia. In this month our feature article deals with the potential cost to an employer when supervisors fail to act when workplace tension becomes an issue. We can be contacted at any time for more information on any of our articles.

Employer Vicariously Liable for Victimisation

Employers that stand back when they see trouble brewing within the employment ranks take a significant risk as their inaction may be seen to amount to negligence and render them liable to pay significant damages.

Interaction in a workplace can lead to tension. Promotions in the workplace can be seen by fellow workers as unfair or inappropriate. This may lead to tension, disputes amongst employees and difficulties for management. Where tension in the workplace exists an employer has a positive obligation to seek to intervene to control that tension.

An interesting example of the substantial risk that employers face was seen in a recent decision of the Court of Appeal in *Mannall - v - NSW Department of Housing* where Mrs Mannall, who suffered a psychiatric injury which was largely attributable to workplace tension, was awarded damages in excess of \$500,000.

Mannall alleged that following her appointment to the position of Team Leader within the Department of Housing she was subjected to victimisation, harassment, humiliation and abuse in the workplace as a consequence of which she suffered psychiatric injury. Mannall had been appointed Team Leader over some protest. A fellow employee who was effectively above Mannall in the hierarchy had expected to be appointed to the position. Of particular concern to Mannall were a number of incidents that took place including alleged belittlement by her Area Manager and Mannall being called a "little Hitler" in the office by one of her staff. The same staff member, who had been reprimanded by Mannall for using Department time to sell Amway products, also offered Mannall some Amway tapes to help her manage better. Mannall also claimed that at a management meeting a couple of incidents occurred including her Area Manager stating to her "Don't you f...ing understand" and "Don't you f...ing walk away from me" as a consequence of which Mannall felt humiliated.

Matters reached crisis point when, following written correspondence throughout the year, Mannall approached her Area Manager about continuing workplace harassment. Two colleagues went with her including the grievance officer in her team. Subsequently, disharmony within the team escalated culminating in a meeting - behind Mannall's back - where members of the team compiled a memo which described a number of examples of "Inappropriate behaviour by the Team Leader" and presented this memo to the Area Manager, who gave the memo to Mannall when she requested it. The next day Mannall attended her general practitioner who diagnosed "stress-related disorder, secondary to work." Mannall stopped work.

The claim came to hearing in the District Court. The trial judge found in favour of the Department of Housing. Mannall appealed the decision and the appeal was successful. The Court of Appeal ordered a re-trial. After a lengthy re-trial over four weeks the trial judge found the Department of Housing liable for Mannall's injury and awarded Mannall \$552,996.32 in damages. The Department of Housing appealed the decision.

The New South Wales Court of Appeal agreed with the trial judge. The Court essentially held that the Area Manager had breached his duty of care as supervisor by what he did - and more particularly did not do - to remedy the "seriously dysfunctional workplace." The Court agreed with the trial judge that "The Area Manager's passivity in responding to an emerging crisis of which he was aware or ought to have been aware" resulted in liability on the part of the Department of Housing. The Court of Appeal commented that "The Area Manager had access to formal and informal mechanisms that could have been used and, should have been used."

The decision demonstrates that supervisors should take complaints of harassment from their employees seriously. It is not sufficient to sit back and do nothing and hope that the problems go away. Conflict needs to be managed and resolved. Complaints need to be addressed. Positive action needs to be taken to address issues in the workplace as they arise. Don't act and the ramifications could be extremely costly.

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Look Out for Trespassers!

The laws of negligence move in mysterious ways - not least of which is the principle that an occupier of premises can owe a duty of care to trespassers.

Businesses that occupy commercial premises that are easily accessed by uninvited 'guests' must deal with this problem. Most organisations today are alert to the risk of children gaining access out of hours and playing with plant and equipment - sometimes with disastrous results (like the death of a 13 year old at a sand mine at Redhead recently).

The recent case of *Consolidated Broken Hill Ltd v Edwards* decided by the NSW Court of Appeal adds another twist.

The defendant company occupied land (for mining leases) in Broken Hill. The land divided the northern and southern parts of the town. A highway provided a route between the two parts of the town for pedestrians and cyclists, but it was quite hilly.

On part of the defendant's land there was a rail line which travelled over a bridge. This route provided a short cut between the two parts of Broken Hill. A practice grew up of people using this short cut which involved crossing the bridge.

The company did little or nothing to stop this practice. It probably thought it was doing the local community a favour.

One day the plaintiff went to cycle across the bridge. He was, strictly, a trespasser. The company had parked some rail cars on the bridge. The gap to pass them was narrow. In trying to do so, the plaintiff fell and was rendered a paraplegic.

In the NSW Court of Appeal, the company argued that the risk was so obvious it ought not to be liable for the injury to the plaintiff. The Court disagreed - it said obviousness of risk is an element to be considered when examining whether a duty of care has been breached. In the circumstances here, the company ought still to have taken steps to remove the risk (the narrow gap). Because the risk was relatively obvious though, the Court deducted 50% of the damages award for contributory negligence by the plaintiff.

A strange result? Maybe so, but it makes clear that businesses need to consider risks to all people who might enter their premises, and also that the mere obviousness of a risk will not mean there is no liability. Or put another way, assume all your trespassers are less than smart.

Is a Gym Such a Good Business

Fitness First gymnasium has recently been found liable by the New South Wales Court of Appeal for an injury to one of its patrons. Ms Vittenberg had attended a circuit class at one of the Fitness First branches. There were about 30 to 35 people in the class with one instructor. The class involved aerobics and use of the circuit machines. Before the class commenced the instructor asked the class whether any one was suffering any injuries and if anyone had not attended circuit classes before. Vittenberg did not reply as she had attended circuit classes before, although not at Fitness First.

The class commenced and ultimately Vittenberg came to use the seated leg curl machine. She had used circuit machines at another gymnasium but had never used or even seen a seated leg curl machine. In fact she thought it was a leg extension machine which she had used at other gymnasiums. When she came to use the machine - in a similar manner to which she had used leg extension machines before - her left leg caught and twisted resulting in a fracture.

The trial judge awarded damages totalling \$179,665.69. The trial judge agreed with Vittenberg that there was a "marked similarity in the set up and appearance of the machines." Fitness First appealed, arguing that there was a sign on the machine telling patrons how to correctly use the machine and the instructor's enquiry was sufficient and in any event Vittenberg had caused her own injuries by incorrectly using a machine with which she was unfamiliar.

The Court of Appeal disagreed. Essentially the Court confirmed that it was reasonable of Vittenberg to assume that the machine was a leg extension machine and the sign was not sufficient. The Court of Appeal stated: "Putting the presence of the sign in the context of a user who had received only the general inquiry from the instructor and who was under the pressure of moving to a circuit machine, adjusting it, using it, and then moving on with a minute or so per machine, and with other class members at the user's heels, I do not think that the judge erred in concluding that having the sign in place was not a reasonable response to the risk of injury." Nor was the instructor's general enquiry sufficient.

Instructions and enquiries must be taken in context. A simple sign and a general inquiry may not be enough. Gyms need to be aware that their patrons may be inexperienced and need guidance before they are thrown into a circuit class.

Training needs to be provided to employees to ensure that they keep an eye out for novices and those who ignore inquiries. The case also highlights the need to ensure that persons that use equipment are shown how to safely use that equipment. Recreational activities can be dangerous and new tort laws will result in Gyms disclaiming liability for this type of claim through risk warnings. This incident did not occur at a time when a risk warning could absolve a Gym from responsibility.

NSW Workers Compensation

The Workers Compensation Commission in NSW determines workers compensation disputes between employers and employees. The Commission utilises medical practitioners to make findings on the extent of an impairment and the finding is conclusive evidence on the issue. What if the doctor made a mistake? Can the doctor's report be challenged? The answer is yes but the process is not that simple. It is necessary for the Registrar of the Commission to decide that the appeal can proceed to an Appeal Panel before an appeal can be entertained.

The legislation as it currently stands provides that the Registrar of the Commission must act as a "gatekeeper" in determining whether there is at least one ground of appeal before a binding medical assessment can be appealed. Broadly, the grounds of appeal are:

- (a) deterioration of the workers condition that results in an increase of the degree of permanent impairment;
- (b) availability of additional relevant information that was not available before the medical assessment;
- (c) the assessment was made on the basis of incorrect criteria; and
- (d) the medical assessment certificate contains a demonstrable error.

But what if the Registrar gets it wrong?. The legislation provides no avenue for an appeal from the Registrars decision to refuse to allow an assessment to proceed to an appeal.

The recent decision of *Wikaira -v- Registrar of the Workers Compensation Commission of New South Wales & Anor* demonstrates that a Registrar's decision may not be final despite the lack of appeal provisions in the legislation.

In this case an assessment of permanent impairment was referred to an Approved Medical Specialist (AMS). It was determined by the AMS that there was no permanent impairment and a certificate was issued to that effect. The facts on which the AMS had based his assessment were expressed to be "the history given by the patient, the physical examination of the patient and the accompanying notes."

The worker lodged an application to bring an appeal against the decision of the AMS but the Registrar ruled that it did not appear to her that at least one of the grounds of appeal existed. The Registrars decision was challenged in the Supreme Court and the Registrars decision was overturned.

The Court confirmed that where an administrative tribunal ignores relevant material, and the tribunal's exercise of afforded power is thereby affected, it will exceed its authority or powers. Such an error of law is a jurisdictional error which would invalidate any order of decision of the tribunal. The Court was of the view that the medical assessment of the AMS contained a demonstrable error. The Registrar then fell into error in determining there was no demonstrable error in the Medical Assessment Certificate. The Registrar's decision was then set aside.

This matter seeks to remind practitioners in the jurisdiction that the principles of administrative law should not be forgotten in the conduct of proceedings in the Workers Compensation Commission. Despite the fact the Workers Compensation Legislation contains no provisions for the appeal from the Registrar's decisions, further disputes can arise with challenges to the decisions of the Registrars. To this point in time, a large number of medical appeals were rejected by Registrar(s). It would not be surprising to find a sudden surge in filings in the Supreme Court challenging the decisions of Registrars.

Footpaths are Still a Problem for Councils but Claims for Damages for Gratuitous Assistance are Truly Restricted

The NSW Court of Appeal handed down a judgment in *Roads & Traffic Authority v McGregor* in Appeal that concerned liability, apportionment of liability between Woollahra Council & the RTA and quantum of damages (in respect of future gratuitous attendant care services with regard to the limitations in the *Civil Liability Act 2002*). The Court confirmed the orders of the trial judge as to liability and apportionment but allowed part of the Appeal in respect of future gratuitous attendant care and reduced the damages accordingly.

The Facts

On 31 December Mrs. McGregor visited friends at Thornton St. Darling Point. After the fireworks she decided to go down Thornton St to a park by the water where her daughter was located. She walked down the driveway and turned right into the street. As she did so, she saw three pedestrians very close to her and moved close to a metal street sign to allow them to pass. She suffered comminuted fractures of the right lower tibia and fibula when her heel became caught in a damaged area of footpath at the base of the metal street sign post. Although on subsequent inspection during broad daylight she confirmed the damaged area was obvious, she had never been to Thornton St. prior to New Year's Eve (she had walked past it once earlier that evening at approximately 10.30pm) and there was no streetlight nearby. At the time of injury visibility was also adversely affected by strong wind and leaves blowing about. The damage in the footpath had been in existence for at least 6 years and probably longer, dating back to the mid 1980's. From the evidence, the cost to repair the footpath ranged from a few hundred dollars to something approaching \$2,000. The footpath had been repaired after the incident.

The trial judge found it was reasonably foreseeable on the part of the Council and the RTA that the damaged footpath posed a risk, particularly at night with a high density of home unit occupation, along with the fact the post was adjacent to a bus stop. On the balance of probabilities, the trial judge also found that the post was erected by the RTA and the footpath damage occurred due to poor workmanship. Council's officers had been in the relevant part of Thornton St. on a significant number of occasions before the accident occurred. The trial judge found that the damaged footpath should have been observed by the Council's officers. Accordingly, the trial judge entered a verdict against both defendants (apportioning 60% to the Council and 40% to the RTA). The RTA appealed the Verdict and the Council cross appealed.

Grounds of Appeal as to Liability

The Council's grounds of Appeal can be summarised as follows;

- His Honour erred in finding the Council owed Mrs. McGregor a duty of care
- His Honour erred in finding the Council was in breach of any duty of care
- His Honour erred in failing to give any, or any adequate consideration to the response of the reasonable person to the risk of injury
- His Honour erred in finding, in light of the fact the Council did not install the signpost (and not responsible for poor workmanship), any act or omission on its part was causative of Mrs. McGregor's injury
- His Honour erred in failing to find that Mrs. McGregor's claim against the Council failed for want of proof as to the existence of and inadequacy of such system of inspection as might have detected the damage to the footpath
- His Honour erred in failing to find that it was an exercise in speculation to determine the cause of the damage to the footpath

The RTA's grounds of appeal can be summarized as follows;

- A challenge to the finding that the RTA installed the post
- A challenge to the way in which the evidence was used to found a finding of negligent installation by the RTA
- An issue as to the duty of care of the RTA and breach of that duty if there was one

Court Of Appeal's conclusion on liability of Council & RTA

The Court upheld Judge Bishop's (trial judge) findings for the following reasons;

- They were reasonably open to him on the evidence before him from witnesses and documents
- He reviewed a number of leading cases dealing with pedestrians
- His consideration of the facts included an application of the "Shirt calculus" which is the benchmark for the necessary considerations.

Quantum Appeal

The only appeal on quantum was in regards to the award of future domestic assistance in the sum of \$56,016. The basis of the Appeal was that no damages should have been awarded having regard to the dual thresholds for care claims stipulated in the *Civil Liability Act 2002*. Counsel for Mrs. McGregor argued that in respect of past assistance, she had clearly crossed the "six hour for six month threshold" and having done so the prohibition no longer applies. The Court of Appeal considered that the threshold was a dual issue, the care needed to be at a level of 6 hours and for at least 6 months and if the care level dropped below 6 hours then there was no entitlement to damages for gratuitous assistance during the period that the care required was less than 6 hours. The trial judge found an appropriate level of care was 4 hours in the future and the Court of Appeal determined in those circumstances there was no entitlement to damages for gratuitous assistance. Accordingly, the award was reduced by \$56,016.

Implications

Councils are still exposed to liability to pedestrians for damaged footpaths but Councils can breathe a bit easier as the decision on the threshold for gratuitous care claims will slow up damages awards as awards will only flow to claimants who need more than 6 hours of care as a result of needs created by their injuries and disabilities.

OH&S Penalties Snapshot

This month we review a number of recent OH&S prosecutions in the Industrial Relations Commission of New South Wales.

A Small Penalty At First But It Triples and Add More Legal Costs

An offence under the OH&S Act was committed when four of Litchfield Roofing (Australia) Pty Ltd's employees went to repair a leak in the roof of the Crowne Plaza Hotel at Newcastle. They were there observed by the Inspector, while working close to the edge of the roof, without fall protection. Such equipment was required to be used, given the height of the roof, some six metres above ground level.

Litchfield Roofing entered a plea of guilty to a charge brought under s 8(1) of the OHS Act and was fined \$3,250 by the Chief Industrial Magistrate. The conclusion was that the nature and quality of the offence fell within the low range and the court noted equipment was available at the companies office, five minutes away; the roof had a slope of 3 degrees, three employees were positioned within two metres of the edge of the roof; at the edge there was a low parapet of approximately 30 cm in height; the company had a safety management system which involved the development of a written risk assessment and a safe work method statement prior to the commencement of the job; compliance with the safety plan was constantly monitored by a supervisor and periodically by senior management; site toolbox meetings

were periodically held in which employees participated; Mr Litchfield was in Indonesia and the companies supervisor had been suspended as a result of a dispute with a client; the employees involved had attended numerous site training inductions during their employment and the company had safety equipment valued at \$68,300 and had taken various steps since March 2004, to reinforce its safety system. WorkCover appealed arguing the penalty was too low. The Industrial Relations Commission agreed and increased the fine to \$11,700 and ordered the company to pay the costs of the prosecutor.

The Court noted there can be no doubt of the serious potential consequences of a fall from a roof at a height of over 6 metres. Nor can the foreseeability of such a risk be doubted. Contrary to the Industrial Magistrates conclusion the evidence showed beyond doubt that the offence was a serious one. That company had safety systems in place, which were not adhered to and this was a relevant factor in assessing the objective seriousness of the offence. It followed that in assessing the penalty, while it was proper to take into account that this was an employer which had paid attention to its safety obligations prior to the offence, the uncontested evidence of Mr Litchfield, the company's manager, that on this occasion the applicable policies were ignored, could not be overlooked. Nor was there proper supervision of the work, or use of the available and necessary safety equipment.

The company is faced with legal bills for its costs of the first hearing and the appeal, the costs of WorkCover for both hearings and now an increased penalty. The initial win for the company with a relatively small penalty turned out to be a very expensive exercise in the long run.

Gas Ignition at Clyde Refinery

Shell is the operator of the Clyde Refinery and an employer. Transfield Services is a contractor who provides labour to Shell at the Refinery. Plescan and Boka were both employees of Transfield Services that worked at the refinery. Whilst turning a splade in a pressured pipe gas escaped and ignited causing a ring of flame several metres in diameter and Plescan was trapped and had to make his escape through the flames.

There was no specific documented procedure for the task of turning a spade on a potentially live pressure line. There was a job safety analysis undertaken in relation to the work being carried out and there was a talk about how the job was to be done including a whiteboard sketch. The Job Safety Analysis did not take account of the presence of hydrogen and there was an inadequate risk assessment in respect of the work being undertaken. There was no appropriate procedure used by either Shell or Transfield Services that addressed the hazard of hydrogen gas being present prior to the fitters removing bolts from the flange. Shell used an increased hazard permit for air breathing equipment to address the nitrogen gas hazard but neither Transfield Services nor Shell assessed the risk of a hydrogen leak.

The Court noted there was a clear obligation on both parties to ensure that a safe system of work was in place for the task of turning a spade on a potentially live pressure line which did not pose a risk to the health and safety of Plescan and Boka. This was a first offence for Transfield Services and a second offence for Shell although the Clyde Refinery had operated for 80 years without any OH&S offences. The companies pleaded guilty and Transfield Services was fined a \$125,000 out of a maximum penalty of \$550,000 and Shell was fined \$185,000 out of a maximum penalty of \$875,000.

Trench Collapse leads to \$90,000 Fine

Shoalhaven City Council, has a division called "the Asset Construction and Maintenance Division" ("ACM Division") which manages the construction work for the Council and on 18 July 2003, two employees of Wayne Burke and Craig Maloney were working in an excavation that was approximately six metres wide, 14 metres long and between 1.8 and 2.1 metres deep when between a half to two tonnes of dirt dislodged from the eastern side of the excavation, pushing Burke over to the western side of the excavation and into Maloney. Neither employee suffered any injuries. WorkCover alleged the Council failed to maintain a system of work that was safe and without risk to health in that it failed to ensure that the excavation was benched or battered in order to prevent collapse. Further the Council failed to require that an excavator, which was working at the site was kept away from the edge of the excavation so as to ensure that the weight and vibration of the excavator would not of itself contribute to and/or cause the collapse of the wall of the excavation.

Burke and another employee Rumble raised their concern at the site prior to the incident that the depth of the excavation was greater than 1.5 metres and that the sides should be benched. A supervisor said that he did not deem it necessary to bench the sides of the excavation because the sides were six metres apart. The section of the OHS&R Manual in respect of trench work was dated 1996 and was not updated to reflect amendments in legislation and regulatory systems. In particular the system did not refer to relevant risks that are discussed in the Code of Practice-Excavation Work such as the zone of influence; the requirement for excavations deeper than 1.5 m to be benched or battered; the nature of the soil and the presence of water. There was also confusion about the ground structure near the trench. Burke, Maloney and a Mr Windell said that the ground layers below the road surface and compacted road base were loose material, primary loose sandy/clay material. In comparison the supervisor emphasised that his decision was justified on the grounds that the material was dry and compact.

The Court found the offence fell between the low to mid range of objective seriousness. In reaching this finding, the Court was mindful that the damage or injury does not, of itself, dictate the seriousness of the offence or penalty. A fine of \$90,000 was imposed.

An incident that did not result in injury led to a substantial penalty as the risk of injury was great. It is the nature of the offence that determines the penalty not the extent of any injury caused.

Two companies same shareholder and director-double up the penalty

Graetz Investments Pty Limited is a labour hire company involved in the transport business. It is one of a number of related companies in which the beneficial ownership was, and is, substantially held by Raymond John Graetz, the sole director and secretary of Graetz Investments and other related companies. Coastal Transport (NSW) Pty Limited is engaged in the business of transport services involving the pick up and delivery of products of various kinds. Graetz is also the sole director and secretary of that company. Graetz managed the corporate entities on a day to day basis. It is apparent the corporate entities were established by Graetz on the advice of his accountant in order to operate a comparatively small sized transport business on the central coast of New South Wales. Although the reasons for such an approach to the running of his business was never spelt out in precise terms by Graetz, it would appear it was a combination of finance as

well as tax and regulatory advantages arising from such a structure. Graetz investments employed Gregory Harkin as a truck driver. His services were contracted to Coastal Transport. On 9 August 2002, Harkin was driving an International table top truck, registration number SJM-896. That truck had a vehicle load crane attachment. On that day, Harkin was using the truck to deliver concrete drainage products to a site at Wentworth Falls. To do that job, Harkin used the vehicle loading crane on the back of the truck. During the delivery operation, Harkin experienced problems in getting the crane hook into position as it had become lodged or jammed. In trying to free the jammed jib and hook, Harkin stood between the jib and the tray of the truck on the right-hand side of the vehicle in order to use the controls on that side of the vehicle. In doing so, the jib slewed to the left and jammed Harkins' head and shoulders between the jib and the tray of the truck. Harkins sustained severe injuries to his back, head and shoulders. He was hospitalised for some ten days. He underwent extensive rehabilitation and he ultimately returned to full time work with the first defendant in or about April 2003. He resigned from that position in February 2005 to commence employment elsewhere.

At the time of Harkin's accident in 2002, all three companies then operating were grouped together for GST, payroll tax and worker's compensation. Both companies were charged with offences under OH&S legislation and both pleaded guilty. The Court noted that the imposition of heavy fines would be a burden on the companies and its financial resources and that consideration should be given appropriate weight on the question of penalty, although this does not necessarily result in the Court not imposing a heavy penalty ... the penalty should reflect the objective seriousness of the offence. The Court imposed fines of \$48,750 for the employer Graetz Investments and \$33,600 for Coastal Transport.

Challenge to fine imposed by Chief Industrial Magistrate

On the evening of 28 February 2004 a patron at a licensed bar and restaurant in Sydney fell out of a large second floor sash window and landed on a metal awning approximately six metres below the window sill. The patron was in a coma for two weeks and sustained serious injuries. T & Y Pty Ltd operated the licensed bar and restaurant. The company had two directors and two equal shareholders: Ms Pan (who had a day-to-day involvement in the management of the business) and her companion, Mr So. The company was charged under the *Occupational Health and Safety Act 2000* as was Ms Pan a director who was also liable for any offence committed by the company.

Following the accident, the company was issued with a prohibition notice under the *Occupational Health and Safety Act* on 26 March 2004 to "immediately cease opening windows until they could be fixed with an opening which would not allow a person to fall out". On 10 April 2004 a WorkCover Inspector noticed that, in breach of the prohibition notice, the windows were open. The company and Ms Pan were then charged respectively with failing to comply with the prohibition notice. Following early pleas of guilty to both offences by both defendants, the Chief Industrial Magistrate imposed a fine of \$5,000 on the company for failing to ensure the safety of the patron and a fine of \$5,000 for failing to comply with the prohibition notice. Ms So was fined \$7,000 in relation to each offence.

The prosecutor appealed against the fines imposed on the company and on appeal the court increased the penalties to \$15,000 on the company for failing to ensure the safety of the patron and a fine of \$20,000 for failing to comply with the prohibition notice. The prosecutor did not lodge an appeal against the penalty imposed on the director.

The court considered that the Chief Industrial Magistrate erred in exercising his discretion and the sentences were manifestly. The sentences did not adequately reflect the objective seriousness of the offences, particularly by reference to the available scale of penalties. The maximum penalty for failing to ensure the safety of the patron was \$550,000 and the prohibition breach had a maximum penalty of \$110,000 although the jurisdictional limit of the fine available to be imposed by the Magistrate was \$55,000 in each case. The Court noted it is critical that the public appreciates the significance of prompt and full compliance with prohibition orders. The Court noted the offence stemmed from the commission of an earlier offence and exhibited blatant disregard for the important social purposes of the *Occupational Health and Safety Act*, and the breach must be viewed in a most serious light.

Fall and get fined

Proform Systems Pty Limited supplies to, and erects formwork for, various industrial and commercial construction sites. In July it employed about 105 employees, 20 of whom were labourers, 80 of whom were formwork carpenters and 5 of whom worked in the office and administration. Proform Systems contracted with Leighton Contractors to supply, erect and remove formwork at the ABC Sydney premises. Mr Kos was employed there by Proform Systems and he was in the process of dismantling and clearing falsework and formwork in a goods lift shaft. During the course of his work on Kos lifted a piece of plywood covering an opening or penetration approximately 600mm x 600mm. He fell some 5.4 metres through the penetration. As a result of the fall he sustained a comminuted fracture to his left forearm and injuries to his vertebrae.

There was no fencing or other means of securing the safety of persons working at a height in excess of 1.8 metres. Nor was there any marking or signage which warned of the existence of the penetration. There was no adequate inspection of the lift shaft before the task of dismantling and clearing the formwork commenced, and, no adequate risk assessment that might have identified the penetration or might have ensured the integrity of penetration covers in the lift shaft prior to the commencement of the work. The company did not ensure a safe system of work for the dismantling and clearing of the formwork in the lift shaft. The Court noted the offence was rendered more serious because the risk to safety could have been easily avoided by the taking of simple steps such as the marking of penetration covers at the time of installation, and, the observance of the requirement to inspect all formwork decks before stripping and dismantling commenced. The company pleaded guilty and was fined \$80,000.

\$150,000 Fine for NSW Police- and a warning that the fine may not be the only cost

A practical joke has led to a fine of \$150,000 and consideration by the court of the additional penalties that can be imposed on an employer following a breach of the OH&S Act.

On 10 December 2001 Mr Hutchins was placed at risk of harm to his hearing by Senior Constable Bell activating the siren fitted to a police vehicle whilst Mr Hutchins was in front of the vehicle inspecting a winch. Hutchins was bending down and his right ear was between 30 and 50 cm from the siren's speaker located behind the vehicle's grille. Senior Constable Bell activated the siren for about two seconds. The court found the employer failed to prevent Senior Constable Bell activating the siren. The case was defended however a conviction resulted and a fine of \$150,000 was imposed.

In addition WorkCover sought an order that the NSW Police be required to undertake a specific OH&S project involving acoustic studies as a consequence of the offence. The court declined to make the order primarily as a result of the projects already implemented by the police following the incident. The case does however alert employers to the fact that a fine may not be the only pecuniary penalty that flows from a breach of OH&S legislation.

The court may order an offender to carry out a specified project for the general improvement of occupational health, safety and welfare and fix a period for compliance and impose any other requirements the court considers necessary or expedient for enforcement of such an order. The power to make such an order is discretionary. Any order made will be in addition to and not in substitution for a fine. The order will not replace the penalty with a direction that an OH&S project be undertaken.

The court stated:

"Although I understand ... that the money to be expended on a fine could be better spent elsewhere in promoting occupational health and safety the defendant must remember that it is before the Court for failing in its duty to ensure the health safety and welfare of all of its employees. In this regard the community through the Legislature has set heavy penalties upon an employer and others for failing to carry out their duties under the Act. The principal objectives of sentencing, such as deterrence, must also be borne in mind. To allow the defendant to carry out a project, which strictly under the Act it should do anyway to ensure its message of a safe work culture is in place amongst its workforce, in lieu of a fine is not in my view penalising the defendant for the breach of the law.

Employers need to be mindful of the additional powers of the courts available to address breaches of the OH&S legislation.

Union Secretary brings prosecution for OH&S breach and receives 50 % of the fine of \$162,500

The Secretary of the Finance Sector Union of Australia commenced a prosecution against the Commonwealth Bank for breaches of the OH&S Act. As part of its operations the Commonwealth Bank operates a number of retail banking premises around the country, including branches at Woy Woy, located on the Central Coast in New South Wales, and Guildford, located near Parramatta, also in New South Wales.

Two separate incidents give rise to the offence pleaded. The first of these occurred on 23 April 2004. At approximately 5.05 pm, while two employees of the Guildford branch were servicing the ATM located on the bank premises, two bandits entered the bank by smashing a side entrance with a sledgehammer. Upon entry, the bandits demanded one of the employees, Ms Pauline Huynh, to open the ATM. Threats were also made against her life. Ms Huynh subsequently escaped from the bandits and shortly after she escaped, the bandits also left the bank. No money was taken from the premises.

The second incident took place on 7 May 2004. At roughly 8.40 am, while two employees of the Woy Woy branch were reloading the ATM canisters with cash inside the bank, two hooded bandits approached the bank. They proceeded to smash the door with a sledgehammer to gain entry, and absconded with the ATM canisters.

A guilty plea was entered and a fine of \$162,500 was imposed. The prosecutor then sought an order from the court that 50% of the fine be paid to the prosecutor. The Commonwealth Bank opposed the application arguing that the Court must have regard to the requirement that the system of justice should be administered in a way that is transparent and, does not give rise to a perception that persons who hold a position, statutorily recognised as a prosecutor, might benefit or their organisation might benefit by receiving a portion of a fine that would ordinarily find its way into the Government's consolidated revenue. Notwithstanding the submissions the Court noted it is clear the discretion exists for the Court to order the payment of a moiety to a union secretary who has the power to initiate prosecutions under s106(1)(d) of the *Occupational Health and Safety Act* and the Court did order that half the fine be paid to the union secretary.

Summary

The above cases highlight the importance of not only having extensive OH&S workplace safety protocols but also having the necessary experienced employees to enforce them. OH&S legislation exposes employers, plant suppliers, directors and managers and employees to prosecution for lapses in safety practices. Further, unions will focus on prosecuting employers if there are prospects of recovering part of the fines imposed for breaches of OH&S legislation.

Using Labour Hire-Do You Owe the Same Duty as an Employer?

NSW has restrictions limiting workers rights to sue their employer for negligence. In addition the damages that can be recovered from an employer are significantly less than the damages which would be recovered from a negligent third party who is not the employer. Consequently workers target third parties to maximise damages.

Construction workers continually seek to sue negligent third parties involved in construction works being carried out by their employer. There are many targets on a construction site. But what about labour hire? In Australia approximately 10% of the workforce comes from independent contractors supplying services and 3% comes from labour hire with 87% from employees. Employees of labour hire companies can and do sue their employer's client when they are injured on site at the client's premises. But does the client owe the same duty of care as the employer.

In *Samsung Electronics Australia Pty Ltd v Macura* the NSW Court of Appeal recently considered the issue again.

Samsung occupied a warehouse at which it stored and distributed electrical goods. Samsung contracted with a labour hire company (**Skilled**) to supply clerical and labouring services at the warehouse. Skilled employed Mr M as a labourer, who along with 7 or more other Skilled employees performed all the warehouse labouring tasks.

Samsung's only employee, Ms D, was a logistics co-ordinator who worked in the warehouse office. That office was shared with 4 employees of Skilled who performed clerical duties.

Ms D provided Skilled supervisors with paperwork identifying goods that needed to be obtained from store and placed on the warehouse floor to be picked up and loaded onto delivery trucks. Mr M was given the task by his supervisor of unloading a container when he sustained a back injury.

At trial, the District Court found that Samsung owed a duty of care to Mr M like that of an employer. It found it had breached this. Liability was apportioned 2/3 to Samsung and 1/3 to Skilled with a reduction of 20% for contributory negligence by Mr M.

Samsung appealed and in the Court of Appeal a different conclusion was reached. Essentially the Court held that Samsung did not exercise sufficient control over the work so as to give rise to duty of care akin to that of the non-delegable duty of care owed by an employer to an employee.

In essence the court was called on to consider the factual matrix as the extent of the duty of care will necessarily turn on the facts in each case and the third parties relationship with the injured person. In deciding Samsung did not owe a duty of care similar to that of an employer the Court held that it was relevant that:

- Samsung was not involved with training Skilled employees or with their occupational health and safety;
- Samsung did not direct Skilled employees to carry out any tasks, nor get involved in the allocation of tasks to particular workmen;
- Samsung played no part in monitoring the performance of Skilled employees;
- Control by Samsung (through its sole direct employee) was basically limited to deciding the volume of work for the day.

We can only speculate on the probable outcome if Samsung exercised more control over the Skilled employee. Factual situations will arise where the control over labour hired is so great that the duty owed will be analogous to the duty owed by the employer of the labour hired. This will impact on the liability insurance program of the company that uses labour hire. In addition the labour hire company may have assumed responsibility for the losses attributable to the work performed by the labour hire through provisions in the labour hire contract. In those circumstances the insurer facing a claim from the employee of the labour hire company will seek to recover from the labour hire company.

It is inevitable that utilisation of independent contractors and labour hire will complicate issues where a person is injured on site and more than one person has played a role in the incident. Careful planning and a close examination of contractual relationships and insurance policies will ensure that responsibility for losses that occur rest where they are meant to fall.

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.

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