

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

Nearly \$2 Million for Harassment and Bullying Claim

Bullying and harassment can cause psychiatric injuries and lead to substantial damages claims. Substantial damages can be awarded against an employer or those who use labour hire where workers are exposed to harassment and bullying in the workplace.

In New South Wales an employee who suffers an injury in the course of his employment will have damages assessed pursuant to the Workers Compensation Act, 1987.

If an employee is placed on hire with a host, that employee may have an entitlement to sue the host for negligence and in some cases for intentional actions of the host's employees and damages will usually be assessed pursuant to the Civil Liability Act, 2002 ("CLA").

Claims would generally fall within the liability insurance policy effected by the host or the workers compensation policy effected by an employer. A problem can arise where there is an intentional assault by an employee causing damage.

Where an injury is inflicted as a consequence of an intentional assault the damages will not be assessed or restricted by the CLA. That means that an injured person may recover exemplary damages which are damages awarded against a defendant to effectively punish the defendant for their actions rather than compensate an injured person for any specific loss. Generally liability insurance policies will exclude cover for exemplary damages.

A company that uses labour hire may be exposed to an award of damages for an intentional assault by employees upon labour hire used by the host or other contractors used by the host. If exemplary damages are awarded the host may not be insured for those damages and will be personally liable to satisfy any exemplary damages awarded.

The NSW Court of Appeal has recently confirmed that a company can be held vicariously liable for the intentional assault committed by its employees in specified circumstances and exemplary damages can be awarded against the employer of a person that commits an intentional assault comprised of harassment and bullying.

The NSW Court of Appeal in *Naidu - v - Nationwide News Pty Limited & Ors* upheld a substantial damages award for bullying and harassment against a company who had engaged the services of employees from a labour hire company where the labour hire employee had been exposed to harassment by an employee of the company. The judgment has significant ramifications for employers and those who use labour hire.

In this case the Court of Appeal has held that the company was liable for the actions of its manager. The company was liable for the psychological injury suffered as a consequence of an intentional assault and the damages which were awarded were not restricted by the CLA, with the Court of Appeal upholding the original Trial Judge's award of exemplary damages.

Naidu sued Nationwide News Pty Limited ("Nationwide News") and ISS Security Pty Limited ("ISS Security"), his employer. In the Supreme Court he was awarded \$1,946,189.40 including

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exemplary damages of \$150,000.00 against Nationwide News and there was a judgment of \$1,700,050.56 against the employer, ISS Security, but no award for exemplary damages. Liability was apportioned 35% to ISS Security and 65% to Nationwide News.

Naidu was a security guard employed by ISS Security and his services were made available to Nationwide News pursuant to a contract between ISS Security and Nationwide News. In 1997 Naidu suffered a psychiatric injury in the form of post traumatic stress disorder, depression and anxiety which he contends was directly caused by the humiliating and harassing treatment which he was subjected to by Nationwide News' Fire and Safety Officer Mr Chaloner, whilst providing security services at Nationwide News' premises.

Naidu worked under the direction of Chaloner who had arranged with ISS Security for Naidu to act as his assistant and report directly to him in respect of his duties.

The relevant conduct occurred over a period of five years and although not continuous was sufficiently frequent to be characterised as systematic. Naidu did not complain about Chaloner's conduct nor take any steps to draw his conduct to the attention of persons at Nationwide News or ISS Security who could have done something about the conduct. Save on one occasion in the case of Nationwide News, his fellow employees who witnessed Chaloner's conduct did not do so either.

There was a substantial body of evidence demonstrating racial vilification and personal abuse incorporating a range of insults including "black boy", "black *****", "monkey face", "curry muncher", "boofhead", "poofter", "hopeless". The wrongs committed by Chaloner also included assaults and battery. There was a sexual assault where the "private parts" of Naidu were grabbed, but the Trial Judge found this assault was not connected with employment although it occurred during work hours. This finding was not challenged on appeal.

Nationwide News and ISS Security appealed against the Supreme Court Judgment.

On appeal the Court of Appeal found that ISS Security was not liable but Nationwide News was. Although there was some adjustment to the damages awarded there was no adjustment to the exemplary damages awarded. Essentially damages awarded for breach of contract were deleted from the award as Naidu had been compensated by an award of damages for pain and suffering and the damages for breach of contract covered the same elements in the award for pain and suffering.

Nationwide News did not seek to defend or in any way excuse Chaloner's conduct which it conceded was indefensible and outrageous but argued that once it found out about Chaloner's conduct it immediately terminated him. Nationwide News argued they were not vicariously liable for the conduct of Chaloner as it was not conduct in the course of his employment.

Chief Justice Spigelman noted that it was accurate to describe the course of conduct as bullying or harassment.

The Court of Appeal held that Nationwide News was vicariously liable for the acts of Chaloner despite their argument that Chaloner was not acting in the course of his employment. Chief Justice Spigelman confirmed that an employer can be liable for negligence because of a failure to protect an employee against bullying and harassment, however, the existence of such conduct does not determine the issue of breach of duty.

As Chief Justice Spigelman noted:

"A plaintiff will not recover damages for an injury which psychiatric opinion will recognise as a psychiatric injury by demonstrating only that such an injury was reasonably foreseeable and that the defendant's negligence was a cause of the injury which the plaintiff sustained.

One of the elements required to be assessed is the degree of probability that the risk of psychiatric injury may occur, even when the reasonable foreseeability test of a risk that is not far fetched and fanciful has been satisfied."

Chief Justice Spigelman determined that the facts of the particular relationship between Naidu and Nationwide News were sufficient to characterise Nationwide News as having a non-delegable duty of care similar to that of an employer. In the circumstances, Nationwide News owed a non-delegable duty of care to Naidu to take care to avoid exposing him to unnecessary risks of injury.

If there was a real risk of injury to Naidu in the performance of a task in the workplace, Nationwide News should have taken reasonable care to avoid the risk by devising a method of operation for the performance of the tasks that eliminated the risk or

by the provision of adequate safeguards.

Although the Court of Appeal upheld the award of damages against Nationwide News, the finding of negligence on the part of the employer was overturned. This was not a unanimous decision, with Justice Beazley determining that the employer ISS Security had been negligent essentially as it was vicariously liable for the actions of Chaloner, even though Chaloner was not its employee. Chief Justice Spigelman and Justice Basten did not share that view.

The case involved a number of complex issues and the 3 judges in the Court of Appeal arrived at different conclusions on some issues. Nevertheless there were a number of fundamental issues determined which provide guidance to employers on the obligations that can arise from harassment and bullying. To understand those issues one must examine the nature of the claim that was made and the analysis applied by the Court of Appeal.

Naidu had alleged negligence on the part of both Nationwide News and ISS Security. The negligence of Nationwide News was alleged to be two-fold in that Nationwide News were vicariously liable for the actions of Chaloner and secondly that they failed to implement a safe system of work for Naidu having regards to its relationship with Naidu where it was acting akin to a de facto employer. Naidu argued ISS Security was also liable for the actions of Chaloner even though he was not an employee of ISS Security as ISS Security had placed Naidu under the direct supervision of Chaloner, and effectively Chaloner was an agent of ISS Security. There was also an argument ISS Security failed to provide a safe system of work.

Nationwide News and ISS Security argued that it was not reasonably foreseeable that Naidu would suffer psychological harm and this arose from the lack of complaint by Naidu about Chaloner's conduct.

Naidu argued that Chaloner was the controlling mind or "agent of knowledge" for the company through whom Nationwide News operated its security and therefore any knowledge of potential harm should be knowledge of Nationwide News. Naidu argued that ISS Security should be imputed with the knowledge of Chaloner as Chaloner was effectively its agent for managing Naidu.

Claims for psychiatric injury in the workplace are problematic as employees are exposed to stresses during their employment which employers might reasonably assume an employee can cope with but employees can ultimately suffer a psychiatric injury. As Chief Justice Spigelman noted:

"In any organisation, including in employer/employee relationships, situations creating stress will arise. Indeed, some form of tension may be endemic in any form of hierarchy. The law of tort does not require every employer to have procedures to ensure that such relationships do not lead to psychological distress to its employees. There is no breach of duty unless a situation can be seen to arise which requires intervention on a test of reasonableness."

Chief Justice Spigelman also noted:

"It may well be the case that it is now well established that workplace stress and specifically, bullying, can lead to recognised psychiatric injury. That does not, however, lead to the conclusion that the risk of such injury always requires a response for the purpose of attributing legal responsibility. Predictability is not enough."

It does appear that over recent decades the helping professions and the pharmaceutical industry have medicalised many of the normal stresses of everyday life, including working life. The law does not expand legal responsibility for the conduct in the same way."

To establish negligence for psychiatric injury it was necessary for there to be a foreseeable risk of psychiatric injury and the complaints of Naidu if they were made, could have alerted Nationwide News to the potential.

The Court of Appeal was required to weigh up whether or not Nationwide News and ISS Security should be treated as having the knowledge of Chaloner in relation to the foreseeable risk of psychiatric injury of Naidu.

In essence, the Court of Appeal determined that Chaloner was essentially a manifestation of the company for the purposes of knowledge.

As Chief Justice Spigelman noted:

"Whether the knowledge of a particular person should be imputed to the corporation depends on the scope of that person's employment. A person in a supervisory position... has duties which encompass the receipt of the relevant knowledge and accordingly, could be said to have a duty to communicate and/or to act upon it."

The Court of Appeal confirmed that a person such as Chaloner could be an “agent to know” in the sense that his knowledge was the knowledge of the company.

As the Court of Appeal was faced with difficulties in determining whether or not in the absence of complaints by Naidu there was foreseeability, Chief Justice Spigelman and Justice Basten turned to consider whether or not there had been an intentional tort which is not confined by a test of foreseeability and does not involve an inquiry into reasonableness of response.

Chief Justice Spigelman noted that although there was no finding that Chaloner actually intended to inflict psychiatric damage, the nature and scale of his conduct was such, as the expert evidence confirmed, as to constitute a recognised psychiatric injury as a natural and probable consequence of that course of conduct. The limitations of foresight and remoteness were not applicable to the question of an intentional tort.

Accordingly Chief Justice Spigelman concluded that if Chaloner would have been sued he would have been liable to pay damages for the intentional infliction of psychiatric injury. It was also determined that Nationwide News could be vicariously liable for that intentional tort and further that either the actions of Chaloner being the actions of the company itself was sufficient to ground liability on the part of Nationwide News or alternatively, most of what Chaloner did constituted a mode of asserting authority over Naidu whose activities he was expressly required to control. The Court of Appeal concluded that the relationship between Chaloner and Nationwide News was such that most of Chaloner’s conduct with respect to Naidu did fall within the course of employment and Nationwide News was vicariously liable for his conduct.

Justice Basten and Chief Justice Spigelman did not think that vicarious liability for Chaloner should be imposed on the labour hire company. To a large extent arguments of negligence of ISS Security fell away once it was not vicariously liable for Chaloner’s conduct as the Court of Appeal held that Naidu had not brought to his employer’s attention the details about the difficulties which confronted him.

An interesting decision which warns companies that:

- Bullying and harassment in the workplace can lead to a damages claim which can run into millions of dollars.
- Acts of bullying and harassment can give rise to an intentional assault and in New South Wales this results in damages being assessed at common law rather than assessed under the CLA.
- An employer can be vicariously liable for the conduct of managers who engage in harassment and bullying.
- Employers can be liable for the conduct of their managers even where that conduct amounts to an intentional assault.
- If a manager’s conduct results in an intentional assault, damages will be assessed outside the CLA and aggravated damages to punish a company can be awarded.
- A labour hire company is not necessarily vicariously liable for the conduct of managers employed by the host that hired the labour hire company.
- For a person to succeed in a claim for damages for psychiatric injury the psychiatric injury must be a foreseeable consequence. In assessing whether or not a recognisable psychiatric injury is a foreseeable consequence it would be relevant to have regard to the complaints made by the person injured.
- Exemplary damages to punish a defendant can be awarded against a defendant where damages are not assessed under the CLA.
- Exemplary damages can be awarded against a company for an intentional assault committed by an employee and in some situations the defendant may not be insured for exemplary damages awarded.

After A Long Battle, No Liability For The Council

In our April 2007 edition we highlighted the High Court decision of Leichardt Municipal Council v Montgomery. In the decision the High Court examined the nature of the duty of care owed by the Council to Mr Montgomery. Montgomery had sustained severe injury to his left knee as a consequence of falling into a Telstra pit along Parramatta Road in Leichardt. The pit was covered by a broken cover which was in turn covered by a synthetic carpet. The Council had engaged Roan Constructions Pty Ltd to carry out repair work on the pit. Part of the instructions given to Roan Constructions was that Roan was to provide an artificial grass or carpet. The negligence that caused Montgomery’s accident was that of the independent contractor. The

NSW Court of Appeal in essence held that the Council had a non-delegable duty of care and was responsible for the actions of the independent contractor. The Council appealed to the High Court. The High Court rejected this reasoning and found that the Council only owed the ordinary duty to take reasonable care, it was not liable for the negligent acts of the independent contractor.

However, this was not the end of the matter. Montgomery had sought to argue in the High Court that the Council itself, and not the independent contractor, had been negligent. The High Court, after concluding that the Court of Appeal had been wrong in deciding that the Council was liable for the negligence of the contractor although finding in favour of the Council, determined that the NSW Court of Appeal should determine whether the Council was negligent in its own right in that it should not have allowed access to the footpath and should have properly supervised the work.

In considering whether or not the Council was negligent Justice Hodgson of the Court of Appeal commented:

"It is necessary to ask whether a reasonable council, in the position of the council in this case, would have foreseen a risk of injury to pedestrians from work being conducted in the way provided for by the specifications, and by the practices spoken about by the engineer. If such a risk would have been foreseen, then the next question would be what, if anything, would a reasonable council have done to deal with that risk, having regard to the seriousness of any damage or injury that could be caused, and the probability of the risk eventuating..."

"In assessing that matter, a reasonable council would have regard to the remoteness of the likelihood that a competent contractor would lay carpet over a surface which was unstable or otherwise such as to give rise to a danger to pedestrians. Particularly having regard to the circumstances that the alternatives, such as excluding pedestrians from the footpath altogether, or laying down duckboards or other hard surfaces, were not explored in the evidence below, so that an opportunity was not given to the Council to explore possible difficulties and disadvantages of those alternatives, it seems to me that the evidence in this case does not justify a finding that the Council breached its duty, when the matter is approached in that way."

New evidence was not considered by the Court of Appeal and the evidence available to the Court of Appeal was limited to the evidence in the original trial.

After a long battle finally a victory for the Council in what appears to be a sensible result. It would have been a bitter pill for the Council to swallow if they had been found negligent when they had not even had the opportunity to address the plaintiff's arguments.

Maybe the result would have been different if the original hearing had considered more evidence that may have demonstrated that the Council was negligent in its own right in that it should not have allowed access to the footpath and should have properly supervised the work - but we will never know. One thing is certain - personal responsibility continues to be the approach of the Courts.

But there is a warning. Although a Council will not be vicariously liable for the acts of an independent contractor, it can still be liable if it is proved that a Council acting reasonably would have restricted access to an area or imposed different supervisory conditions which would have removed the risk of harm.

Principal's Liability For Independent Contractors - More Comments From The NSW Court Of Appeal.

Hot on the heels of the NSW Court of Appeal's decision in *Leichhardt Council - v - Montgomery*, the NSW Court of Appeal has delivered another judgment which deals with a claim by an injured person against a Council arising as a consequence of the alleged negligence of an independent contractor.

As everybody knows, the City of Sydney Council has had problems with trees in Hyde Park. The problems have led to the removal of a number of trees. Mr Choi suffered a serious brain injury when he was struck by a falling tree branch in Hyde Park. The branch was 7 or 8 metres long and fell from one of the closely planted rows of Hill's weeping figs lining the Avenue in Hyde Park. The planting of the trees had occurred over a century ago. The tree joints had been weakened by a condition called Bark. The propensity for the figs to shed branches was known to both the Council and Prestige Property Services Pty Limited who had been engaged by the Council to maintain healthy and well formed active trees free of diseases, insects, dead wood and damage. In essence, Prestige were responsible for the management of the trees in the park.

The original Trial Judge found that Prestige was negligent and the Council was not. The Council was acquitted of negligence

because it had acted reasonably in selecting and supervising the specialist contractor to look after safety and maintenance in the park, including the checking and removal of dangerous tree branches. Choi was awarded \$718,259.95 in damages and the judgment was payable by Prestige.

Prestige appealed seeking to argue that it either had no liability or that the Council had not delegated the whole of its responsibility to Prestige.

The Court of Appeal in *Choi - v - Prestige Property Services Pty Limited & The City of Sydney Council & Anor* noted that the Council's duty of care was a non-delegable one but the question was what was the extent of the duty. The Court noted that more than one person may owe and breach a duty of care to a person injured in an accident and there is no reason why one person cannot assume sufficient control over activities to fall under concurrent duties of care.

President Mason of the Court of Appeal noted:

"To show that the Council continued to occupy the park or to retain what is described in the grounds of the appeal as "the overall control" of the park does not preclude a finding that a person such as Prestige also assumed and exercised sufficient control so as to fall under a duty of its own."

The Court of Appeal confirmed that a Council that acts with reasonable care in appointing and supervising the work of an independent contractor is not liable for the negligence of the independent contractor. President Mason confirmed that:

"The retention of an adequate system of control over the performance of subcontractors is an important aspect of an analysis of the question of breach in a case where a person seeks to discharge its duty by appointing a specialist contractor. What is reasonable in such a situation will vary with the context:

Thus a school or prison authority faced with an emergency involving a pupil or inmate would not be expected to send the headmaster or prison governor to supervise the surgeon called in to perform emergency surgery."

Expert evidence at the trial had shown that the branch that fell was dangerous in the sense that it was detectable and such that a reasonable arborist would have removed the danger by removing or at least shortening the branch. In those circumstances liability for the accident was sheeted home to Prestige but there was nothing in the Council's conduct which demonstrated that it had failed to properly select an appropriate contractor or failed to adequately supervise them.

In those circumstances the appeal was dismissed and Choi's judgment against Prestige remains with the Council having no liability.

Clearly, principals can discharge their duty of care through the careful selection of independent contractors and adequate supervision of those contractors and not attract liability for the negligence of an independent contractor.

Appeal On Credit Unsuccessful

It is often the case that when an injured person's claim proceeds to trial one of the parties is unhappy with the result. Sometimes the unhappy party will not do anything further. Other times they will appeal the decision. In deciding whether or not to appeal a decision a number of issues must be considered. These include the damages and costs that may be saved on a successful appeal, and whether or not the judgment itself is appealable. In NSW a party has the right to appeal if the damages in issue on the appeal are greater than \$100,000.00. If this is not the case then leave to appeal must be sought. Of course even a case where more than \$100,000.00 is in issue may not be worth appealing as the trial judge may have made a number of findings of fact which, although a party may not agree with, will not be overturned on appeal.

An obvious difficulty in any appeal is that a trial judge has had the benefit of observing the witnesses whereas the Court of Appeal only has the transcript of the witness' evidence available to them. The transcript may not adequately capture the tone of the evidence. It is for this reason that the Court of Appeal is reluctant to interfere where there are issues of credit.

The Court of Appeal has recently been faced with this difficulty in the decision of *Nominal Defendant v Clancy*. Mrs Clancy was injured in a rear end collision on 16 February 1999. As the motor vehicle was not identified a claim was made against the Nominal Defendant. There was no issue at the trial that as a consequence of the accident Clancy sustained an aggravation injury to her right thumb and a pre-existing wrist condition. The issue that was in dispute was whether the collision either precipitated a condition known as severe multi-directional glenohumeral instability ("MDI") in Clancy's right shoulder or, at least, severely exacerbated a pre-existing minor shoulder condition.

The trial judge was of the opinion that the accident did lead to an aggravation and worsening of Clancy's pre-accident right shoulder problem and awarded Clancy substantial damages totalling \$634,522.64.

The Nominal Defendant appealed. The Nominal Defendant argued on appeal that the trial judge was wrong in finding that the motor vehicle accident caused Clancy to suffer MDI in her right shoulder or at least severely exacerbate a pre-existing minor shoulder condition.

A major issue in the case was whether or not Clancy had complained of right shoulder pain, or increased right shoulder pain, in the first few months after the accident and whether her right shoulder had subluxed or dislocated within six months of the accident. Clancy contended that she had complained of pain. The Nominal Defendant argued that at the time of the collision Clancy had a congenital condition which was not known to Clancy at the time and that MDI was not usually brought on by a single trauma (that is, the collision), but repetitive activity (Clancy had previously undertaken marathon swimming but had stopped a few months prior to the accident because of her shoulder condition). The Nominal Defendant argued that there was no contemporaneous complaints of shoulder problems as a consequence of the accident. According to the written medical evidence, the first time Clancy attributed her shoulder problems to the accident was in March 2000.

Cross-examination of Clancy exposed inconsistencies in her evidence about when she first complained about her right shoulder after the accident but the trial judge was of the opinion that Clancy's credit was not of vital importance to his findings and that she was mistaken about when her shoulder pain first became significant and when its increase first became significant to her.

The Court of Appeal dismissed the appeal. In the Judge's opinion the Nominal Defendant did not demonstrate sufficient grounds for disturbing the trial judge's conclusions, taking into account the constraints on the Court of Appeal in disturbing findings of a trial judge in relation to credibility.

The decision again demonstrates the difficulty of overturning a decision by a trial judge where credit is a predominate issue.

Even where the Court of Appeal decides that there has been an error the parties may still face a retrial where credit is an issue as the Court of Appeal may determine that the Court is unable to determine the case as it cannot satisfactorily resolve the credit issues in the case.

McCracken Appeal Dismissed

Former rugby league footballer Jarrod McCracken has failed to convince the Court of Appeal to increase the damages awarded to him by Justice Hulme of the Supreme Court with the Court unanimously dismissing the appeal.

McCracken played professional rugby league from 1991 to 2000. On 12 May 2000 his career came to an abrupt end when he was injured in a game between his team, Wests Tigers, and the Melbourne Storm. McCracken was injured in a spear tackle by Stephen Kearney and Marcus Bai when he was dropped head first onto the ground. McCracken alleged that Kearney and Bai failed to exercise due care by lifting him in a posture and to a height "which created an unreasonable risk that he would fall to the ground head first" and by failing to control his movement. It was alleged that the Storm were vicariously liable for the actions of Kearney and Bai.

Justice Hulme in the Supreme Court found in favour of McCracken. His Honour found that because of the negligence of Kearney and Bai McCracken had suffered a significant strain of the cervical spine as a consequence of which McCracken was no longer able to play rugby league. Justice Hulme awarded McCracken \$97,500 comprised of general damages and medical expenses. His Honour did not accept that McCracken had suffered any loss of earning capacity.

There was no issue that as a consequence of his injuries McCracken's capacity to earn income as a footballer was destroyed. Justice Hulme in fact accepted that McCracken would have earned \$762,000 playing rugby league but for his injury. The difficulty for McCracken was that after his injury McCracken became heavily involved in property development and retained, purchased developed and sold property to a significant extent. To such an extent, in fact, that Justice Hulme did not consider McCracken should be awarded any allowance for economic loss. McCracken was not happy with this and appealed (Kearney, Bai and the Storm cross appealed on liability but the cross appeal was dismissed).

The Court of Appeal agreed with Justice Hulme. Put simply, McCracken earned far more from his property developments than

he would have playing rugby league. Nor did the Court of Appeal accept that McCracken would have been able to be involved in property development than if he was still playing rugby league.

A loss for McCracken in what seems like the right result. Damages are supposed to put someone back in the position that they would have been in had the negligence not occurred. McCracken was doing better financially after his injuries- and so he cannot be compensated for economic loss.

Interestingly the injury propelled McCracken into a career that resulted in a much greater earning capacity so there could be no compensation for loss of earning capacity as there was no loss.

Can an Insurer Pursue A Developer Under A Home Building Act Policy?

Although this might seem like a straightforward question, a recent Supreme Court decision shows that arriving at the answer - in this case, yes - can be quite complicated. The decision is *The Owners Strata Plan 56587 v TMG Developments Pty Limited [2007]NSWSC 1364*.

TMG was the developer of a 194 unit residential complex. It engaged the Builder to undertake the actual building work.

Prior to commencement of construction, Vero issued policies of insurance under Part 6 of the Home Building Act (HBA) in respect of work done by the Builder. The Builder subsequently went into liquidation.

Some of the work done by the Builder was defective. The Owners Corporation - which had only come into existence on the registration of the Strata Plan following completion of construction - made a claim on Vero in respect of the defective work. Vero made a payment to the Owners Corporation in settlement of the claim.

Vero then sought to exercise a right of subrogation to take over court proceedings which the Owners Corporation had commenced against the Developer. These sought damages for breach of the statutory warranties under the HBA. The issue was - did Vero have such a right?

Subrogation is a doctrine which allows an insurer, after having indemnified the insured, to be placed in the position of the insured. In that way an insurer can pursue a third party for recovery of the loss involved.

Here, the Developer argued, essentially, that the Owners Corporation had not come into being when the policy was issued, so that it could not be an insured under the policy. The result of this would be that Vero could not be subrogated to its rights.

The Supreme Court held that in light of the statutory scheme for building warranties, the right of subrogation was available. The design and purpose of the scheme is to create a legal relationship between the issuing insurer and the Owners Corporation and ultimate lot owners. This relationship was also reflected in the terms of the policy.

For the Developer, the result means that it must face the claim for defects of the insolvent builder. As the policy has already been called upon by the Owners Corporation, it will have to meet the claim from its own pocket. Perhaps it was wise enough to have taken out separate insurance?

Natural Justice and Referee Reports

In any proceedings where a referee's report is submitted to the Court, there is always going to be an unhappy party who disagrees with the result. When may a Court refuse to adopt a referee's report on grounds of bias?

The decision of Associate Justice McLaughlin in *Carbotech-Australia Pty Limited and Anor v Ian Kenneth Yates and Ors [2007] NSWSC 1304* concerned the adoption by the Court of a report given by a referee, which was opposed on grounds of apprehension of bias, after the referee communicated with one party and not the other before issuing the report to the Court.

What is a referee?

In civil proceedings, the Court can refer the whole of the proceedings or any question in the proceedings to a referee to report on the proceedings or question referred. A referee appointed by the Court is not an officer of the Court and the referee's report is not legally binding upon the parties unless adopted by the Court.

The parties will also pay the referee's costs. The Court may direct the way a hearing before a referee is to be conducted but otherwise, a referee may conduct the proceedings in any way that the referee sees fit and is not bound by the rules of evidence.

So why refer proceedings to a referee?

This procedure under the *Uniform Civil Procedure Rules 2005* has an overriding purpose to achieve the "just, quick and cheap resolution of the real issues in proceedings." Referral by the Court to a referee will be most appropriate where there are technical factual issues and an appropriately qualified referee can be appointed.

Once a referee submits his or her report to the Court, the Court may adopt, vary or reject the report in whole or in part. The Court may also remit the report for further consideration by the referee on any part of the report.

There is obviously a large degree of flexibility allowed to a referee conducting proceedings, but this does not mean that a referee can abandon the principles of natural justice. These principles require the referee to:

- Be impartial; and
- Allow each party the opportunity to present its contentions.

The Carbotech Case

In the Carbotech case, specific questions were referred to the referee to report on the similarity of products produced by the plaintiffs ("Carbotech") and one of the defendants, Era.

The product manufactured by Carbotech was a chemical product comprising two components known as Bevedol, a polyurethane resin used in consolidation of fractured ground. Carbotech alleged that its former managing director, Yates (also a defendant in the proceedings), disclosed confidential information to Era which Era then used to produce a competing product known as Geobind. Era denied the allegations.

The orders made by the Court for reference to a referee contemplated that each party would produce to the referee copies of all formulas and recipes for their respective products.

After this information was produced, 19 emails and 4 telephone communications passed between the referee and Clayton Utz, solicitors for Carbotech. In particular:

- No details of the communications were copied to or provided to Era's solicitors;
- The emails attached draft reports for comment by Clayton Utz;
- A second draft report was sent to Clayton Utz for comment.

Was there a failure of natural justice?

The relevant test is whether a disinterested bystander would have a reasonable apprehension of bias in the circumstances. The question is not only whether there was actual bias, but whether there was a perception of bias.

When approaching the issue of apprehended bias, Associate Justice McLaughlin considered that it was the fact of the emails and telephone conversations, not the content of those communications, which constituted the ground for apprehended bias in the mind of an objective observer.

Similarly, the fact that a draft report was only sent to one party for comment was a further ground for such apprehended bias, even where there was no change to the report. He said:

"The fact that an opportunity was given to the Plaintiffs to comment on the draft report is what I consider to impugn the integrity of the procedure. It matters not whether the Plaintiffs chose to comment upon the draft report, or whether the Referee chose thereafter to make any alterations thereto. What matters is that the Referee gave to the Plaintiffs (but not to Era) an opportunity to so comment and to himself an opportunity to change the draft Report in light of any such comments."

His Honour concluded that by communicating with one party and releasing the report to only one party for comment, the referee in Carbotech had compromised the integrity of the procedure and so had given rise to a perception of apprehended

bias.

His Honour was also satisfied that an inference of actual bias was supported by the evidence. In doing so he considered the following passages from the decision of the High Court in *Re JRL; Ex parte CJL (1986) 161 CLR 342*:

"It is a fundamental principle that a judge must not hear evidence or receive representations from one side behind the back of the other"...

"It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide."

But does that mean the Court should not adopt the report?

Associate Justice McLaughlin considered previous decisions of the Court concerning a referee's requirement to apply the principles of procedural fairness, including *Xureb v Viola (1988) 18 NSWLR 453* where Cole J said:

"Another aspect of natural justice is that the referee must be actually impartial, and must be perceived by a disinterested bystander to be so. Accordingly he must not hear evidence or receive representations from one side behind the back of or in the absence of the other..... It follows that he [the referee] must observe concepts of natural justice in preparing his opinion, for if he does not do so, the court, being obliged to apply concepts of natural justice, must reject his report."

The principles of natural justice required that the report in *Carbotech* was rejected by the Court.

An expensive lesson learnt by all. The costs incurred in presenting the case to the referee have been wasted as the referees report is now of no use in the case to either party.

OH&S Roundup

Substantial Penalties Against Companies, Directors And Managers For Fatality

The NSW WorkCover Authority has recently prosecuted Dupond Industries Pty Limited, two directors of the company and a manager of the company for a breach of the Occupational Health and Safety Act for failing to ensure the safety at work of employees.

The company operated a pallet storage and repair business. The business undertook the painting, drying, stencilling, stacking and unloading of pallets which were moved through the factory via a conveyor belt system. A 37 year old employee was fatally injured in the factory. He was found by a fellow employee trapped by his chest between a stack of 20 pallets that had moved along the feed conveyor to enter the destacking area. It was unclear whether the incident occurred when the employee was clearing a blockage or removing a steel bar from under the bottom pallet so the pallet would release and continue.

Essentially, the prosecution related to a failure to properly guard machinery.

The corporate defendant fully complied with WorkCover Improvement Notices issued following the incident and engaged companies to make recommendations to improve the guarding of the conveyor and to improve the computer system operating the conveyor belt. Guards and safety switches were placed on the machine and additional sensors were located on the machine. An improved occupational health and safety system was introduced and extensive training and induction of all employees was conducted. A complete audit of the OH&S system after the event was conducted.

The company was a small family run business and any fine on the company would have a direct impact on the directors. There were no prior convictions for any of the defendants.

The Court noted the risk of injury from a machine which is not properly guarded is obvious. The Australian Standards are clear and the risk in this case arose because an employee had access to a potentially dangerous area of the machine. The Court was somewhat critical of the absence of a documented training system noting the training system was largely verbal and the Court commented that this can result in inconsistent training. The Court did not consider it was necessary to impose a specific penalty to deter the defendants from re-offending. They had an unblemished record in a dangerous industry and had taken appropriate measures after the event.

After weighing up the objective seriousness of the offence, the Court imposed a fine of \$200,000.00 on the company and

\$25,000.00 on each of the two directors and the manager. A substantial penalty for all involved. Perhaps the focus of WorkCover is changing as clearly WorkCover pursued not only the corporate defendant but directors and a manager in this serious incident.

Another Manager Prosecuted

WorkCover has recently prosecuted ABC Tissue Products Pty Limited, two directors and a manager of the corporation for breaches of the Occupational Health and Safety Act arising as a consequence of an injury to an employee. Once again the incident involved unguarded machinery.

An employee suffered a soft tissue injury and muscle injury to his right arm and was off work for four days after his arm got caught in machinery when he was attempting to clean an embossing roller on a rewinder machine. There was simply inadequate guarding of a nip point of the embossing roller.

The manager that was prosecuted was in charge of safety and trained employees on a regular basis. Persons from outside of the company would also be brought in from time to time to train employees. One of the directors in his evidence suggested that he was overseas at the time and had no reason to think that safety matters were a problem.

The corporate defendant supports charities in a substantial way and had donated in excess of \$250,000.00 to charities in 2006 and 2007 and in fact had donated over \$1.4 million to charities since July 1999. One of the directors was suffering from prostate cancer and receiving radiotherapy and the director responsible for occupational health and safety had now stepped down from that role appointing his son to take over the situation as the effects of the accident had resulted. He had found dealing with the accident extremely hard and stressful. In the year ending 2006/2007 the company had spent over \$480,000.00 on occupational health and safety comprised of wages for the OH&S department and approximately \$100,000.00 on training courses and printing induction books for employees. The Court held in this case there was a lack of supervision. The defendant conceded the risk was foreseeable and measures were available to address the risk.

The company had two prior convictions under the OH&S Act which had resulted in penalties of \$15,000.00 and \$12,000.00 for the offences. The business had a turnover of approximately \$230 million in the 2006 financial year and employed at least 300 people.

The Court determined that there was a need to impose a penalty for specific deterrence. Employees and persons not in employment were exposed to risks and the Court imposed a total fine of \$70,000.00 on the corporate defendant for two offences and fined the manager \$12,000.00 and the director \$3,000.00. No doubt the substantial charitable commitments had an influence on the penalty.

Once again WorkCover has pursued a manager of a business, not only a director. Perhaps a trend is developing with managers coming under the spotlight in OH&S prosecutions.

The Structure Of Your Business Can Bring You Unstuck.

WorkCover has recently prosecuted J T & L C Tippett Pty Limited and R D & L F Tippett Pty Limited for breaches of the Occupational Health and Safety Act arising out of an injury to a worker who was attempting to clean an area on a Grimme windrower which harvests potatoes. The employee was injured when using a potato harvester and attempting to clear away blocked dirt and debris and pieces of potato on a conveyor system. The lack of guarding was seen as a cause of the accident and was the reason that there was an unsafe system of work.

Each company was ultimately fined \$60,000.00 in relation to a breach of the Occupational Health and Safety Act.

The defendants had argued that the Court should view the offence in a global way and impose a single penalty and attribute 50% of the penalty to each defendant. This was because the two companies were in essence family companies conducting farming operations in partnership.

The Court confirmed that where there are two corporate defendants involved in an incident, there must be two separate penalties no matter how close the corporate relationship is. The two companies had been established as trustees of a trust to do no more than split income with family members. Notwithstanding, the Court determined that it was necessary to impose a penalty on each corporate defendant.

The Court concluded in this case the defendant corporations together constituted a two-man enterprise employing two farm

workers. Consequently each corporation received a \$60,000.00 fine.

Businesses need to be aware that their business structures may ultimately result in multiple prosecutions where there is more than one entity involved in the undertaking of the business.

Using Directions For Production In Workers Compensation Cases in NSW

In compensation claims a subpoena was a good way to obtain information that could assist an employer in the defence of a claim. A subpoena would require a person or entity to produce documents to the Court and the employer and the worker could gain access to the documents.

Times have changed. In NSW parties to proceedings will need permission from the Arbitrator to issue Directions for Production, which are akin to a subpoena.

The issuing of Directions for Production was the focus of the recent Presidential Decision in Toll Pty Limited - v - Morrissey. The employer sought leave to issue a Direction for Production upon the worker for his financial records. The employer argued the documentation would enable the employer to make a proper assessment of any entitlements the worker may have for partial incapacity benefits under the Workers Compensation Act, 1987.

The Arbitrator declined the employer's request as, according to the Rules, leave to issue Directions for Production would only be granted in "exceptional circumstances".

An appeal followed and resulted in a Presidential Decision. The Commission took the view Directions for Production could not be issued simply to obtain a broad range of documents. There must be a specific identified issue requiring specific identified documents. Parties are required to exchange all material and documents they seek to rely upon in a dispute before proceedings are commenced, and the bank records should have been sought by the employer by way of a request rather than by way of Directions for Production. Further, as there were no credit issues in the claim and the worker's addressed his financial situation, the Commission concluded the circumstances should have been taken at face value. The issuing of a Direction was not justified in this case.

Employers must ensure that they request workers to provide all necessary information to facilitate the consideration of the claim, particularly where there is a statutory obligation on the worker to provide the information. The employer in this case argued they were denied the opportunity to issue the Direction and therefore denied the opportunity to present evidence to establish an ability to earn exceeding the worker's admissions in his statement on his ability to earn. The argument was to no avail.

Pursuant to Sub-rule 13.4(1) of the Workers Compensation Commission Rules 2006 an Arbitrator has the discretion power to decide whether or not a party may issue a Direction for Production. A Direction for Production must not be issued where the party requesting the Direction is otherwise entitled to be provided with the documents sought.

The documents which would have been sought in the Direction for Production were attached to a statement provided by the worker and contained in a Wages Schedule filed by his lawyers. If the employer wanted to challenge the evidence presented in the statement they should have previously requested the information from the worker. If the worker failed to provide the information in response to the employer's request, this would probably be sufficient reason for an Arbitrator to grant leave to issue a Direction to Produce.

The essential requirement is that the documents to be produced under a Direction to Produce must take the matter further and assist the Commission in the decision making process. In this case the production of the documents would not have added any further assistance in determining the workers entitlements, therefore the employer was not allowed to issue the Direction.

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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