

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

Road Authority Immunity Has Its Limitations

In New South Wales the *Civil Liability Act, 2002* provides that a road authority is not liable for civil liability for harm arising from a failure of the authority to carry out road work or to consider carrying out road work unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

Carrying out road works is defined to mean carrying out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of the road work within the meaning of the *Roads Act, 1993*.

Road work is defined in the *Roads Act, 1993* to include any kind of work, building or structure (such as a roadway, footway, bridge, tunnel, road-ferry, rest area, transit way station or service centre) that is constructed or installed on or in the vicinity of the road for the purposes of facilitating the use of the road as a road, the regulation of traffic on the road or the carriage of utility services across the road but does not include a traffic control facility, and carrying out road work includes carrying out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of the road work.

The *Roads Act, 1993* defines "traffic control facility" to have the same meaning as traffic control facility has in the *Transport Administration Act, 1988*. The *Transport Administration Act, 1988* provides that a "traffic control facility" means traffic control lights on roads or road related areas and equipment used in connection with traffic control lights; any sign, marking, structure or device containing or relating to a requirement or direction, contravention of which is an offence arising under legislation; any other sign, marking, structure or device that is intended to promote safe or orderly traffic movements on the roads or road related areas or to warn, advise or inform the drivers of vehicles, or pedestrians, of any matter or thing in relation to vehicular or pedestrian traffic or road conditions or hazards; or any bridge or subway or other facility for use by pedestrians over, across, under or alongside a road or related area.

Effectively, it is necessary to prove actual knowledge on the part of the road authority of the particular risk the materialisation of which resulted in the harm in relation to road works but not works in relation to traffic control facilities.

So how does this impact on a claimant?

The New South Wales Court of Appeal in *Colavon Pty Limited t/as Thormans Transport v Bellingen Shire Council* has recently considered a claim by a company that suffered property damage when a prime mover and trailer went over the edge of a narrow road near Dorrigo and rolled down an embankment. The local council for the area in which the accident occurred had the care, control and management of the road.

In the case *Colavon* argued that the road had been recently graded in a negligent manner and the Council failed to carry out some roadworks and failed to install guard posts to guide heavy vehicles away from the edge of a downhill slope. *Colavon* was originally unsuccessful in their claim before the District Court Judge and appealed.

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The appeal was ultimately successful. However, the case has been referred for a rehearing as the Court of Appeal could not come to a final conclusion on the evidence before it. There were, however, a number of interesting findings which resulted from the judgment of the Court of Appeal.

Firstly, if a person wishes to bring a case claiming that there was a failure to carry out roadworks they must specify details of the actual knowledge of the road authority in their Court documents and provide details of the actual knowledge alleged or the claim cannot be made. The Court of Appeal noted with favour the comments in the case of *Porter v Lachlan Shire Council* concerning the *Civil Liability Act* and the impact of the road authority immunity provisions where the Court found:

“When a plaintiff alleges actual knowledge of something in a defendant, the defendant is entitled to particulars of any communication of that information that the plaintiff relies on, and if the actual knowledge is alleged by the plaintiff to be a matter of inference from certain circumstances the defendant is entitled to particulars of the circumstances relied on.”

In this case there were no details in the Court documents specifying that the Council had knowledge of any condition in the road that made it prone to failure. Accordingly, it was not open to Colavon to make a claim against the Council for its failure to carry out road work. The Court of Appeal concluded that the failure to plead actual knowledge meant that the case could not be heard.

In the appeal Colavon also argued that any failure in relation to guide posts was a failure in relation to a traffic control facility and was not caught by the road authority immunity provisions. The Court of Appeal agreed and held that the guard rails were traffic control facilities and therefore any failing in relation to the installation of such activities could be brought against the Council and the road authority immunity provisions had no impact on such a claim. In addition, the Court of Appeal held that any misfeasance (fault) of a Council in grading the road could also be maintained without any impact by the road authority immunity provisions. Misfeasance is an active act which the road authority has actually carried out negligently which has caused loss.

Consequently the Court of Appeal held that the claims for negligently carrying out grading and failing to install guide posts could be maintained but the claim that the Council failed to carry out road works could not. The Court of Appeal determined that there was no option but to remit the matter for a rehearing but limited the rehearing to exclude any claim arising from a failure to carry out road works.

Claimants who bring claims against road authorities need to carefully characterise and plead the negligence of the Council or road authority to ensure that they can maintain all allegations and when there is an allegation of failure to carry out road works the actual knowledge of the Council or road authority must be pleaded and proven. However, where there is an allegation that there is a failure to provide traffic control facilities or there is misfeasance on the part of the council Section 45 of the *Civil Liability Act* which contains the road authority immunity provisions will have no application. A lesson for all involved.

Tampering With Witnesses In A Civil Trial- Do You Have To Plead Fraud

In New South Wales, personal injury claims are commenced by filing a statement of claim setting out the allegations and a wrongdoer must file a defence specifying the grounds on which the claim will be defended.

The process is designed to ensure parties in litigation are not taken by surprise and that issues that would not necessarily be contemplated by the parties do not arise during the trial.

In a trial there will be a number of witnesses. So what happens when a defendant finds out that a person has engaged in conduct to entice another person to give false evidence on their behalf? Is a defendant under an obligation to raise in its defence an allegation of fraud?

The NSW Court of Appeal in *3WJ Pty Limited & Anor v Jamal Kanj* was called on to consider this precise issue.

Mr Kanj alleged that he was injured at the premises of 3WJ when he fell 2-3 metres from the back of a truck whilst loading it. He alleged that he fell because a forklift negligently driven by an employee of 3WJ collided with the truck. Liability was denied and it was contended that the forklift did not collide with the truck and did not cause the injury. Kanj had no independent recollection of the accident. He relied on an eye witness, El Ghazzaoui, another employee of 3WJ. El Ghazzaoui's version of events was accepted and Kanj's claim was upheld. 3WJ appealed. The relevant grounds of appeal were that the trial judge

erred in refusing to allow 3WJ to call witnesses to give evidence that Mr Kanj had suborned or attempted to suborn witnesses to support his case.

In the District Court El Ghazzaoui and Kanj were cross-examined on the basis that Kanj had offered El Ghazzaoui money to give evidence in his favour. The cross-examination identified the occasions when the offers were made and who was present during these occasions. 3WJ sought to call 2 witnesses to prove Kanj had attempted to persuade El Ghazzaoui to give false evidence. The trial judge refused to allow the witnesses to be called as he concluded that the suborning of Mr El Ghazzaoui amounted to an allegation of fraud which needed to be pleaded in the defence because it took Kanj by surprise. Fraud was not pleaded so the witnesses could not be called to give evidence.

Justice Ipp in the Court of Appeal disagreed.

The surprise rule relates to material facts relevant to the cause of action relied upon.

As Justice Ipp noted:

“The dishonesty of a witness, testifying in support of a cause of action or defence in which dishonesty in any form is not an element, is not a material fact that has to be pleaded. ... In a case like the present, a standard motor accident claim, where fraud is neither an element of the claim nor a defence, the fraudulent or otherwise dishonest giving of evidence “is not a pleadable matter”.”

It was noted that the obligation of a party which contends that a witness has been tampered with or has given fraudulent or otherwise dishonest testimonies is to make clear at an appropriate time the honesty of the witnesses testimony is a real issue at the trial and the witness should be fairly confronted with the allegations in question. This was done in this case in cross-examination.

Accordingly, the Court of Appeal held that the appeal should be allowed and the case remitted for a new trial and this time 3WJ will be entitled to call the witnesses who will give evidence as to the alleged offers to El Ghazzaoui.

So at the end of the day where a witness is suborned or bribed to give evidence it is not necessary to plead fraud in the case provided the fraud is not an essential element of the claim or defence. The failure of the trial judge to permit evidence to be called to support the argument that the witnesses had been suborned was wrong as it was based upon the finding of the District Court judge that fraud needed to be pleaded. That was not the case. So a retrial will now follow.

Failing To Advise May Not Result In Payment Of Damages

Not all negligent acts cause damage. It is incumbent on a person who brings a claim for damages arising from an injury to demonstrate that the damage suffered is caused by the negligence of the wrongdoer. If an injured person fails to demonstrate that the injury was caused by the negligence of a wrongdoer their claim will fail.

The NSW Court of Appeal in *Michael Neil v The Ambulance Service of NSW* has considered a claim by a person who was injured and argued that the NSW Ambulance Service were negligent as they failed to advise the police had a person that the police had taken into custody for being intoxicated required medical treatment.

Mr Neil suffered a serious blow to the head whilst walking alone in Newcastle. Police discovered him and called an ambulance. He rejected assistance from the ambulance officers. Since he was clearly inebriated the police took him into custody under the Intoxicated Persons Act 1979 (NSW). The following morning his condition was observed to deteriorate and being unable to rouse him easily, the police had him taken to the Mater Hospital. A CT scan done at the Mater Hospital showed a bleed in the brain with a fracture of the skull. Neil was transferred to John Hunter Hospital to drain the bleed. Ultimately Neil suffered from right-sided weakness (hemiparesis) which he alleged was caused by the failure to take him to hospital when the police found him in the street.

Neil sued the NSW Police and the Ambulance Service. He was successful in the District Court against the Ambulance Service only and his damages were assessed on the basis of the loss of a chance of a better outcome. Neil's damages were assessed in the order of \$100,000. Neil appealed in relation to his failure to succeed against the NSW Police and the amount of damages assessed. The Ambulance Service also appealed the finding of negligence against the Ambulance Service.

Whilst the NSW Court of Appeal noted the ambulance officers were not sued, presumably because they had immunity from liability for conduct carried out in the execution of their duties in good faith (*Ambulance Services Act, section 26*), that immunity

is to be disregarded in considering the vicarious liability of another person (*Law Reform (Vicarious Liability) Act 1983, s10(2)*) namely the Ambulance Service. The Ambulance Service accepted that if the officers were liable in negligence it was liable.

Neil was found at 2am in the morning, lying across a driveway, with a small cut to his head and a small drop of blood on the driveway. He was well affected by alcohol and was asked if he had an injury to his head but there was no clear response. He was found by the police and the ambulance were called by the police. Whilst the ambulance officers attempted to examine Neil's head Neil did not co-operate and he knocked one of the ambulance officer's hands away. The ambulance officers gave evidence that they could not examine or treat Neil or take him to hospital without his consent as he clearly did not give his consent.

Neil argued at trial not that the ambulance officers would have been able to make a definitive assessment of his condition but rather that they should have appreciated, he needed to be taken to hospital for an adequate medical assessment of his condition. Neil argued the ambulance officers should have been alert to the need for a medical assessment at hospital, something the police officers would not have appreciated. If properly advised the police should have taken him to hospital themselves.

Justice Basten noted:

"ambulance officers have a duty to take reasonable care in treating a person to whose assistance they have been called, should be uncontentious, whether the cause of the need for treatment is an accidental injury, illness or the result of a criminal attack. ..."

The relevant question for the Court of Appeal was whether the ambulance officers owed Neil a duty which required them to advise the police that Neil needed to be conveyed to hospital.

The *Civil Liability Act 2002 (NSW)*, section 5D, provides that "a determination that negligence caused particular harm comprises the following elements:

"(1)(a) that the negligence was a necessary condition of the occurrence of harm ...

(3) if it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in light of all the relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest."

Justice Basten noted that the real purpose of this provision is to provide how a Court is to identify what course Neil would have taken if there was no negligence. It was noted the assessment might include the following evidence:

"(a) conduct of the plaintiff at or about the relevant time;

(b) evidence of the plaintiff as to how he or she might have felt about particular matters;

(c) evidence of others in a position to assess the conduct of the plaintiff and his or her apparent feelings and motivations; and

(d) other matters which might have influenced the plaintiff."

Justice Basten noted on the evidence of the ambulance officers and the police the only available inference was that Neil would have not willingly gone to hospital and submitted to medical assessment, whether taken by the police (which was itself improbable) or in an ambulance. It therefore followed that Neil failed to establish, affirmatively, that he would have accepted medical assessment and treatment. Any breach of duty on the part of the ambulance officers was therefore not shown to have caused the delay in obtaining treatment and hence liability was not established. The Ambulance Service was therefore successful on the appeal.

The Court of Appeal did however note that the ambulance officers were under a duty to pass on what they knew or should know about the person who was taken into custody by the police and they failed to do so. Despite the negligence of the ambulance officers Neil did not prove his claim against them as he did not demonstrate that he would have acted differently.

The Court of Appeal also noted that the findings in relation to causation would have precluded a finding of liability on the part of the Police Service and further the Police Service was not negligent.

Basten noted that one of the police officers knew Neil had a head injury but he was not personally able to assess its significance and although he considered it very minor it was clearly of sufficient significance to warrant the calling of an ambulance when the constable on duty found Neil earlier in the night. Not to have called the ambulance in such circumstances would have been a breach of duty and if the police had simply taken Neil to the police station without calling the ambulance it would equally have been a breach of the police custody manager's duty not to have called an ambulance had the intoxicated person arrived at the police station in such a condition without any form of medical assessment having been undertaken. But that was not the case. The calling of the ambulance officers was seen as sufficient.

The end result is that Neil loses his damages of almost \$100,000 which was to be paid by the Ambulance Service.

If a person fails to demonstrate that negligence was a necessary condition of the occurrence of harm then an injured person will fail in their claim. The impact of the Civil Liability Act on this type of claim is significant and it demonstrates the impact of tort reform in NSW with regard to personal responsibility for those who are injured.

Intoxicated Pedestrian Not Entitled To Damages

In NSW the Courts place a strong emphasis on personal responsibility for personal injury claims. The *Civil Liability Act 2002* contains provisions which also apply to motor accidents which state that an intoxicated person cannot be awarded damages unless the Court is satisfied that the accident would have happened in any event, and an injured person who is intoxicated at the time of the injury is also presumed to have been contributed to the accident unless they can satisfy the Court that the intoxication was not an issue. These provisions only came into effect in late 2002 and are not retrospective however even for prior claims the intoxication is a very relevant issue.

The NSW Court of Appeal has recently handed down the decision of *David Hawthorne v Simone Hillcoat* in which the intoxication of the injured person was an issue.

David Hawthorne was struck by a motor vehicle at Picton shortly after midnight on 31 July 1999. Hawthorne suffered severe injuries and had no recollection of the accident. When Hawthorne was admitted to hospital he had a blood alcohol reading of 0.226.

Hawthorne sued Hillcoat in the Supreme Court of NSW claiming that Hillcoat was negligent.

The accounts as to how the accident occurred were given by an associate of Hawthorne's who was in the vicinity of the accident, a driver travelling in the opposite direction and Simone Hillcoat. Any discrepancies between the versions of events were only minor and in essence the first time Hillcoat saw Hawthorne he was standing in the roadway in front of her car. Hillcoat did not know where Hawthorne had come from and as soon as she saw him she slammed on the brakes and skidded but about a second later her car struck Hawthorne. The driver's side of Hillcoat's windscreen was shattered.

The trial judge in the Supreme Court found in favour of Hillcoat and Hawthorne appealed, arguing amongst other things that the trial judge had made errors in interpreting the evidence that was before the Court including the evidence that was given by accident reconstruction experts. The primary argument of Hawthorne was that if Hillcoat had been exercising reasonable skill and care and travelling at a slower speed then she would not have struck Hawthorne.

The Court of Appeal disagreed. Justice Hodgson who delivered the leading judgment stated:

" In the present case, with the wisdom of hindsight, it can be recognised that if the respondent had slowed significantly below her speed of about 55 kilometres per hour, she could have seen the appellant in the darkened area in time to avoid colliding with him. However, this does not mean that she was negligent. In my opinion, to say that the respondent was negligent because (i) she did not appreciate that the deficiency of street-lighting, coupled with the effect of the curve in the road and her headlights being on low beam, meant that, in the event that a pedestrian was standing in this darkened area paying no attention to traffic, she might be unable to see him in time to stop or steer so as to avoid hitting him, and because (ii) she did not accordingly slow down to a speed such that, in that event, she could avoid hitting such a pedestrian, would be to apply an unreasonably and unrealistically high standard, and not the standard of reasonable skill and care. "

Justice Hodgson also went on to consider the question of contributory negligence (as an aside only as Hawthorne had failed in

the claim) and determined that if Hawthorne had ultimately been successful then his damages would have been reduced by 80% as a consequence of his own negligence - no doubt due to his intoxication. The case provides a reminder that it is not sufficient for an accident to simply have occurred for a claim to succeed - there must be negligence on the part of the defendant. The personal responsibility of the claimant is a live issue and the effects of intoxication is an important part of that consideration.

Employee Moving Desk- No Negligence

The NSW Court of Appeal in *Seage v The State of New South Wales* recently determined that a police officer who was injured whilst attempting to lift a heavy desk at a police station was not injured as a consequence of the negligence of the Police Service.

Seage was a detective at the Wollongong Police Station. There was a significant increase in detectives at Wollongong Station and the station was not big enough to house the increased number of detectives. After some discussions Seage suggested to his manager that a strike force room be created and a wall could be knocked down which divided 2 rooms to create the strike force room. Seage was told to make it happen. Seage told the commander "I've spoken to the troops and they've agreed to embrace the idea and the strike force room will be up and running by the time I get back from annual leave".

Seage spoke to the other police officers before he went on leave and suggested that they get everything out of the room, clear it out, put benches around. When Seage returned from leave he found the room was unchanged except the wall had been removed and replaced with a room divider. He was disappointed. Remaining in this room was a desk which he then proceeded to move with a resultant back injury. The desk weighed about 100kg.

Seage sued the Police Service and in the District Court his claim failed. The District Court judge noted that Seage was not given directions to move the desk. The District Court judge concluded it was not foreseeable that Seage would attempt to remove the desk himself without warning or requesting assistance and accordingly the employer was not negligent for failing to take precautions against the risk of harm because it was not foreseeable and because a reasonable person in the Police Service's position would not have taken precautions.

Seage appealed. The Court of Appeal rejected the appeal. Justice MacFarlan noted that the High Court has described the employer's duty to an employee as follows:

"An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in the workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of that task that eliminates the risk, or the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work."

The Court of Appeal noted it was necessary in this case to ask whether or not a reasonable man in the Police Service's position would have foreseen that Seage's conduct involved a risk of injury to himself or a class of persons and then to determine what a reasonable man would do by way of response to that risk. Moving a desk was not part of the ordinary policing duties although there was always a possibility that that may need to be done. The Court of Appeal was of the view that it could not be concluded that the employer should have reasonably foreseen a not insignificant risk of Seage (or other members of the Police Service of his seniority) taking upon himself, particularly without assistance from any others, the performance of the relatively menial task of moving an obviously heavy desk. The presence of a large number of detectives emphasised the unlikelihood of Seage doing this. The Court of Appeal noted that it seemed to be a fit of anger on the part of Seage which led him to do what he did.

Justice MacFarlan in his judgment also noted that even if an employer would have assessed the risk as not insignificant a reasonable person would not have taken any steps to attempt to reduce or eliminate that risk. That is, the reasonable person would have at least assessed the probability of occurrence as very low.

Justice MacFarlan noted:

"A reasonable employer would ordinarily regard it was quite unnecessary to give warnings or take other steps in relation to these commonplace activities. The movement of furniture, when it forms no part of the employee's regular

duties or activities to perform it, in my view, falls into the same category."

The Court of Appeal did not believe that the Occupational Health & Safety Regulations and the requirements for risk assessments referred to in the Regulations came into play as a risk assessment was not required by Regulations 9 and 10 of the Occupational Health & Safety Regulations which were said to impose an obligation to carry out a risk assessment as they only apply where an employer taking reasonable care identifies a foreseeable hazard. Justice MacFarlan did not consider that a foreseeable hazard existed in this case.

It was the moving of the desk without assistance which was fatal to Seage. A different outcome may have resulted if he was injured whilst carrying the desk after seeking assistance.

It is true that the employer's duty of care is a strict one, however not all injuries at work will result in a negligence finding on the part of an employer.

The Way Forward With Fair Work

So, what will the landscape look like for employment contracts when the Fair Work legislation settles in? What types of contract will exist? Will there be State and Federal Awards? Will common law contracts still exist?

Fair Work will specify National Employment Standards ("NES") which will provide the minimum standards for all employment arrangements. The NES will be the starting point for all employment arrangements.

There will be minimum wage rates which are set and reviewed regularly. The minimum wage rates will be set by the Australian Fair Pay Commission.

The third level of protection will be Federal Awards. All State and Federal Awards are currently being modernised with the intention of creating a greatly reduced number of Awards which are intended to apply across industry sectors. The Federal modernised Awards are intended to replace existing State and Federal Awards. A modern Award will provide a third layer of protection as the Award will apply to employers and employees in a sector. Employers and employees who earn more than \$100,000 per annum (indexed) can enter into an agreement to contract out of the application of the Award.

The final step in the process will be an agreement with the worker. Some employers will choose to rely on Awards. Some will have common law contracts with their employees and some will have collective agreements.

There will be three types of collective agreements, namely:

- Union collective agreements;
- Employee collective agreements; and
- Greenfield union collective agreements.

So, let's look at the starting point for Work Choices, the National Employment Standards.

The National Employment Standards are minimum standards applying to the employment of employees and relate to the following matters:

- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave and related entitlements;
- annual leave
- personal/carer's leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay;
- fair work information statements.

Maximum Weekly Hours

An employer will not be able to request or require an employee to work more than 38 hours a week for full-time employees unless the additional hours are reasonable. An employee may refuse to work additional hours if they are unreasonable.

When assessing the reasonableness of the hours the following must be taken into account:

- any risk to employee health and safety from working the additional hours;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise in which the employee is employed;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of working additional hours;
- any notice given by the employer or any request or requirement to work the additional hours;
- any notice given by the employee of his or her intention to refuse to work additional hours;
- the usual pattern of work in the industry or the part of an industry in which the employee works;
- the nature of the employee's role and the employee's level of responsibility;
- whether the additional hours are in accordance with any other relevant matters.

It should be noted that modern awards or enterprise agreements may include terms providing for the averaging of hours of work over a specified period and the average weekly hours must not exceed 38 hours for full-time employees.

Request for flexible working arrangements

Employees who are parents or have responsibility for the care of children under school age may request employers for a change in working arrangements to assist the employee to care for the children. The employee will not be entitled to make the request unless they have completed 12 months of continuous service or for casual employees they must be long term casual employees and have the reasonable expectation of continuing employment.

Any request by an employee must be in writing and set out details of the changes sought and the reasons for the changes. The employer must provide a written response within 21 days of receipt of a request stating whether or not the request is granted or refused and refusal can only be on the basis of reasonable business grounds.

What amounts to reasonable business grounds is not defined by the legislation.

Parental Leave

Employees other than casual employees who have completed at least 12 months of continuous service with the employer immediately before the date of birth or expected birth of a child may request parental leave. If the parental leave relates to adoption the 12 month period must be completed before the day of placement or the expected day of placement of the adoption.

In addition if an employee completes 12 months service before the date on which they are due to take a period of unpaid parental leave they will still be entitled to parental leave.

There will be an entitlement to 12 months of unpaid parental leave provided the employee has or will have responsibility for the care of the child. Leave must be taken in a single continuous period and may start from up to 6 weeks before the expected date of birth of the child and must not start later than the date of birth of the child for a female. Concurrent leave is permitted for parents for up to three weeks. Employees can be required to give the employer a medical certificate containing details of the employee's fitness for work in the last 6 weeks before the expected date of birth and the employer may require a period of unpaid parental leave if the certificate does not certify that the employee is fit for work.

Employers will be required to provide written notice to the employee regarding parental leave at least 10 weeks before the leave is commenced. At least 4 weeks before the intended start of the parental leave the employee must confirm the start and end date for the leave. If less than 12 months parental leave is taken by the employee they can extend their leave up to the 12 month period by 4 weeks notice before the end date of the original leave period. Only one extension is permitted, however an employee and an employer may agree to further extend the period of unpaid paternal leave one or more times.

Employees will be entitled to make an application for an additional 12 months parental leave by written notice at least 4 weeks before the end of the initial parental leave period. A written response to the request must be provided within 21 days by the employer and the employer may refuse a request only on reasonable business grounds. The response must include details of the reasons for the refusal.

Parental leave cannot be extended beyond 24 months after birth or placement of an adoption.

Periods of parental leave can be reduced by agreement of the parties.

Employees will be entitled to take paid leave at the same time as taking parental leave. Personal/carer's leave or compassionate leave cannot be taken during parental leave.

Effectively there will be an entitlement of up to 24 months unpaid parental leave.

On ending unpaid parental leave an employee is entitled to return to the employee's pre-parental leave position or if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

Annual leave

Employees will be entitled to 4 weeks paid annual leave or 5 weeks paid annual leave if an employee is a shift worker as defined in a modern awards or enterprise agreements. Paid annual leave will increase progressively during a year of service according to ordinary hours of work and accumulates from year to year. Paid annual leave may be taken for a period agreed between the employer and the employee and an employer must not unreasonably refuse to agree to a request for leave. Annual leave must be paid at the employee's base rate of pay for ordinary hours of work. Paid annual leave must not be cashed out except in accordance with a modern award or enterprise agreement provision or an agreement between the employer and non award/agreement employees. Annual leave will not be able to be cashed out if the cashing out would result in employees retaining accrued entitlements of less than 4 weeks.

Personal/Carers Leave/Compassionate leave

For each year of service an employee will be entitled to 10 days of paid personal/carers leave. The leave accrues progressively during the year. The leave can be taken because the employee is not fit for work because of illness or personal injury or to provide care and support to a member of the employee's immediate family or the employee's household who require care due to a personal injury or personal illness or an unexpected emergency. The leave is paid at the base rate for ordinary hours of work. Awards and enterprise agreements may include terms providing for the cashing out of paid personal/carers leave by an employee, however, there will always need to be at least 15 days of paid leave remaining on the cashing out of the paid leave. In addition to the paid leave employees will be entitled to 2 days of unpaid carers leave for each occasion when a member of the employee's immediate family or a member of the employee's household requires care or support because of a personal illness or personal injury affecting the member or an unexpected emergency affecting the member. The 2 days leave must be taken continuously or as separate periods by agreement between the employer and the employee. The employee is also entitled to 2 days of compassionate leave for each occasion when a member of the employee's immediate family or the employee's household contracts or develops personal illness that poses a serious threat to his or her life or sustains a personal injury that poses a serious threat to his or her life or dies. Employees must give notice to the employer on taking the paid and unpaid personal/carers leave and the employer may require the employee to provide evidence that would satisfy a reasonable person in relation to the need for the leave. The evidence will include medical certificates.

Community Service Leave

Employees will be entitled to take community service leave for eligible community service activities which will include voluntary emergency management activities and jury service. The government will be able to prescribe other activities for which community service leave may be taken in Regulations. The employee will be required to provide a notice to the employer advising the employer of the period or expected period of absence that may be required by the employee and to give evidence that the employee will be engaging in the activity if the employer requests evidence. Employers will be required to pay the employee whilst they are on jury duty for the first ten days of absence.

Long Service Leave

Employees will be entitled to long service leave in accordance with award-derived long service leave terms. The obligations for long service leave will be found in modern awards and agreements rather than prescribed in the NES.

Public Holidays

Public holidays are prescribed by the legislation and include New Year's Day, Australia Day, Good Friday, Easter Monday,

Anzac Day, the Queen's Birthday, Christmas and Boxing Day. Awards and enterprise agreements may include terms providing for substitution of a day or part of a day that would normally be a holiday. Employees must be paid for holidays according to ordinary hours of work.

Notice of Termination and Redundancy Pay

An employer is required to provide written notice to the employee of the termination and the day of termination. Employees will be entitled to make payment in lieu of notice. The following notice periods are relevant:

- employees of not more than 1 year - 1 week;
- employees of more than 1 year but not more than 3 years - 2 weeks;
- employees of more than 3 years but not more than 5 years - 3 weeks;
- employees of more than 5 years - 4 weeks.

Where an employee is over 45 years of age and has completed at least 2 years of continuous service it will be necessary to add a further week to the notice period above.

Modern award and enterprise agreements may include terms specifying the period of notice which must be given in order to terminate employment but the terms will be no less favourable than the above.

There will also be base redundancy pay entitlements. An employee will be entitled to paid redundancy pay on the following basis:

Employee's period of continuous service	Redundancy pay period
at least 1 year but less than 2 years	4 weeks
at least 2 years but less than 3 years	6 weeks
at least 3 years but less than 4 years	7 weeks
at least 4 years but less than 5 years	8 weeks
at least 5 years but less than 6 years	10 weeks
at least 6 years but less than 7 years	11 weeks
at least 7 years but less than 8 years	13 weeks
at least 8 years but less than 9 years	14 weeks
at least 9 years but less than 10 years	16 weeks
at least 10 years	12 weeks

If an employer obtains other acceptable employment for the employee FWA may determine that the amount of redundancy pay is reduced to a specified amount which may be nil but which FWA considers appropriate. The redundancy pay provisions will not apply to small business employers, that is business employers with less than 15 employees.

Employees will not be entitled to redundancy pay if the employee rejects an offer of employment made by another employer that is on terms and conditions substantially similar to and considered on an overall basis no less favourable than the employee's terms and conditions of employment with the first employer and the new employer recognises the employee's service with the first employer for the purposes of the termination/redundancy provisions.

The redundancy provisions will not apply to employees employed for a specified period of time, for a specified task or for the duration of a specified season, an employee who is terminated because of serious misconduct, casual employees or employees to whom a training arrangement has been entered into.

The redundancy provisions will not apply to employees to whom a redundancy scheme in an enterprise agreement applies.

Fair Work Information Statement

FWA will determine a fair work information statement which will be published and contain information about the National Employment Standards, modern awards, agreement making under the Fair Work Act, the right to freedom of association and

the role of FWA and the Fair Work Ombudsman. An employer will be required to provide each employee with a Fair Work Information Statement before or as soon as practicable after the employee starts employment.

Conclusion

So, the landscape is changing. In a little under 10 months all employment contracts will need to incorporate the NES. Perhaps it's time to consider revisiting your employment arrangements to prepare to update your employment contracts with your employees as 1 January 2010 is not that far away.

Businesses need to carefully consider the impact that the NES will have on costs and prepare for the change well in advance of their implementation.

OH&S Roundup

Inform The Subcontractor Or Breach The Act

Mehrban Allam, the Managing Director of Allam Homes Pty Limited and Allam Homes, recently pleaded guilty to breaches of the Occupational Health and Safety Act arising out of circumstances where a sub-contractor carrying out building works on behalf of Allam Homes was injured.

Allam Homes undertakes construction of residential homes and engages sub-contractors to undertake the construction, co-ordinates the sub-contractors and trades and arranges for materials and utility services for projects. The company employed supervisors who had a number of building works under their care and were assigned to individual projects. The supervisor's duties included the supervision of the construction of the houses on site from excavation stage to the end of the maintenance period, co-ordination of the various sub-contractors, reading safe work method statements received from sub-contractors, monitoring the work of any sub-contractor present on site and comparing their work to the safe work method statement.

In one project a carpenter sub-contractor was injured in a fall after the collapse of a Flexi Safe Void Protection, a system that was erected in a building to create a removable floor with a platform formed by a false plywood floor secured to decks and brackets. The subcontractor sustained a fractured shoulder, fractures of his ribs, a fracture of his neck and back and other injuries when the system collapsed.

During the course of the day of the accident gyprock had been delivered to the building site by sub-contractors to Telik Ceiling Systems. The employees of the subcontractor delivering the gyprock removed the Flexi Safe Void Protection System to allow the sheets to be stacked to the second level of the building. The platform was then reinstalled and the men delivering the platform left the site. Those subcontractors had not received any training or information about the Flexi Safe Void Protection System, its erection or demolition and re-erection. This was a specialist task to be performed only by skilled and trained persons.

Allam Homes essentially accepted they could have done more in the form of signage and education to contractors in relation to the flooring system to heighten the awareness of those persons visiting or working on the company's site of the system and the risks if properly qualified persons did not dismantle and re-erect the platforms.

It was noted Allam Homes had made significant contribution to the Wesley Mission and programmes for assisting a Central Coast drug initiative and through fund raising efforts had contributed more than \$800,000 to charities.

After the accident Allam Homes embarked upon a complete review of their safety systems. Allam Home's failure was that it did not distribute any information about the Flexi Safe Void Protection System to subcontractors and it did not ensure that only trained personnel reinstalled components when it was disassembled. It was noted that Allam Homes had in its hands the assessment of the expert that supplied and erected the platform, that its dismantling and re-erection by unqualified persons, including subcontractors, posed a serious risk of injury and no steps were taken to pass this information on to contractors and others coming onto the site, such as those delivering gyprock and other building material.

It was noted that there were simple remedial steps available to Allam Homes to pass on information to their sub-contractors and this had not been done.

The Court was critical of the fact that the director who was at the apex of the organisation had totally delegated the

responsibility for occupational safety matters to others and took no steps to have those systems reviewed or audited or explained to him so as to satisfy himself that the systems were appropriate and effective. The Court was quite adamant that matters of safety cannot be delegated to others by a director without oversight and input from directors.

At the end of the day there was a fine of \$140,000 for Allam Homes and \$14,000 for the director.

Construction Death Leads To Fines Of \$175,000, \$168,500 & \$154,000

A fatality at a worksite can lead to a multitude of penalties as was seen in a recent prosecution for breaches of the OH&S Act by NSW WorkCover. Australand Holdings Ltd was the principal contractor for a large industrial complex consisting of three buildings, two of which were still under construction. The buildings were approximately five levels high and were of concrete slab and column design. Between 13 and 14 January 2003, Australand entered into a subcontract with Sassall Glass & Joinery Pty Ltd ("Sassall") for the manufacture, supply and installation of strip windows and curtain wall panels for the project, for an overall contract price of approximately \$2 million. Curtain wall panels are a form of non load bearing cladding connected to the structural members of a building to form its external façade. The curtain wall panels consist of equal size quadrants of glass separated by aluminium strips and are enclosed in an aluminium frame. The panels can be manufactured in various sizes and weights offsite, and are then lifted up the side of the building with the use of a crane or other lifting device to be installed outside of the building.

Sassall subcontracted Skyrise Installations Pty Limited ("Skyrise"), a façade installation company, to install the curtain wall panels in the buildings under construction at the site.

Mr Hill was operating a crane in the process of moving the largest size panels of a curtain wall into place. One panel weighed approximately 480 kg and exceeded the maximum weight that the crane could safely lift. While attempting to pull the crane with its suspended curtain wall panel back, the crane suddenly and without warning lifted at the back and began to fall over the edge of the floor breaking through a timber edge stop. Due to a deficiency in Skyrise's system of work, Mr Hill was unattached to the static line at this point. Mr Hill instinctively attempted to stop the crane lifting and was taken over the edge of the building by the crane. He fell four floors, approximately 15 metres to the ground. Mr Hill was on life support for four days. His injuries were severe and included a jaw fractured in several places, fractures to his left and right arms and punctured lungs. Mr Hill received a tracheotomy and had a pin installed in his left hip.

The fundamental reason why Mr Hill was not attached to the static line was that he had to unclip his lanyard from the line in order to pull the crane back far enough into the building. The two metre lanyard he was wearing did not enable him to reach far back enough. Mr Hill should have had an inertia reel system which would have allowed him full mobility to move the crane while still attached to the static line.

It was argued that Sassall and Skyrise failed to ensure that Hill was using appropriate fall protection equipment such as a retractable lanyard and the safety fence was open when he was moving the crane close to the edge of the building. It was also argued that Australand failed to supervise Hill either by its own employees or by Skyrise or Sassall's employees to ensure Hill was working at heights using appropriate fall protection equipment.

Australand had one previous conviction although that related to an incident that post dated the incident the subject of this prosecution. Accordingly Australand was treated as if they were a first time offender and the maximum penalty for the offence was \$550,000. Sassall had no previous convictions.

Skyrise and Dominique Vullo, a director of Skyrise were also prosecuted.

The Court noted that Hill was pulling back the crane under the load of the panel and that there was a clear and foreseeable risk to safety and it was foreseeable that under load the crane could by simple momentum roll forward and off the edge of the building which is exactly what it did, and given that possibility, it was essential that every practical step be taken to ensure the employee's safety, and ensure that his lanyard was attached to the static safety line at all times.

The Court noted that both Australand and Sassall were well aware that it was important for Skyrise to know the weight of materials and it was important for the weight to be clearly and accurately conveyed. After the accident the Safe Work Method Systems were changed to require the weights of the panel to be marked on the panels before being lifted.

The Court in sentencing Australand believed that it was important to impose a fine which included a component for specific

deterrence as there was some evidence of an overall failure by Australand to ensure a comprehensive and adequate follow through of what was, on any view, a comprehensive commitment to workplace health and safety. It was noted Australand acted swiftly and comprehensively to address the issues following the incident.

At the end of the day Australand were fined the sum of \$175,000, Sassall was fined \$168,500 and Skyrise, in a previous prosecution was fined \$154,000. These penalties demonstrate the significant cost to businesses engaged in the construction industry where there is a workplace injury and subsequent OH&S prosecution.

Increase In Workers Compensation Commission Costs For Complex Matters

The change in the Workers Compensation Commission structure in 2006 imposed further restrictions on the payment of legal costs. Although the cost structure was loosely based on an event system from 2002 to 2006, the November 2006 amendments imposed on the legal profession even less discretion in the calculation of costs for matters in the Commission.

An increasing trend in the Commission has been the application by solicitors acting for workers to seek an uplift (ie. increase) for their costs on the basis that the matter was complex. A maximum 30% uplift is available to legal practitioners in the Workers Compensation Commission for a complex matter. However, this uplift must be certified by an Arbitrator and is subject to the discretion of the Arbitrator.

The recent matter of *Smith - v - Roads & Traffic Authority of New South Wales [2008]* examined the types of factors that would be applied by an Arbitrator in making a certification that a matter would be complex.

Deputy President Snell firstly determined that the length of time that proceedings are on foot is irrelevant in determining whether a matter is complex. Some proceedings take longer than others but that is not a true test of whether a matter is complex. Similarly, the volume of documentary material in the proceedings is only of limited relevance. In many matters which are not complex, bulky material and documentation is obtained and put into evidence by one side or the other. This would include employment records or hospital records. By their nature those documents are not complex and in isolation large volumes of those types of documents should not attract a complex certification.

The complex noting is intended to deal with legal issues that are complex in nature. This would include issues regarding causation, numerous factual issues that are in dispute and the necessity to obtain numerous witness statements and the existence of multiple injuries and in particular, psychological sequelae.

In this particular matter where there were a number of lay witness statements obtained, a number of legal issues raised as part of the original declinature and the proceedings included the determination of reasonable actions of the employer, the Deputy President awarding the Applicant a 20% uplift on their costs to reflect its complexity. The Deputy President also commented that a complexity loading is not applicable in matters where an uplift is available for multiple employers and in the case of employer solicitors, when they are acting on behalf of the Scheme in a Lead Agent solicitor capacity.

We consider this decision helpful in providing a framework in defending complex matter uplift applications. Anecdotal experience has shown that complexity uplifts are now sought in almost every matter that proceeds to Arbitration in the Commission simply due to the length of the proceedings or the volume of documentation obtained under Direction for Production. These matters alone should not be construed as resulting in a complex matter and the normal schedule costs have adequately taken these aspects of a litigated claim into account.

Playing In A Band - Are You A Worker?

When considering whether a person is a worker pursuant to Section 4 of the *Workers Compensation Act, 1987* and *Workplace Injury Management Act, 1998* the totality of the relationship between the parties must be considered to determine whether an employment relationship existed. The following factors will be relevant:

- Was the agreement to carry out work in writing and if so on what terms?
- Could the contractor employ other people to perform work and did they employ others to do the work?
- Was the contractor engaged at stated hours on usual days?
- Did the Contractor supply their own motor vehicle?
- Did the contractor provide a fixed quotation or was the work done on an hourly rate and did the payment to the contractor include a charge for materials?

- Did the contractor supply their own tools? Did the tools include power tools?
- Was the contractor obliged to remedy any defects at their own expense?
- Was sick pay, holiday pay or superannuation paid?
- Was GST paid on invoices of the contractor?
- Did the contractor provide material and invoice for material?
- Could the contractor engage subcontractors or delegate the work (e.g. to a partner or anyone else)?
- Did the principal have capacity to direct the contractor how to do the work and when to do the work?
- Did the contractor advertise for work in local papers, using fliers, the Yellow Pages, the White Pages or by any other means?
- Does the contractor conduct a business independent from the principal?
- Did the contractor work for the public generally?
- Did the contractor have business cards?
- Did the contractor perform work for anyone other than the principal in the financial year? If so, for who and for what portion of the year and what percentage of time each week was worked for the principal?
- Did the contractor have a genuine and practical entitlement to work for others?
- Could the contractor choose when to do the work?
- Did the principal have the right to suspend or dismiss the contractor?
- Does the contractor create goodwill or saleable assets in the course of your work?
- Did the principal present the contractor to the world as an emanation of his business activity?
- Did the contractor spend a significant portion of his remuneration on his own business expenses?
- Was the contractor a company?
- Did the contractor have his own workers compensation insurance?

Arbitrators in the Workers Compensation Commission must balance the various indicators of an employment relationship to determine the true nature of the relationship and if an analysis of the indicators is not performed by an Arbitrator the findings of the Arbitrator will be open to challenge as was seen in the recent Workers Compensation Commission decision of *R Elkin & P Pinney trading as Crescent Head Tavern v Bradshaw*.

Bradshaw and her husband were a musical duo who were engaged by the Offbeat Operations Entertainment Agency of Coffs Harbour to perform at the tavern on 13 February 2004. Bradshaw tripped and fell sustaining significant injury to her left wrist at the tavern. Bradshaw commenced proceedings in the Workers Compensation Commission alleging the Tavern was Bradshaw's employer. The Arbitrator found Bradshaw was a worker within the definition of Section 4 of the Act. The Tavern appealed.

Acting Deputy President Deborah Moore overturned the arbitrator's decision and found Bradshaw was not a worker.

Section 4 of the Workers Compensation Act defines worker as "a person who has entered into works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is express or implied, and whether the contract is oral or in writing)".

The Deputy President considered all the usual indicators when considering whether a contract of employment existed. These included having the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.

The Deputy President found the arbitrator erred in finding the applicant was a worker under the Act. The arbitrator made this finding on the basis that on the evening in question Bradshaw submitted she was directed by the Tavern to perform in a specific place and for a specific period of time. The place and period of time she performed on this night was different to the place she performed at the Tavern every other time she performed there. Bradshaw claimed the small area where she was performing was causative of the injury.

The Deputy President found no consideration was given by the Arbitrator to the relevant factors which were considered in the case of *Stevens v Brodribb*, which is generally the main case referred to when determining whether an employee/employer relationship exists.

The Deputy President noted in none of the statements filed by Bradshaw (there were four) was there any reference made to any of the indicators mentioned in *Stevens v Brodribb*. A letter from Offbeat Operations Entertainment Agency confirmed they

had been Bradshaw's agent for about 14 years and Bradshaw paid them an agency fee. Bradshaw worked at the Tavern about 9 to 10 times a year and out of other venues throughout the year and was paid on the night by the venue and paid the agency fee to the agency thereafter. None of this was discussed by the arbitrator in the initial decision.

The Commission found the Arbitrator erred in not examining the totality of the relationship between the parties which is a crucial task when determining the issue of worker.

Bradshaw and her husband chose their place of business, provided their own equipment, there was no evidence to suggest the Tavern deducted tax from Bradshaw's fee and there was no element of control on the part of the Tavern over the relationship.

Bradshaw was not an employee. She was engaged under a contract for service not a contract of service. Bradshaw was not entitled to workers compensation benefits.

Union & Delegate- \$61,550.00 in Fines- Breach Of Freedom Of Association Provisions

Deans was the site shop steward for the CFMEU at the CSL Parkville construction site. He was elected by the employees of CSL to be the occupational health & safety delegate. One of Deans duties was to conduct the safety induction for new employees.

In September 2006 Deans inducted a number of employees onto the site. In the course of the induction conducted by Deans, he ascertained two employees were not financial members of the CFMEU and another employee was not a member of the CFMEU. After the inductions, only employees who were financial members of the CFMEU commenced work. One of the employees made a complaint to a workplace inspector who proceeded to conduct an investigation to ascertain whether Deans, by his actions, had breached the Freedom of Association provisions in the Workplace Relations Act.

Section 792 of the *Workplace Relations Act, 1996* provides that an employer must not, for a prohibited reason, threaten to dismiss, injure, alter or discriminate against an employee. The Prohibited reasons include that the employee or proposed employee is not, or does not propose to become or proposes to cease to be, a member of an industrial association. The prohibited reasons include the employee's membership of a union. Section 794 also prohibits an employer or person from inducing an employee to become a member of an industrial association.

The Federal Magistrates Court of Australia imposed penalties totalling \$61,550.00 on Deans and the CFMEU after it was found they had contravened the right to Freedom of Association. The Court found the conduct of Deans and the CFMEU struck at the very heart of the Freedom of Association provisions in the *Workplace Relations Act, 1996*.

The Court upheld that an employer may legitimately offer individual agreements to existing employees and at the same time refuse to collectively bargain with those who decline to sign up with a union without breaching the Workplace Relations Act, 1996. Also, an employer can require the signing of individual agreements as a condition of employment rather than engage employees under an award or collective agreement. The Court has found this does not victimise the applicant employee on the basis of their entitlement to the benefit of the other instrument as they are not actually employed and have no such entitlement.

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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