

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. In this month our feature article deals with one of the problems that may confront police in Australia when dealing with criminal activity. We can be contacted at any time for more information on any of our articles.

Assault and Trespass Committed By Police Officers

In recent times there has been a focus on the loss and damage caused by terrorist and riotous behaviour. Such loss and damage could relate to property, financial or psychological matters and could involve complex and competing legal issues. Police powers to deal with terrorist and riotous behaviour have been bolstered recently. Accordingly, the level of policing and the amount of scrutiny over that policing will increase considerably.

Policing, of course, is a very difficult and highly charged task, with officers having to make quick decisions in stressful circumstances. In some cases an officer may overstep the mark and act unlawfully and commit acts of trespass and assault (possibly the same acts they were intending to prevent).

In the recent Court of Appeal decision of State of NSW -v- Ibbett Mrs Ibbett succeeded in an action against a police officer for trespass to land and assault. The facts of this case do not stem from acts of terrorism or riotous behaviour, but the actions of the police officer could certainly be an indicator of what is yet to come.

The officer had chased Mrs Ibbett's son who was suspected of having committed a traffic offence. The son drove his car into Mrs Ibbett's garage and closed the door. The officer slid under the door, drew his gun and aimed it at the son in order to arrest him. Mrs Ibbett entered her garage from a side door and told the officer to leave. The officer pointed the gun towards Mr Ibbett briefly and demanded she open the garage roller door so his fellow officer could enter. The officers arrested the son and stripped searched him in the vicinity of Mrs Ibbett.

The Court of Appeal decided that turning the weapon on Mrs Ibbett was "outrageous conduct justifying of a contemptuous disregard of Mrs Ibbett's rights and was deserving of the censure of the Court". Mrs Ibbett was awarded general damages for the assault and aggravated damages for the trespass to land. She was awarded a total of \$105,000 plus costs.

An issue for the Court of Appeal was whether the exemplary damages (damages designed to punish or deter a defendant from certain conduct) that were also awarded for the assault and the trespass were precluded by the *Civil Liability Act* 2002 (NSW) and whether, in any event, they were justified. As to the first issue, the Court held that s 21 of the *Civil Liability Act* does not preclude the award of exemplary damages in a case such as this where there has been "an intentional act... done with intent to cause injury". As to the second issue the Court found that while there was no specific finding as to the state of mind of the officer, there was at least implicitly sufficient factual basis for an award of exemplary damages for the assault, and that his indifference as to whether he had lawful authority to remain on Mrs Ibbett's property after he had dived under her garage door was sufficient basis for the award of exemplary damages for the trespass to land.

Having regard to the heightened focus on greater policing and what follows from such activity, we could see an increase in this type of litigation in the immediate future. Alternatively, the Government may see fit to reduce the rights of individuals as they presently exist.

Employers & Others Who Are Negligent-What Are The Rights Of Recovery?

In many situations an employee is injured in circumstances where both an employer and another party has been negligent. The laws of New South Wales provide different methods for the calculation of damages that may be recovered from employers and negligent third parties.

The damages recoverable from an employer are regulated by the *Worker's Compensation Act, 1987*. Damages recoverable from third parties are generally regulated by the *Civil Liability Act, 2002*. Each piece of legislation provides a different mode of assessment of damages and each has a threshold. The *Civil Liability Act* provides a threshold which prevents injured persons from recovering damages for pain and

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suffering only where the injury falls below 15% of the most extreme case. The *Worker's Compensation Act, 1987* is more draconian and where a person's injury results in a degree of permanent impairment of less than 15% as assessed pursuant to specified guidelines then a negligence claim cannot be made against the employer by the employee. Where the permanent impairment does not meet the threshold under the *Worker's Compensation Act*, does this mean that the employer will not be liable to contribute to a damages claim which must be paid by a negligent tortfeasor? The answer is yes.

In *Forstaff Blacktown Pty Limited - v - Brimac Pty Limited* the New South Wales Court of Appeal has confirmed that where an employee is not entitled to maintain a damages claim against his employer as his claim falls below the relevant threshold, any other party who has been negligent who has contributed to the employee's injury will not be entitled to bring a claim for contribution against that employer.

Paul Lawrence Johnson was an employee of a labour hire company, Forstaff Blacktown Pty Limited and was injured on 8 November 1999 when working at the premises of Brimac Pty Limited. Forstaff had provided Johnson's services as a labourer and forklift driver to Brimac. The proceedings were heard before a District Court Judge who had found that both Brimac and Forstaff had been negligent and assessed the culpability of Brimac and Forstaff at 80%/20%. The Judge did assess the damages under the two different regimes and determined a sum under the different regimes and effectively ordered Forstaff to pay 20% of the damages assessed under the *Worker's Compensation Act*.

Forstaff appealed and the appeal was successful.

In essence the Court of Appeal determined that Mr Johnson's injuries were such that he did not suffer from a permanent impairment of 15% or greater. The only evidence concerning his impairment was of a lesser figure. Applying a proper assessment of damages under the *Worker's Compensation Act, 1987* would have resulted in the conclusion that Johnson would not be entitled to maintain a claim for damages against his employer. In those circumstances Brimac was therefore precluded from seeking contribution from the employer.

The net effect of the Court of Appeal's judgment is that Brimac is ultimately liable for the entire damages assessed under the *Civil Liability Act* and has no right of contribution from the employer.

Where an employee's injuries are such that on an assessment of impairment he does not reach the threshold to bring a claim for damages under the *Worker's Compensation Act, 1987*, a negligent third party who has contributed to the employee's injuries will not be able to seek any contribution from the employer. Nevertheless, it must be remembered that in some circumstances there will be an agreement between the employer and the negligent third party. If that agreement provides that the employer effectively agrees to indemnify the third party for any loss the third party will be able to rely upon those contractual rights, although the worker's compensation insurer will not be liable.

Falling Through Skylight a Foreseeable Risk

The New South Wales Court of Appeal has recently considered the general principles of negligence as codified by the Civil Liability Act 2002 in an incident involving a 12 year old boy, Martin Ferreira who died when he fell through a skylight. The skylight was in the roof of a community centre situated in a park. The park was designed to attract children and was fitted with swings and other playground equipment. Martin had been playing with a friend in the park and had climbed onto the roof to retrieve a dart. Martin had climbed onto the roof by climbing up a nearby mesh fence which was surrounded by undergrowth.

Martin's father sued Waverley Council who were responsible for the park for damages for mental harm allegedly sustained as a consequence of his son's death. Ferreira was entitled to do this as the Civil Liability Act 2002 entitles a "close member of the family" to bring such a claim. At trial Ferreira was successful and awarded damages of \$138,400.00. Waverley Council appealed. The Council contended that it had not been negligent and even if it was the damages should have been reduced for Martin's contributory negligence. It was also argued that the future economic loss awarded to Ferreira was too high.

In the leading judgment Justice Ipp considered the effect of section 5B of the Civil Liability Act. Section 5B (1) provides that a person is not negligent in failing to take precautions against a risk of harm unless (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and (b) the risk was not insignificant and (c) in the circumstances, a reasonable person in the person's position would have taken those precautions. The section also provides that in determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things): (a) the probability that the harm would occur if care were not taken, (b) the likely seriousness of the harm, (c) the burden of taking precautions to avoid the risk of harm, (d) the social utility of the activity that creates the risk of harm.

Justice Ipp noted the following:

- The fence (which was a mesh design) and the undergrowth made it relatively easy for children to climb onto the roof. The removal of the fence and undergrowth would have reduced the chances of children climbing onto the roof and therefore the likelihood of them falling to the ground. It was foreseeable that a child such as Martin might fall to the ground once he had climbed onto the roof. How he precisely fell did not matter.
- The risk of harm in 5B(2) must be considered objectively by the particular circumstances of the case. In this case the likely seriousness of the harm was severe injury or death.
- The condition of the skylight through which Martin fell demonstrated that there were either no or inadequate inspections if

- The risk of the skylight collapsing was foreseeable.
- A reasonable person would have installed a grille over or under the skylight and in failing to do so the Council had breached its duty of care.
- There was no contributory negligence as a boy of Martin's age would not have properly appreciated the risks.
- There ought to be a reduction in the allowance for future economic loss.

The Council's appeal on liability failed. The appeal was however successful on quantum only.

The decision demonstrates that the Civil Liability Act 2002 has not really altered the concept of foreseeability. Where there is a risk of harm that is foreseeable Councils are obliged to take action to address the risk or face the consequences. Children's actions are unpredictable and they regularly put themselves in peril and this will continue to present problems for Councils who will need to ensure that facilities provided to the public are safe, even when used in a way in which was not contemplated.

The Judicial Perils of Foreseeing the Future

In a recent New South Wales Court of Appeal decision His Honour President Mason, and Justices Hodgson and McColl unanimously upheld Judge Quirk's decision of the District Court in awarding damages to a plaintiff which included a future economic loss buffer of \$160,000.00.

The Facts

The facts of the case were that on 7 April 2001, Montgomery sustained a severe injury to his left knee in the form of a ruptured anterior-cruciate ligament and a tear to his medial meniscus as a result of falling into a pit owned by Telstra in a footpath along Parramatta Road, Leichhardt. At the time of the incident, the pit was covered by a broken cover which was in turn covered by synthetic carpet. Leichhardt Municipal Council had engaged Roan Constructions Pty Limited to carry out the repair work on the pit. Part of the specific instructions given to Roan were to provide an artificial grass or carpet to be placed over the top of the pit to provide clear access to surrounding commercial properties.

The Decision at First Instance

On consideration of the facts presented, Judge Quirk concluded the Council owed a non-delegable duty of care to Montgomery and found further that the duty had been breached the duty as a result of the pit cover being broken at the time of the accident when Roan had placed, in accordance with their instructions, carpet over it. Further, Judge Quirk found no contributory negligence on behalf of Montgomery. Upon analysis of the injuries sustained, Judge Quirk concluded Montgomery had suffered an injury giving rise to an entitlement of non-economic loss at 30% of the most extreme case. In relation to future economic loss, Judge Quirk awarded the \$160,000.00 as a buffer.

Court Of Appeal Decision

The Council appealed.

In determining the appeal, the Court of Appeal considered it necessary to examine two broad issues in relation to liability.

- Whether Judge Quirk had erred in concluding the carpet was placed over the pit and/or that the cover was broken.
- Whether Judge Quirk had erred in concluding the Council owed a non-delegable duty.

In relation to damages, the Court of Appeal concluded there were three main issues to be considered.

- The amount of non-economic loss.
- Whether Judge Quirk failed to make the appropriate deduction for vicissitude in relation to future economic loss.
- Whether the future award for the economic loss buffer was excessive.

The Court of Appeal held the finding that the pit cover was broken and covered by carpet, was open to the Trial Judge on the evidence.

In relation to whether the Council owed a non-delegable duty Court of Appeal concluded that the duty the Council owed to Montgomery was correctly defined as a non-delegable. In reaching this conclusion, the majority noted:

"In these situations a special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or property of another or is so placed in relation to that person or his property as to assume particular responsibility for his safety in circumstances where the person affected might reasonably expect that due course would be exercised."

The majority concluded that this was the correct way to define the Council's duty to Montgomery as the Council had maintained complete control over Roan who were engaged to perform the work to correct the broken pit cover. In considering Judge Quirk's finding in relation to non-economic loss, it was unanimously agreed having regard for Montgomery's injuries that Judge Quirk's finding of 30% of the most extreme case was a finding open to be made as was the award of economic loss. A substantial allowance was acceptable despite the absence of any arithmetic calculation.

Conclusion

The New South Wales Supreme Court of Appeal has confirmed that a non-delegable duty to road and footpath users can arise where defects are under the control or supervision of a responsible authority that has utilised contractors to remedy those defects. In relation to future economic loss buffers the Court of Appeal, although unanimously supporting the original judgment, have sounded a warning to judicial officers. This can be seen in the sentiments of President Mason who stated:

"This is the highest cushion or buffer award that I have encountered, I would not wish to encourage litigants and Trial Judges to go down this path in preference to the more difficult yet exposed path of reasoning towards an award in the more conventional manner. In my experience a buffer or cushion award is usually reserved to the situation where there is a smallish risk that otherwise secure employment prospects may come to an end, in consequence of the tort related injury, at some distant time in the future."

The sentiments of President Mason may encourage trial judges to consider a more arithmetic approach to allowances for future economic loss except in the "smallish cases".

OH&S Penalties Snapshot

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

What Happens If You Do Not Plead Guilty Early

Boka Aluminium Windows Pty Ltd ("Boka"), while a supplier of aluminum windows (as its name indicates) was also a company which constructed commercial premises which premises were, after completion, leased. Boka through Mr Franovic, a director of the Company engaged A Team Concrete (Aust) Pty Limited to perform concreting work at a site at Prestons. Those sub-contractors brought onto the site a commercial truck on which was attached a concrete boom pump. A Team Concrete (Aust) Pty Ltd was pouring the first concrete load of Readymix concrete when the boom connection to the pump collapsed. The boom broke from the pump unit at the main trunnion connection where two remaining rings both fractured. They fractured from fatigue. Evidence revealed a number of tests were available to test the strength of the connections which snapped and caused the boom to collapse. Either of those tests could have been conducted during maintenance which, if either one had been performed, would have identified the fault.

When the boom arm fell to the ground it struck two workers, Mr James Gowans and Mr Joseph Romeo. Mr Romeo suffered fractures to his neck, shoulder and ribs. Mr Gowans suffered a head injury and died as a result of this incident. Boka retained overall responsibility for the site. The boom pump was not owned by Boka.

Boka and Mr Franovic, were charged with an offence under NSW OH&S legislation for failing to ensure that proper maintenance and inspections had been carried out on the pump prior to its use by persons at the site and failing to ensure that persons not in its employment did not work under or close to the boom of the pump. Each originally raised a defence of not guilty. However, at the close of the prosecution's case, it was agreed between the parties that Boka would seek leave to enter a plea of guilty and the prosecution against Mr Marko Franovic was adjourned.

Mr Franovic gave evidence on the plea. He revealed he had a conversation with a Mr Sam Cardile of A Team Concrete (Aust) Pty Ltd and asked for an assurance from Mr Cardile, when he was negotiating the contract for the concrete pour, as to the state of his equipment. In that conversation, Mr Franovic agrees that his major concern was the reliability of the equipment and he asked: "Are your pumps in good order?" He had experienced, on other sites, the failure of such pumps which had the effect of causing a financial loss on his building projects. Mr Cardile had replied: "Yes they are all certified"

Mr Cardile then placed in front of Mr Franovic a document which, on inspection, is dated 14 April 1997. The document is from a consulting engineer and it was an authorisation in the nature of an inspection certificate for the said boom pump for the purpose of certification. However, in authorising the certification in 1997, while the document states the boom satisfied the requirements of the relevant code for concrete placing booms, it in addition states: "...if regularly maintained (it) will continue to operate satisfactorily."

Evidence revealed Boka did not require the production of maintenance logs recording the regular maintenance of the boom pump. Mr Franovic revealed he had asked no further questions after being shown the certification. He did not note the date on the document.

The boom pump was not owned by Boka and the court was required to assess the contribution of Boka to the relevant risk and focus on the nature and seriousness of Boka's breach. The offence led to two employees being exposed to a risk to their health and safety arising from conduct of the employer.

The court found that Boka's attitude to questions of workplace safety and the steps it took to improve safety following the incident were commendable. Boka met its obligations to review its procedures. Boka was a first offender who has now in place proper safety practice and procedures which procedures ensure there should be no risk of re-occurrence. The court accepted that Boka had not manifested, by its commission of this offence, a continuing attitude of disobedience to the law or likelihood that any offence of like kind would be committed in the future.

Nonetheless elements both of general and specific deterrence were taken into account in the court's consideration as the company continues to work in the construction industry. Specific deterrence was necessary as construction is a continuing activity of Boka. There must also be an element of general deterrence factored into the penalty to ensure the fundamental obligations for safe working are once again brought to the attention of employers.

It is important to note that other companies involved in the incident had been dealt with by the court previously and fines had been imposed on those companies. A court when determining a penalty where multiple defendants are involved must deliver a penalty to each defendant that accounts for the nature of the offence committed by each defendant but at the same time is not out of kilter with fines imposed on others. This is the principle of parity. The principle of parity was relevant to this offence.

Three companies, A Team Concrete (Australia) Pty Limited, A Team Concrete Pty Limited and Concrete Civil Pty Limited were associated with this incident and had already been sentenced by the Court. A Team Concrete (Australia) Pty Limited faced two charges, one under section 8(1) of the Act and one under section 8(2) of the Act. A Team Concrete Pty Limited faced one charge under section 10(2) of the Act. Concrete Civil Pty Ltd pleaded to one charge (they were relevantly employers or machine owners). A Team Concrete (Australia) Pty Limited was fined \$100,000 for its two offences; A Team Concrete Pty Limited was fined \$55,000 for its offence as the owner of the plant and Concrete Civil Pty Limited was fined \$45,000. In the consideration as to parity it is relevant to note each company was identified as a "small" company to which the application of s6 of the *Fines Act* 1996 was held to be appropriate. Further, A Team Concrete (Australia) Pty Ltd, who received the larger penalty was found guilty of two offences under the Act.

When a plea of guilty is entered the court will discount the fine for the fact there has been acknowledgment of guilt and saving of court time. Fines are discounted by a maximum of 35% and 25% of that discount relates to the early plea of guilty. In this case as a guilty plea was entered after the prosecution case was presented the court determined that the full discount of 25% should not be allowed but instead allowed a discount of 15%.

The company was ultimately fine \$45,000 and Mr Franovic's penalty will be determined at another time.

Stock Picker Fatality Leads To Substantial Fine.

JR Haulage Pty Ltd t/as State Warehousing and Distribution Services a logistics company was fined \$130,000 following a prosecution under s8(1) of the Occupational Health and Safety Act 2000 relating to a fatality that resulted from inappropriate use of a stock picker. The company was charged with failing to ensure adequate instructions and adequate information was supplied to employees on the safe use of the stock picker;

failing to supervise adequately the use of the stock picker by employees; failing to provide adequate training to its employees in the use of the stock picker; and
failing to identify, assess and control adequately risks and hazards in relation to the use of the stock picker.

Mr Pineda an employee of the company did not hold a certificate of competency for the operation of a forklift truck. He did not hold a certificate of competency for the operation and use of a load-shifting device such as the stock picker.

From 6 January 2003 to 24 July 2003, Mr Pineda was a trainee for operation and use of a forklift and, as such, was required to keep a training logbook, which was to be signed by his supervisor. From 6 January 2003 to 3 June 2003, Mr Pineda kept a training logbook signed by his supervisor. The log book kept by Mr Pineda did not record the type of equipment operated or used by the Mr Pineda.

On 5 June 2003, Mr Alley assessed Mr Pineda's competency in the operation of forklift. Mr Alley assessed Mr Pineda as having achieved "*practical*" competency but as not attaining "*knowledge*" competency. As a result of the assessment Mr. Pineda was deemed "*not yet competent*" on the basis that he "*need[ed] more theory study*". After the assessment, Mr Alley kept (incorrectly) the training logbook for Mr Pineda.

After 5 June 2003, Mr Pineda continued to operate forklifts and stock pickers but he did not keep or maintain any training logbook. Mr Pineda's supervisor did not inquire or ensure that Mr Pineda kept a training logbook for forklifts or stock pickers in that time. At the time of the accident on 24 July 2003, Mr Alley held Mr Pineda's training logbook.

On 24 July 2003, Mr Pineda was not a trainee stock picker under a training logbook system, although the company assumed (incorrectly) that Mr Pineda remained a trainee stock picker.

Since about November 2002 some employees of the warehouse played cricket during their lunch break on the driveway outside dock 15, batting from the southern Victoria Street end of the premises towards the northern end of the warehouse. The employees used tennis balls wrapped with insulation tape, a bat and a rubbish bin for stumps. The balls were often hit up onto the roof of the warehouse between docks 12 to 13 and docks 13 to 14. Mr Tuite or Mr Pineda would retrieve the balls from the roof about twice a week.

On 24 July 2003, Mr Pineda had driven the stock picker out through dock 12 along the outside eastern wall of the warehouse approximately 7 metres towards dock 13. Mr Pineda was operating the stock picker from within the cage, which consisted of an operator platform, and he used the controls to raise the platform. The concrete driveway sloped away from the wall at this point, and was not level. Mr Pineda was in the process of retrieving balls that were collected in the guttering of the warehouse roof.

At the time of the accident a strong gust of wind was blowing from the northerly direction over the 15m wide driveway between the warehouse and the next-door building on the left. Mr. Pineda had positioned the stock picker about 1.5m from the warehouse and about 4m from dock 13. The stock picker control end was facing south, towards Victoria Street, Wetherill Park. Mr Pineda then raised the platform of the stock picker up to reach the gutter of the warehouse.

As the platform reached a certain height, it appeared to become unstable and started swaying towards the driveway. A witness saw the stock picker fall and crash down across the driveway with Mr. Pineda at the controls inside the stock picker. Mr Pineda suffered severe head injuries and died later that day as a result of his injuries in Westmead Hospital.

The slope of the area where the accident occurred was found to be between 4 and 5.5 degrees. Consequently, at the time of the accident, the stock picker was being operated outside of its operational gradient limits. In addition the maximum grade allowed for the machine was specified to apply with a fork height of 300mm, and that based on information provided the fork height at the time of the accident was in excess of 300mm. No instruction had been given to the operators not to use the picker outside the warehouse and the operators had not been instructed about the dangers of operating a stock picker on an uneven surface.

The company was a significant employer within New South Wales providing employment for some 674 employees in New South Wales, Victoria, and Queensland and approximately 553 of those employees are in New South Wales. The industrial record of the company revealed one prior conviction on 6 December 2004 brought under s8(2) of the *Occupational Health and Safety Act*. Relevantly, in the transport and distribution industry, the company operated a significant number of forklifts, stock pickers and rigid trucks. The court held in the circumstances, its industrial record does not reveal blatant disregard for its obligations under the *Occupational Health and Safety Act 2000*. The court noted the company makes a significant contribution as a corporate citizen in New South Wales through its charitable activities and was satisfied the defendant contributes significantly as a corporate citizen and employer within New South Wales.

The court was impressed with the company's actions after the incident which no doubt influenced the ultimate penalty and noted "The defendant, to prevent a recurrence of such an incident, has modified its work practices and has also erected large metal warning signs outside the warehouse. It has reviewed its procedures generally particularly related to the use of logbooks by trainees but also refined the practices of its supervisors. Toolbox meetings are now used to impress on its employees the need for fundamental safe working procedures and that those procedures be respected by the individual employees. I am satisfied, on the evidence before me, the updated system for safe working has ensured the responsibility between the defendant company through its supervisor and their trainees is now much more formalised and the new policy is rigorously applied by the defendant."

A tragic incident and a substantial penalty in all the circumstances.

The Size of the Business Is Relevant to the Fine Imposed-Incapacity to Pay the Fine

Minett Enterprises Pty Ltd (Minett Enterprises) entered a plea of guilty to an offence arising under s 10(1) of the *Occupational Health and Safety Act 2000*. It was alleged the company failed to ensure that premises were safe and without risk of to the health of persons, in particular, Mark Anthony Marchiori, whilst forestry work was undertaken. Mr Minett was employed by the company

Mr Marchiori sustained serious injury when a sapling, inadvertently pushed over by a skidder driven by Mr Minett, struck him directly on the head. As a result of the incident, Marchiori suffered a major head injury, which resulted in paraplegia and a certain degree of brain damage. As a consequence, Marchiori is confined to a wheel chair. Prior to commencing work on 11 March 2003, Minett and Marchiori talked about the way in which they would co-ordinate their activities to maintain a 'safe working distance' between Marchiori and the skidder. The working area was divided into quadrants so that the tree feller and the skidder would be working in different areas. Also, Minett and Marchiori discussed an 'exclusion zone' around the skidder.

However, no specific distance was established, orally or in writing, as the minimum 'safe working distance'. Also, no specific distance was established, either orally or in writing, for the 'exclusion zone' around the skidder. The Company provided no written site safety plan, no safe work method statements, nor any written instructions regarding the 'safe working distance' to be maintained in the felling area and/or the 'exclusion zone' around the skidder. When interviewed after the event, Minett stated that these are matters of common sense. Communication between skidder operator and the tree feller was based on the skidder operator and the tree feller maintaining visual contact so that they could 'signal' each other. Any verbal communication required the skidder operator and the tree feller to be close enough to talk directly to each other.

On the day of the incident, Marchiori started work at the site prior to Minett. When Minett started work, at about midday, Marchiori was already felling trees. After Minett and Marchiori had lunch, Marchiori was again felling trees whilst Minett was operating the skidder.

While no documents were tendered as to the current financial position of either company, Mr Minett gave evidence during cross-examination that:

"The financial situation of the company at the moment is getting to be in very dire straits ... We owe a fair bit of money to account customers. Doing our best to pay them but at this stage, yes, it's in very poor state of affairs, income wise."

Mr Minett also gave evidence that both he and his partner derived a small income from Minett's Logging in 2004, which came to a total of \$14,860, or \$7,430 each. Mr Minett stated that this was his only source of income. A decision to discontinue the business was also made and Minett would not be earning any future income from the business.

All of the factors as detailed above have an impact on Mr Minett's capacity to pay the fine. That is a consideration which may be taken into account and is premised on s 6 of the *Fines Act 1996* which states as follows:

"In the exercise by a court of a discretion to fix the amount of any fine, the court is required to consider:

- (a) such information regarding the means of the accused as is reasonably and practicably available to the Court for consideration, and
 - (b) such other matters as, in the opinion of the Court, are relevant to the fixing of that amount."
- to give that information proper consideration in the exercise of its sentencing discretion."

In relation to a defendant's ability to pay the court noted that:

“... where a defendant desires to plead incapacity to pay as a determinative issue in the imposition of penalty, it behoves the defendant to discharge the onus that such a submission invokes by placing before the Court all of the information it relies upon in support of that submission in order for the Court to give that information proper consideration in the exercise of its sentencing discretion.”

The Court noted

“In the circumstances, the evidence relied upon by the defendant, going to its limited means, is somewhat scant. Nevertheless, the defendant is essentially a one man company and any penalty imposed will fall squarely upon Mr Minett. The defendant may not be strictly impecunious but it would appear to have very limited financial means. Mr Minett gave evidence to that effect, which I accept. There is no evidence to the contrary. Mr Minett would not appear to have any other significant assets. He resides with his de facto partner in her home. Overall, the approach I propose to adopt is that I accept that the imposition of a heavy fine would be a burden on the defendant and the financial resources of Mr Minett who, ultimately, will bear the burden of paying it. Accordingly, that consideration should be given appropriate weight on the question of penalty. Ultimately, to the extent appropriate within the context of that consideration, the penalty should reflect the objective seriousness of the offence.”

A fine of \$30,000 was imposed.

Are You In Control Of Premises

The NSW OH&S legislation imposes obligations on persons in control of workplaces. Section 17(1)(a) provides:

“Persons in control of workplaces, plants and substances used by non-employees to ensure health and safety

(1) Each person who has, to any extent, control of:

- (a) non-domestic premises which have been made available to persons (not being the person’s employees) as a place of work, or the means of access thereto or egress therefrom... shall ensure that the premises, the means of access thereto or egress therefrom or the plant or substance, as the case may be, are or is safe and without risks to health. “

A prosecution of Euroka, a mining company arose out of an incident that occurred on 28 March 2000 when a part of the roof of an underground opal mine collapsed. At the time of the collapse the mine was being worked by Peter Buchanan and Anthony Kennedy. Mr Kennedy was seriously injured. Neither Mr Buchanan nor Mr Kennedy were employees of the company. The mine was located at Dead Bird Opal Field at Lightning Ridge and the company was the registered claim holder of the mine, which was known as Claim 26313.

The charge brought against the company was that being the controller of non-domestic premises (i.e., Claim 26313) that was made available as a place of work, the company failed on 28 March 2000 to ensure the premises, and the means of access thereto or egress therefrom, were safe and without risk to health. The particularised failures of that charge were that the company: failed to ensure that the shaft used for access remained uncluttered and able to be used in an emergency situation to retrieve injured persons; failed to ensure that the ladders used to gain access to the mine were properly secured and not swinging; failed to ensure that adequate and proper propping and/or bracing of the roof took place; failed to ensure that the mine was equipped with an adequate communication system so as to enable medical and emergency services to be contacted when persons were injured in the mine; failed to develop and put in place an emergency procedure; and allowed the roof collar to be over excavated so as to reduce its support.

In proceedings in the Chief Industrial Magistrates Court the magistrate was not satisfied beyond a reasonable doubt that the respondent had sufficient ability to control to any extent non-domestic premises in the form of an underground opal mine such control being an essential element of the offence created by s 17(1)(a).

The magistrate held in a practical sense, the evidence strongly points to the conclusion that Peter Buchanan occupied Claim 26313 with an understanding on the part of Euroka that it was he who attracted the controlling authority and ability inherent in the position of registered claim holder. The fact that the claim had been registered to Euroka was more by way of convenience or contrivance rather than suggesting that Euroka was at all times the true occupier of the Claim or had any role in controlling the mining activities undertaken within it.

WorkCover appealed and the appeal succeeded.

The Full bench carefully considered legislation that regulates mining claims and noted:

“We also consider that the fact Peter Buchanan may have had control of the mine in a practical or day-to-day sense does not necessarily mean that the respondent was precluded from exercising any control. Section 17(1)(a) is directed to the situation of a person who makes premises available to other persons (not being the person’s employees) as a place of work. If that person has, to any extent, control of the premises the person has a duty to ensure that the premises and the means of access thereto or egress therefrom, as the case may be, are or is safe and without risks to health.

Even if Wayne Buchanan and his father Kevin, as directors of Euroka, felt personally constrained in intervening in the working of the mine by Peter Buchanan because they considered that, in all practicality, the mine was Peter's Claim, that is not a basis upon which to conclude the respondent had no ability (or responsibility) to compel corrective action to secure safety. The respondent had a right or interest in the Claim that was akin to a proprietary right or interest. It was clearly open to the respondent and, indeed, it was legally

obliged under the conditions of the Claim, to direct Peter Buchanan to take steps to ensure safety in the mine. If those directions were ignored, there were other steps available to the respondent, through the Department of Mineral Resources, to have Peter Buchanan removed from working in the mine. Once the respondent withdrew its permission for Peter Buchanan to work the mine Peter Buchanan was in breach of s 5 of the Mining Act and liable to criminal sanctions. The conditions of the mining claim also gave the respondent exclusive mining rights in the use of the land associated with the claim. It is no answer to that course of action to contend that for all practical purposes the Claim belonged to Peter when it was open to, and incumbent upon, the respondent to take the steps we have outlined in meeting its obligations to ensure safety at the mine."

To determine the issue of control the test applied by the Full bench was as follows:

"The obligation imposed by s.17(1)(b) on the appellant to ensure the plant was safe and without risks to health is to be so viewed and as assisting in the determination of whether it had at the relevant time the requisite degree of control over the subject plant as would make it liable. In other words, the proper operation of the section requires, in our view, the degree of control which a defendant has over plant or substances or non-domestic premises, as the case may be, to be to the extent to which that person is able to ensure safety by guaranteeing, securing or making certain. For that reason, the applicable meaning of "control" in the context of s.17, by reference to its ordinary meaning as earlier outlined, must, it seems to us, have about it the sense of not mere "sway", "checking" or "restraint" but rather controlling in the sense of "directing action" or "command" - the ability of a person to compel corrective action to secure safety, having in mind the context and purpose of the statute, clearly seems to be necessary in order to enable safety to be ensured. If it were otherwise then the alleged controller would be simply unable to assume the strict duty cast by the section. ... It may be thought that the words "to any extent" qualify the word "control" so as to reduce or diminish the degree otherwise than as we have stated; however, and conformably with the context of the section, the phrase "to any extent, control" means no more than that the person liable being able to compel (or direct or command) to any extent."

A legal entitlement to impose changes or regulate a situation will be sufficient for the purposes of NSW OH&S legislation to establish "control" of premises even if the owner of premises is not entitled to occupation of the premises.

Summary

The above cases highlight the importance of maintaining control at all times. The size of a company does impact on the ultimate fine for a breach of OH&S legislation as does the status of a company in the community. In addition the timing of a guilty plea will have a financial impact on the ultimate penalty imposed.

Inconsistent versions of an accident-Will the plaintiff Lose?

What happens when there is an inconsistent version of the causes of an accident? Will the injured employee lose their damages claim? Not necessarily. The New South Wales Court of Appeal was asked to review a District Court finding that an employer breached its duty of care, based on inconsistent accounts of how an employee was injured. In the same matter, the Court of Appeal was also asked to determine whether an assessment of 30% of a "most extreme case" was so unreasonable as to warrant appellant intervention.

The matter was originally heard in the District Court. The primary judge, His Honour Acting Judge Murray QC, found the Appellant had breached its duty of care and awarded damages of \$233,931.00. There were inconsistent accounts as to how the injury occurred but all accounts involved lifting a sheet of glass, it was just a question of which one. The employer argued the employee's evidence was he had been injured when lifting the first panel of glass and due to the primary judge concluding that he had been injured whilst lifting another panel of glass, it was not open to the primary judge to conclude the employee had been injured due to the employer's negligence. It should be noted that irrespective of which lift may have produced the low back injury, it was conceded all of the glass panels the employee was required to lift on the day in question were overweight. The Court of Appeal all agreed it was open to the primary judge to find on the whole of the evidence that the accident was due to the employer's negligence. The primary judge was not prevented from making a finding of negligence if, after evaluating all the evidence he could conclude the lifting of a panel of glass other than the first panel amounted to a breach of duty of care, provided it was within the employee's pleaded case. Enough evidence was tendered to make this finding.

The second question to be determined was in relation to the award of non-economic loss damages. The employer submitted the primary judge's assessment of 30% of a most extreme case was excessive considering the employee was also suffering from limitations due to another injury.

The Court of Appeal reminded us that the exercise of determining non-economic loss was neither scientific nor normative. Whilst non-economic loss awards are susceptible to review by the Court of Appeal, the original judgement involves an exercise of discretion and the Court of Appeal will rarely intervene. It was up to one of the parties to demonstrate the trial judge had erred to reach a conclusion which was manifestly erroneous. The Court of Appeal was prepared to intervene in this matter as they were unable to reconcile the primary judge's conclusion that the employee's complaints were "moderate" and entitled an assessment of 30% of a most extreme case. The Court commented it was difficult to assess 30% of a most extreme case for a person with muscular ligamentous strain, an aggravation of pre-existing degenerative low back and an ability to return to work, albeit light. As such, the assessment of 30% was so unreasonable that it warranted appellant intervention. Accordingly the Court reduced the worker's assessment of non-economic loss to 20%. This also resulted in the worker losing his ability to claim economic loss given the modified common law provisions contained within the *Worker's Compensation Act, 1987*.

Although it should be remembered damages for non-economic loss are not applicable to any cases for work injury damages in NSW brought since 26 November 2001, the recent Parliamentary Committee reviewing the legislative changes in personal injury over the last few years have recommended the reinstatement of some form of "a most extreme case" test in determining thresholds for common law employment cases. Indeed, His Honour Justice Santow commented the legislature had previously failed to appreciate these anomalous and harsh consequences when these particular modifications to the common law regime had been previously introduced. We wonder if Justice Santow's comments will be seized upon in the next round of legislative amendments in NSW.

With respect to the decision on liability, the Court of Appeal has once again demonstrated it is prepared to extend employees/plaintiffs a reasonable degree of latitude in demonstrating negligence on the part of the employer despite a less than perfect recall of events and inconsistent medical histories.

Bessemer "Hostess" Deemed Worker

The Courts have on many occasions had to consider whether or not a person is an independent contractor or an employee. This is a particularly significant issue for companies in premium calculations for worker's compensation. The Court of Appeal in New South Wales has recently had the opportunity to consider this issue in *QBE Worker's Compensation (NSW) Limited v Simaru Pty Ltd t/as Bessemer Sales and QBE Mercantile Mutual*.

Rita Santelli brought proceedings against Simaru Pty Limited t/as Bessemer Sales ("Bessemer") in the District Court. Santelli was involved in selling Bessemer's products including pots and pans. Santelli had to buy the pots and pans from Bessemer and also purchase a kit so she could show people what the various cookware looked like. The sales would generally take place at parties at which the plaintiff was the "hostess". Santelli was responsible for making all the arrangements in relation to the sales of the items including who she would give a demonstration to and the time and the place of the demonstration. If she was successful in selling goods then she would take an order. That order was delivered by Santelli to Bessemer who then provided her with the goods. Santelli would personally be paid by the customer and she would pay the account with Bessemer. Santelli was not provided with any group certificates nor paid any superannuation by Bessemer.

Santelli sustained injury when she slipped whilst attending Bessemer's premises for the purpose of paying an account. Bessemer sought indemnity from its worker's compensation insurer and public liability insurer, both of whom denied indemnity. The worker's compensation insurer of Bessemer argued that Santelli was not an employee and the public liability insurer argued that Santelli was an employee. At trial Judge O'Toole found that the worker's compensation policy applied. The worker's compensation insurer of Bessemer appealed.

Judgment was handed down by the Court of Appeal on 20 December 2005. *QBE Worker's Compensation (NSW) Limited* was unsuccessful in the appeal. President Mason who delivered the leading judgment found that Santelli fell within Clause 5, Schedule 1 of the *Workplace Injury Management Act, 1998*. According to Clause 5 of Schedule 1 "A salesperson, canvasser, collector or other person paid wholly or partly by commission is, for the purposes of this Act, taken to be a worker in the employment of the person by whom the commission is payable, unless the commission is received for or in connection with work incidental to a trade or business regularly carried on by the salesperson, canvasser, collector or other person or by a firm of which he or she is a member." In the Court of Appeal's opinion the plaintiff's remuneration by way of mark up was properly characterised as commission and even if Santelli was not a salesperson her managerial functions that generated an additional right to commission were sufficient for her to fall under Clause 5. Nor did the plaintiff fall under the exception in Clause 5 for a commission received incidental to a trade or business. In the Court of Appeal's opinion Santelli was not conducting an independent trade or business.

The Court of Appeal's decision will have a significant impact on businesses where persons such as Mrs Santelli carry out tasks and receive what is classified as commission. The worker's compensation premiums of such businesses will increase significantly as a consequence of this decision. Industries engaging sales agents should now stand back and watch the flood of wage audits by NSW Workers Compensation Scheme Agents seeking to claw back premium as a consequence of the decision.

The Building & Construction Industry – Under the Microscope!

The Federal government recently introduced plans for a major overhaul of the Building & Construction Industry in response to what is perceived as an urgent need to reform within the sector.

This follows claims that it was "an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy". Whilst some will disagree with this observation, there is clearly a uniqueness associated with Australia's building & construction industry.

Is the problem a result of the dynamics of the different trades or the contractual nature of business, both during the tender process and the subsequent construction process? Many are in agreement that something needs to be done – the question is how much and in what way?

The federal government's response was to change the Industrial Relations system. The change was swift and to the point.

The changes seek to establish an industry specific tribunal; impose limits on pattern bargaining and strike action; and impose substantial

constraints on union organizing rights and activities. Many players particularly unions view the reforms as intrusive measures - dealing with enterprise bargaining and accountability as to how parties should conduct themselves within the workplace.

Whilst there are aspects of the IR reforms which clearly represent a response to recommendations of the Cole Royal Commission, it is clear the government is attempting to address a perceived "deep-seated culture" of disregard for the law and unlawful conduct within the Building & Construction Industry. That manifests itself not just in relation to conduct of employees and unions, but also conduct from companies and commercial pressures which are placed on smaller sub-contractors.

Although the reforms and the associated federal Building and Construction Code are aimed at one industry sector, it is questionable whether the legislation and more specifically the impact of the Code will be confined to the traditional building & construction area.

Flow on effects are sure to have implications for the manufacturing sector and some service sectors. The desire to be "Code compliant" so as to obtain federally funded work will impose additional responsibilities to suppliers. This is particularly the case for manufacturers who primarily supply building and construction related materials to federally funded construction projects.

Considerable debate about the Code's application is occurring. The issue has been raised by many employers directly with the Department of Employment Workplace Relations (DEWR).

Defining the boundaries of the building and construction industry will be an interesting issue and despite guidance from DEWR, considerable confusion as to the Code's application continues. Some employers have adopted the conservative position, accepting that the Code applies to their operations and have restructured their agreements and practices accordingly. Not to do otherwise may result in loss of federally funded work, a risk many are not willing to take.

But what a measure they have taken to just to keep the "perceived" work.

Others are in a difficult situation with new workplace agreements being identified as having "non Code complaint" clauses, with another two years before they expire. Re-negotiating these agreements not only presents a logistical nightmare for employers, but in many cases will be impossible as unions argue about the application of the Code.

Workplace relation laws have at times been viewed by employers as ineffective with the capacity of industrial tribunals to control and/or assist questionable. The new reforms are sure to generate considerable legal debate as to their application. Some view the new system as simply not an option, given the commercial realities associated with a building project and time periods associated with enforcing orders and other legal remedies currently available.

It is questionable whether these reforms will change how business is conducted within the building and construction industry.

The sector itself is more a reflection of the commercial structure unique to the Building & Construction industry, particularly provisions within building contracts and deadlines. There is the ever feared "liquidated damages" clauses dealing with delays occasioned by sub-contractors conduct; that is one of the main problems, as opposed to the legal system or the players within the system.

The establishment of the Australian Building Construction Commission is seen as desirable by many employer groups and employers. It will represent a dedicated body with the power to investigate, and enforce workplace relations laws and to prosecute. It will also be a third party capable of seeking court and tribunal orders or damages on behalf of affected people (to date only one prosecution has been filed in the Victorian Magistrates court against the CFMEU). This will certainly be seen as attractive to smaller operators in the sector who do not have the financial capacity to commence legal actions or who simply prefer not to get involved.

One of the reforms objectives is to enable small business to have access to information and to an enforcing body (ABCC) to handle workplace relations matters as well as assist in recovering damages if affected by unlawful industrial action, particularly by a union or principal contractor. It also aims towards providing parties, both employers and employees, with a genuine choice dealing with bargaining and reaching agreement as to how their workplace should be governed, be that under a certified agreement or an Australian Workplace Agreement.

This will mean increased accountability and compliance by both unions and employer associations, particularly regarding officials, employees and members of these organisations. The federal government is open to using its power as a major service user to forge reforms and place more responsibility on main parties.

Provided the application of the reforms are uniform and across the board to both unions and employers, the critics who have labelled them as an attack on the union movement will be in the minority. It is desirable that any main sector become efficient and flexible, not just for job growth but for the Australian economy; whether this will occur in the Building & Construction industry, time will only tell.

Whilst there is a need to place the Building & Construction Industry under the microscope and address some deep seated practices, particularly regarding the structure and nature of building contracts, it is questionable whether the new legislation which is expected to be implemented early in 2006 and the continued federal Government's focus on the sector can address the critical aspect of contractual relations. It is how a building contract is implement and the ever present "liquidated damages" clause that is more the main issue in need of reform - as opposed to the conduct of the parties.

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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