

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on the insurance market in Australia. In this month our feature article deals with the High Court's recent decision concerning DVT litigation in the airline industry. We can be contacted at any time for more information on any of our articles.

The Curtain Comes Down on Litigation Against Airlines in Australia

Deep vein thrombosis (DVT) and so called economy class syndrome has received significant publicity recently. Airlines have moved to include warnings concerning DVT in instructional literature and in-flight entertainment consequent to litigation involving claims that passenger DVT is caused by flights.

A claim was mounted in Victoria which was to form the basis of a class action against Qantas Airways and British Airways. Brian Povey sued Qantas and British Airways in the Supreme Court of Victoria for damages for personal injury for his DVT. In his claim he alleged that he suffered a DVT as a result of traveling on the airlines from Sydney to London and return. British Airways and Qantas brought an application to dismiss the claim on the grounds that the claims were bound to fail. The original trial judge refused to dismiss the claim but the Court of Appeal of Victoria found that the trial judge was in error and reversed his decision dismissing the claim. Mr Povey's case then found its way to the High Court. On 23 June 2005 the High Court effectively closed the door for DVT litigation against airlines in Australia.

Claims against airlines arising as a consequence of international flights are regulated by the Civil Aviation (Carriers Liability) Act 1959. More than 75 years ago when international travel was in its infancy Australia became party to a Convention known as the Warsaw Convention and the Civil Liability Act incorporated the rules in the Warsaw Convention to regulate the liability of carriers to passengers. The Warsaw Convention was amended on a number of occasions. The Warsaw Convention as modified by a number of protocols applied to Povey's claim.

Povey's claim was that he suffered from DVT caused by conditions of and procedures relating to passenger travel upon the flight. Povey complained of cramped seating from which it was not easy to move, the discouraging of movement about the cabin and the offering of alcohol, tea and coffee during the flight. He also complained of lack of warnings.

The problem for Povey was that the Warsaw Protocol as it applied provided that a carrier "is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger but the liability is subject to an important qualification, that is, the carrier is liable:

"If the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking".

It was necessary for Povey to demonstrate that Mr Povey's condition was the result of an accident. The High Court held that Povey's claim was not an accident and the circumstances could not bring his claim within the definition of accident in the Warsaw Convention as modified.

The US and UK Courts have been littered with DVT cases against airlines. The High Court reviewed the many decisions in the various Courts and noted that the House of Lords in England is yet to deliver their decision of DVT litigation against airlines.

Justice Callinan in his decision noted:

"No-one who has every endured the discomfort of a long journey by air and seemingly ever diminishing personal space provided by airlines for economy class passengers, could fail to sympathize with the plight of this appellant. But whether the respondents could and should have done better in this and other respects for him on his long flights the subject of his appeal, is not the question rather it is ... whether on the facts alleged by the appellant he may be able to make out against the respondents a case of accident within the meaning of "accident" as that word is used in Article 17 of the Warsaw Convention 1929. The answer to that question must I think be a negative one."

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Justice Callinan was also quite critical of the Warsaw Convention as modified. Justice Callinan imposed a question:

"Why, it may be asked should a carrier by air be exonerated if it has negligently injured a passenger simply because there has not been an accident? Great technological strides rendering air travel much safer and predictable have notoriously been made, even in the 30 years since the last, relevant modification of the Convention. It is at least open to question whether air carriers and their insurers are enjoying, as arguably sea carriers also are, the benefit of an anachronistic approach to the perils of travel as defined by out moded international instruments ... Perhaps the time has come to revise these instruments in the light of increased knowledge and improved technology in the interests both of consumers, and greater certainty of applications."

Povey's decision effectively brings an end to the much feared class actions to be brought against airlines arising out of DVTs developed as a consequence of flights. However, at least one of the judges of the High Court was critical of the benefits that applied to airlines from the Warsaw Convention.

It is highly unlikely that the Australian Government will seek to step away from the Warsaw Convention and introduce more novel concepts which would allow claims such as Povey's claim to be brought against airline carriers. The airlines industry will no doubt oppose any changes at an international level. Australian international travelers on airlines are effectively left with one option only, that is, traveling on aircraft and risk a possible DVT without recourse to compensation from the airline.

Is a School Liable when a Teacher Turns Their Back?

School yard play is not without risk. Children that play can get into dangerous situations. Schools have a duty to take reasonable care and supervise children during playtime. But how far does that duty extend?

The High Court of Australia has recently confirmed that schools owe a duty to ensure that children are properly supervised when playing, but not necessarily with constant supervision.

Farrah Hadba was an 8 year old in year 3 at St Anthony's Primary School in the ACT. Each day there was a morning recess between classes and it was customary for the seniors at the school to play at the top of the oval and the junior school to play at the bottom oval. Each area was supervised by 2 teachers. The school had devised a "hands off rule" requiring the children not touch each other during play in the playground. The school told the children of this in class, in assembly and by posters.

At one morning recess it was the year 3 children's roster to use a flying fox in the playground. The playground equipment had been at the school for a little less than 6 years but had been used almost everyday twice a day in that time on many thousands of occasions. There was no evidence that in the past there was any serious accident involving the flying fox.

Unfortunately Farrah was standing on one the platforms on the flying fox and took hold of the triangle ready to ride across to the other platform when a boy and girl in breach of the school's "hands off rule" each grabbed one of her legs. Farrah struggled to free herself and called on the children to desist, although the girl complied the boy did not. Farrah was pulled off the flying fox and her face struck the platform as she fell to the ground. Her injuries were the result of the two children having behaved in breach of the "hands off rule".

The event was not observed by the teacher on duty as she had looked away from the flying fox to survey the bubblers and the toilet block which were also in her supervision area. The accident happened in about 20 to 30 seconds between the moment the teacher left her point in the playground where she could see the flying fox to the moment she was informed by two pupils of the accident.

The High Court in a majority judgment noted that if Farrah was to succeed the only basis was that one teacher should have been assigned to the supervision of the fixed equipment and nothing else and that a second teacher should have had responsibility for all other areas, and that if that task was beyond the capacity of the second teacher, a third should have been assigned to duties. The majority judgment of the Court noted that:

"It must be remembered that there was no evidence of any serious accident on the flying fox in the past, there was no evidence of pupils having pulled each other from the flying fox in the past, and there was a well known and enforced school policy against this."

The majority judgment also noted:

"The magnitude of the risk of injury was not high, and nor was the degree of probability of its occurrence. Perhaps the existing staff could have carried out supervision without increased expense and without complaint or damage to moral. But for them to carry out recess supervision duties on three, or perhaps four or more occasions per week rather than two was a course which entailed difficulties and inconveniences."

In reaching their decision to reject Farrah's claim the majority of the Court noted:

"The school operated a system under which particular teachers had specific duties of supervision. But understandably teachers were expected to minimise dangers of kinds other than those to which their specific duties related. The Court of Appeal required that there be a

teacher whose sole duty was to watch the flying fox and adjacent equipment. Whether it be assumed that that teacher notices a crisis developing nearby - at the bubblers or toilets - which the teacher responsible for those areas was not available do deal with. The teachers supervising the flying fox and adjacent equipment either will not be prohibited from intervening or will be prohibited from intervening. If the teacher is not prohibited from intervening and does intervene that teacher will be unable to continue the constant supervision of the flying fox and adjacent equipment. If, on the other hand the teacher is prohibited from intervening, how is the risk of the harm at the bubblers or the toilets to be dealt with? The teacher responsible for those areas cannot be everywhere at once unless the duties in relation to those areas are, like those relating to the play equipment, also duties of constant supervision, and sufficient teachers are deployed to enable them to be carried out. The number of staff required, the financial and other costs of providing them and narrowly specialised responsibility required of them are going well beyond the bound of reasonableness.

Nor is it reasonable to have a system in which children are observed during particular activities for every single moment of time - it is damaging to teacher a pupil relationships by removing even the slightest element of trust, it is likely to retard the development of responsibility in children, and is likely to call for a great increase on the number of supervising teachers and in the cost of providing them."

The High Court majority held that Farrah's case did not seek to explain how constant supervision of the flying fox and adjacent equipment could be carried out and it was difficult to conclude that a different system would have prevented the injuries. The High Court majority noted it was unlikely that a teacher, even a teacher watching the equipment uninterrupted, would have been able to prevent Farrah's fall once the two children had grabbed her leg.

The High Court overturned the Court of Appeal's determination and Farrah lost any entitlement to compensation for the injuries. The school escaped liability. It is however interesting to note that there was one dissenting judge.

Justice McHugh did not agree with the majority and noted that the critical matter was that when the teacher's back was turned and more importantly when the teacher was out of sight, an opportunity for mischief presented itself and if a mischievous child availed him or herself of the opportunity of pushing and shoving of children using the flying fox an injury was "on the cards". Justice McHugh noted that the system of recess supervision gave rise to a reasonably foreseeable risk of injury and that risk caused Farrah's injury and noted the probability was high that the injury would not have occurred had the system not required the teacher to turn her back on the children. Justice McHugh noted that the school could have required an extra teacher to be on full-time recess duty and that would have prevented the need for the supervising teacher to turn her back.

Justice McHugh noted that when assessing a person's responsibility for a risk it is important to balance variables against conflicting responsibilities and the expense, difficulty and inconvenience of taking action to eliminate or reduce the risk. Justice McHugh reminds us that:

"... a risk may have a low probability of occurring when the person is a mature adult or ordinary intelligence. It may have a high probability of occurring when the person at risk is a small child. So action on the part of the risk maker that is reasonably required in one situation may not be required in a different situation the immaturity of a child, especially a young child - makes the child insensitive to danger to him or herself and other children."

Was a simple increase in the level of supervision of the children all that was necessary to remove the risk? The majority of the High Court did not think so but one judge believed that the risk should have been removed by the school. Each situation turns on the facts of the case but for the St Anthony's Primary School a comprehensive "hands off" policy played a role in protecting the school from a major loss.

The High Court has highlighted that it pays for authorities such as schools to have in place clear, well publicised and enforceable rules for students that dictate appropriate and inappropriate behaviour within school grounds. The case also highlights that where an authority has a duty to provide reasonable supervision it does not necessarily follow that such supervision must be uninterrupted and continuous.

Treacherous Shallow Waters

The Victorian Supreme Court of Appeal ("VSCA") has recently thrown itself into shallow waters reaffirming a decision of the Victorian Supreme Court ("VSC") to award damages of \$5.6 million to a person injured in a diving accident. The Court did however conclude one of the two authorities found at first instance to owe a duty of care only owed a "generalised duty of care" and accordingly was not liable.

The Facts

In late December 1996 Jason Ballerini, aged 16 went to Collie Park near the Victorian town of Baroogo. Ballerini decided to go swimming in the Bullanginya Lagoon which was a renowned swimming hole in the area. Ballerini walked out onto a log which jutted out over the lagoon and dived into the water. Previously the water underneath the log had been sufficiently deep enough to dive into, however, due to recent flooding, the bed of the lagoon had become raised resulting in Ballerini striking his head on the bottom of the lagoon. Ballerini suffered severe spinal injuries rendering him a quadriplegic.

The Berrigan Shire Council was the trustee of the public reserve which correlated to it being the trustee of land surrounding the lagoon. The Forestry Commission of NSW had control and management of certain areas within the lagoon, in particular the bed of the lagoon. Prior to the litigation taking place the assessment of damages was agreed between all parties at \$8 million.

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The VSCA concluded the VSC had found correctly in concluding that the log from which Ballerini dived into the lagoon had protruded from land occupied, controlled and managed by the Council and subsequently the Council owed a duty of care to Ballerini. In relation to the Forestry Commission, the VSCA disagreed with the VSC and found that although the Commission owed a generalised duty of care to members of the public, that duty did not extend to taking steps to avoid the risks of diving from a log into a swimming hole.

In determining each of the duties owed to Ballerini by both the Council and the Commission the Court held that each entity's duty differed on account of the charter and purpose attached to each authorities control and management of the land. In determining the definitive differences in the charter and management of the lagoon and surrounding land, the VSCA considered the Commission's principal concern was in maintaining, developing and exploiting state forests and importantly the area under its occupation did not afford it the means to control the entry by the public into the lagoon.

The VSCA concluded the Commission had a "generalised duty of care" to members of the public making use of the swimming hole and was involved in supervising vast areas with many kilometres of river frontage. The Council's charter of purpose, on the other hand, was to develop and maintain town infrastructure. As a part of this charter it had powers of management and control over the land of Collie Park and accordingly the powers to create and maintain the park so that it was an attractive recreational feature of Barooga.

The VSCA agreed with the VSC findings that the duty owed by the Council had been breached. They found that an authority such as the Council exercising reasonable care in occupying, controlling or managing the area, having regard to the risks associated with the swimming hole and the recent floods would have reached a conclusion that the log overhanging the lagoon needed to be removed as it provided for a serious risk of injury associated with its use. The Court considered the alternative in which the log could remain and the processes by which the Council could have warned of its inherent dangerous use. The Court considered that at the very least the Council should have put in place appropriate signs warning of the dangers associated with diving into the lagoon.

In examining the issues of contributory negligence, the VSCA concluded the VSC had found correctly in ruling Ballerini was 30% responsible for the accident which occurred. In their decision the VSCA concluded Ballerini was a 16 year old of reasonable intellect and education who was able to exercise care for his own safety, he had been aware that recently the area had flooded and as such he is expected to consider his own safety before diving into the lagoon. The Court considered that Ballerini should have possessed such foresight, however he did not have the same appreciation and assessment of the risks as a mature adult would have in the same circumstances. Justice Nettle accurately depicted the Court of Appeal's position by stating:

".... at his age and state at life he could be expected to exercise some degree of caution, even if it were no more than jumping feet first from the log into the water before diving head first into it. In my view his failure to exercise at least that degree of caution was significant and it was blameworthy."

Conclusion

It is interesting to note the above decision bucks the trend of the NSW Appellant Courts, in the judgments of *Wyong Shire Council - v - Vary* and *Mulligan - v - Coffs Harbour City Council*.

With the Australian High Court poised to hand down their decision in *Wyong Shire Council -v - Vairy and Mulligan - v - Coffs Harbour City Council* it will be interesting to see where this controversial area of the law ends up. Ballerini's case may also find its way up to the High Court.

Please Take a Seat at Your Own Risk

The New South Wales Court of Appeal has recently overturned a judgment of a District Court judge who had awarded a sum in excess of \$240,000.00 to Esmeralda Gomez when she was injured when she fell from a chair in a real estate office.

Esmeralda was injured when she fell off a chair in the reception area of Ashfield Realty a real estate agent office. She had visited the premises to make enquiries about three bedroom residential units. The person who would have attended to her was busy and the receptionist asked her to wait and take a seat. When she put her weight on the chair it tipped forward and she slipped off and fell to the ground suffering injury.

The original judge found that the chair posed a risk of injury to customers because of a feature of its design that rendered it unstable when a person sitting on it leant forward or sat towards the front of the seat. The trial judge found that there were reasonable steps that could have been taken to prevent the injury. The chair could have been removed from the tiled reception area and placed on a carpeted area or the chairs could simply have been replaced as they were not expensive.

The Court of Appeal did not like the trial judge's reasoning.

The Court of Appeal noted that the trial judge had found that Ashfield Realty had breached its duty of care in failing to ensure the chair was

safe to sit upon. That was an incorrect expression of the principles to be applied when determining whether a duty of the kind owed by Ashfield Realty, as occupier of the premises, to Mrs Gomez has been breached and may have misled the judge into making the finding that she did. Ashfield Realty's duty was to take reasonable care to avoid a foreseeable risk of injury. It was not to ensure that the chair was safe to sit upon. In essence the Court of Appeal held that Ashfield Realty neither knew nor ought to have known that the chair was unstable and unsafe and was not liable in those circumstances.

Don't Stack the Crates

A recent decision in the New South Wales Industrial Commission has delivered a message to transport companies and warehouse operators to take care when stacking crates.

Top Container Transport was responsible for the operation and management for a warehouse facility for the general cartage, storage and distribution of steel and ceramic products. The company employed Maxwell Cook. Cook used a forklift at the premises to stack steel crates containing stainless steel welded pipes. The crates were approximately 6.2 metres long, 0.6 metres wide and 0.57 metres high and fully laden weighed approximately 1,400kg. The warehouse premises were owned by Keralex. Cook received delivery of 12 crates and put them one on top of the other, six crates high. Cook was operating the forklift near the stack when it collapsed and one of the crates fell on top of the forklift resulting in Cook suffering a fatal injury.

WorkCover mounted prosecutions against Top Container and Keralex. In addition Francis Byrne the sole director of both Keralex and Top Container was also prosecuted for the alleged offences based on a deemed commission of the same offence as the two companies. WorkCover also prosecuted Donald Steel who was the general manager of Top Container Transport. Steel pleaded guilty and was fined \$5,000.00. Byrne also pleaded guilty and was fined a total of \$17,500.00, \$8,750.00 for each of the two charges brought against him arising consequent to the charges laid against Top Container Transport and Keralex.

Both Keralex and Top Container Transport were in difficult financial circumstances at the time of the prosecution. Top Container Transport was in liquidation and Keralex was placed in administration prior to the hearing of the prosecution. The two companies did not have any legal representation when the matter came before the Court. Penalties of \$140,000.00 were imposed on each company. The maximum penalty for each company was \$550,000.00. The Court held that the responsibility for attending to matters of safety at the premises must clearly lie on both companies and it was noted that both companies during the offence had common directorships. The Court noted that the culpability of the two corporate defendants was equal.

One matter that required some attention was the capacity of the corporate defendants to pay a fine. The correspondence from the liquidator and administrator suggested the defendants had little financial means. The Court noted that the defendants had a level of debt that according to the administrator prevented the defendant from defending the prosecution and it might be thought that the imposition of a penalty on the defendant would in the circumstances be futile. As there was no proof of debt in evidence and the principal purpose of punishment is to deter future breaches from others it was still important to impose a penalty. Taking into account the defendant's capacity to pay a fine the substantial penalties were still imposed on the two corporate defendants.

Driver Fatigue Caught in the Headlights in NSW

In a bold step to combat fatigue in the long haul trucking industry WorkCover NSW has announced new legislation supplementing the Occupational Health and Safety Act 2000 and associated Regulation to reduce the inherent dangers of driver fatigue amongst long haul truck drivers. The new legislation came into effect on 13 June 2005 however it will not be enforceable until 1 March 2006.

Under the existing Occupational Health and Safety Act and associated Regulation employers of truck drivers are to address driver fatigue where fatigue is found to be at levels which danger the employee's health and safety. The new legislation backed by WorkCover is a result of a New South Wales Government backed enquiry in conjunction with 3 years of consultation with industry and unions relating to driver fatigue within the road freight industry. The new regulations attempt to relieve the pressure trucking companies place on transport operators and drivers to meet delivery targets and deadlines.

The new amendments place obligations on the employers of long distance truck drivers, head contractors who contract self employed drivers and consignors and consignees of goods that are being transported over a long distance. The new regulations define a long distance trip as anything more than 500km.

The new legislation imposes the following duties and obligations:

Duty to Assess and Manage Fatigue of Drivers

An employer must not cause or permit any of its employees to transport freight long distances unless the employer has carried out an assessment of the risk and harm from fatigue to the employee's health and safety in transporting that freight unless the employee has put in place a process to eliminate the risk of fatigue.

A head carrier must not cause or permit any of its self employed to transport freight long distance unless the head carrier has carried out an

assessment of the risk and harm from fatigue to the self employed's health and safety in transporting that freight unless the self employed has put in place a process to eliminate the risk of fatigue.

A consignor or consignee must not cause or permit any of its employees to transport freight long distance unless the consignor or consignee has carried out an assessment of the risk and harm from fatigue to the self employed carrier's health and safety in transporting that freight unless the self employed carrier has put in place a process whereby to eliminate the risk of fatigue.

Duty of Consignors and Consignees to Make Enquiry as to likely of Drivers

A consignor or consignee must not enter a contract with a head carrier for the transport or freight long distances unless the consignor or consignee is satisfied that the proposed delivery timetable is reasonable in relation to fatigue of any drivers driving to that timetable and that each driver who is driving freight long distance under the contract is carried by a driver fatigue management plan.

Driver Fatigue Management Plan

All employers, consignors or consignees and head carriers must prepare and implement a driver's fatigue management plan for all its employees and self employed carriers who are driving under their control.

The driver fatigue management plan must target and address the risks associated with fatigue inherent in transporting freight over long distances where it is at all practicable to do so.

Conclusion

The new changes to the Occupational Health and Safety Act and associated Regulation will require all authorities affected by the changes to implement change. Employers in the trucking industry will need to develop fatigue management plans to comply with the legislation, review contracts for the transportation of freight over long distances to eliminate the risk of fatigue which their drivers may be exposed to, and provide further education and training to employees regarding driver fatigue.

Industrial Commission of New South Wales Increases Penalty Relating to Fatality

On 3 July 2002 Donald Wilson was removing trees and undertaking wood chipping on a construction site in New South Wales. His employee and a contractor Jardine were assisting in the process. Mr Jardine was preparing a sling around trees in order to assist an excavator operator remove the trees and deliver them to Wilson. Jardine was found lying on the ground about 6 metres from the excavator and his injuries were consistent with having been run over by a heavy vehicle such as an excavator. Wilson was prosecuted under New South Wales occupational health and safety legislation and the original trial judge found there was clearly a failure to provide a proper level of supervision and instruction and there were problems with the work method that allowed Jardine to stand behind the excavator in the vicinity of the chipper.

The judge noted that the Fines Act, 1996 provided that in exercising a discretion to fix the amount of fine a court is required to consider the means of the accused and other matters as are relevant to the fixing of that amount. There was extensive evidence as to the status of Wilson's means and the judge found Wilson was relatively impecunious. The judge noted that Wilson's outstanding debts exceeded his outstanding assets and that in his belief any significant penalty would give rise to a need to sell his family home. Having weighed up the objective seriousness of the offence the trial judge ordered that Wilson need only pay 20% of the prosecutor's costs and a fine of \$2,600.00. The maximum penalty was \$55,000.00 for the offence.

The judge's findings were overturned on appeal. The fine was increased to \$9,750.00 however the costs order made in the original trial was found to be appropriate.

The Full Court concluded that Wilson mounted an exceptional and well documented case before the Court on the issues of his financial circumstances and hardship to the family was a proper factor taken into account by the judge in determining the sentence. It was noted the judge had a discretion in relation to penalty and properly had regard to evidence of the financial situation. Nevertheless the Full Court determined the penalty imposed was manifestly inadequate. The Full Court determined that the judge at first instance did not give sufficient weight to the objective seriousness of the offence.

A fine of \$10,000.00 is a relatively small fine when loss of life is involved. New South Wales has recently enacted legislation which substantially increases the maximum penalties that can be imposed for breaches of the Occupational Health and Safety Acts which lead to fatalities.

Financial hardship will not necessarily be the answer to substantial penalties in the future. Although the financial circumstances of a defendant is one of the considerations taken into account by the Court when determining the penalty, the objective seriousness of the offence is a factor which will weigh heavily on the Court when determining the penalty.

South Sydney Juniors Loses the Game

South Sydney Juniors has a gaming lounge known as Smithy's Bar. Amusement devices including poker machines are available for use of members and guests. Employees of the Club work as cash handlers in the money change area of the lounge. Mr Jose Santos an employee of the Club was engaged as a barman and was working as a security doorman at a desk which faced glassed doors to the street. He was confronted by a person wearing a balaclava and armed with a knife who entered the glass doors took Mr Santos hostage and proceeded into a cash handling area of the lounge where he obtained approximately \$10,000.00 in cash from three other employees.

Mr Santos had not received any training as a doorman and although there was a red emergency button located under the desk where Mr Santos had been seated he had not received any training in relation to the availability for its use. The glass doors allowed automatic entry of persons from the street, there was no close circuit television system in effective operation and the doors to the cash handling area of the lounge were left open in accordance with prevailing practice.

The Club had also experienced two earlier armed hold-ups and subsequently had installed 30 security cameras within the premises and had spent approximately \$2,000.00 weekly on security arrangements and security guards since those earlier robberies.

The Club was prosecuted pursuant to the New South Wales Occupational Health and Safety Legislation for failing to ensure the health and safety at work of employees. It was the second OH&S offence for the Club. The maximum potential penalty was \$875,000.00 and Justice Boland imposed a fine of \$195,000.00.

The Club appealed to the Full Court. The Full Court noted that the OH&S Legislation is directed at obviating not eliminating risks and the legislation compels attention to the failures of the employer to ensure, by its acts or omissions, against the risks to safety of persons either at work or at the workplace of the employer. The Court concluded that the fine imposed by the trial judge was not outside the reasonable range of fines which ought to have been imposed. There was no specific error in the reasoning of the trial judge. Accordingly the appeal was dismissed and the fine of \$195,000.00 was confirmed.

Training was seen as the short coming in this scenario. A hefty penalty was imposed where arguably the unlawful and uncontrollable acts of third parties had intervened in the employee's relationship with its employer. An employee cannot take training lightly and a careful risk assessment should be carried out by an employer who exposes employees to the need to handle money in an area where the general public has access.

Delivery Driver Succeeds in Claim

In May 2004 George Bristow was awarded in excess of \$440,000.00 for injuries sustained on 17 February 2000 whilst making a delivery. Bristow was a delivery driver whose job required him to drive a semi-trailer around the suburbs of Sydney delivering pallets of groceries. On 17 February 2000 he delivered groceries to the Welcome Mart Store. He parked his semi-trailer in a lane behind the store went to the front of the store to inform a person of his presence and that he had a delivery. He returned to his semi-trailer waited for the doors to open and using a forklift removed the pallet and then maneuvered the pallet on a pallet jack up a rise in the footpath through the doorway. The clearance between the goods and door jams was approximately 6 inches on each side. It was necessary for Bristow to pull the laden pallet jack whilst walking backwards through the doorway with sufficient speed and momentum to get up the rise and at the same time check that the goods on the pallet did not collide with the door jam. While carrying out this task his right boot came into contact with a metal bracket protruding from the floor and one of the wheels then ran up on top of the steel cap causing him to fall backwards suffering injury. He had been at the premises twice before and he had hit the metal bracket once before and had complained about the bracket to the store owners. It was also noted that another delivery driver had complained about the protruding metal bracket.

The occupier appealed arguing that the delivery driver should have taken care to avoid and deal with obvious hazards which were known to him and which the exercise of reasonable care on his part would have enabled him to avoid. The Court of Appeal noted that there was no doubt that the risk of tripping over the metal bracket was obvious. The defendant was aware of the risk and the defendant knew anything protruding up from the floor was an obvious danger and even greater danger when people had to do work requiring them to concentrate on going backwards while pulling heavy load. The Court noted the risk of serious injury to a person who tripped over the metal bracket onto the concrete floor was manifest. The Court concluded that the trial judge was correct in finding that the occupier had been negligent. There was no reduction for contributory negligence in this case. The Court of Appeal accepted that the primary judge was correct in finding that there was no alternative route through which to deliver the goods. The Court of Appeal and the trial judge both formed the view that the actions of the delivery driver were no more than inadvertence and did not amount to blame worthy negligence on his part.

Bristow is entitled to retain the full measure of damages that he was awarded. Even though Bristow knew of the danger the store owner did not escape liability consequent to a failure to take action once the risk was identified.

NSW - A New Frontier

In August 2005 in the New South Wales the legal world will herald in a new era. The Local, District and Supreme Courts will for the first time be governed by a sole piece of legislation - the Civil Procedure Act 2005. There will be common forms, rules and procedures in civil proceedings in the three Courts.

The effect of the legislation is that the majority of personal injury cases will still be heard in the District Court. Proceedings can only be transferred to the Supreme Court if a Court is satisfied in the case of a motor accident claim or workplace injury damages claim the damages will exceed \$1 million and the case involves complex legal issues or issues of general public importance. In any other case proceedings may be transferred if damages awarded are likely to exceed the jurisdictional limit of \$750,000.00. The Act does not affect the Courts' current jurisdictional limits.

The legislation introduces a number of new elements into the Courts such as the electronic filing of documents. E-mail may also be used to serve a document if the other party consents. The Act also gives the Court power to direct expert witnesses to confer on matters, endeavour to reach agreement on matters or provide a joint report on matters. Mediation is also provided for and the rules in relation to offers of compromise and costs have changed.

A major change will occur as a consequence of the legislation in the conduct of Court proceedings. The legislation includes a number of guiding principles for conducting Court proceedings in order to facilitate the just, quick and cheap resolution of the real issues. Courts will be able to manage proceedings with the aim of eliminating delay and resolving disputes so that the costs of proceedings are proportionate to the importance and complexity of the dispute. If parties fail to take steps within the specified time then Courts will be able to impose appropriate sanctions such as costs orders.

Part 6 of the Act relates to case management and interlocutory matters. The Court has the power to give directions as it thinks fit whether or not the directions are consistent with rules of the Court for a speedier determination of the real issues between the parties.

Most significantly, section 62 of the Act gives the Court power to give directions as to the conduct of any hearing including directions in which evidence is to be given and addresses are made. The Court can give directions at any time before or during a hearing limiting the time in examination, cross-examination or re-examination of a witness, a direction limiting the number of witnesses a party may call, a direction limiting the number of documents a party may tender in evidence, a direction limiting the time that may be taken in oral submissions and a direction limiting the time that may be taken by a party presenting his or her case. The Act provides that a direction under this section must not depart from the principle that each party is entitled to a fair hearing.

Nevertheless it will be interesting to see how the application of these sections co-exist with the principles of natural justice, a fair trial and a fair go for all.

It is difficult to reconcile the legislation with decisions such as the High Court decision of *Queensland v JL Holdings* according to which case management principles play a part but not a paramount role in the conduct of Court proceedings. A Judge will now have the power to prevent a party calling all their witnesses or even cut short a cross-examination.

This form of case management is new and its impact will develop with time. How will an appellate Court deal with a situation where a party is prevented from calling relevant witnesses or a Judge cuts off a barrister in full flight? One ponders whether or not the legislation will have the intended effect of making litigation more efficient and cost effective without affecting justice.

Asset Protection Strategies can Lead to Increased OH&S Fines

The New South Wales Industrial Commission has recently delivered a judgment in *Inspector Green (WorkCover) v Metropolitan Administrative Services Pty Ltd; Inspector Green (WorkCover) v Metropolitan Demolitions and Recycling Pty Ltd; Inspector Green (WorkCover) v Giannikouris*, which exposes possible issues for company's who have structured their business affairs in a way that separates assets from their business operations.

The Court in the proceedings was asked to consider whether two companies had been in breach of the *Occupational Health and Safety Act* 1983. In determining these issues the Court examined the composition of the two companies. The two companies had the same shareholders and owners, one company conducting a business, whilst the other owned the plant and equipment. The establishment and corporate structure of the two companies was driven by asset protection strategies. It is not uncommon that businesses utilise structures that ownership of plant and equipment from the operating company.

The Court was encouraged by the Company to impose a penalty based on a single breach of the act by the business. However, the Court did not adopt that approach. Rather the Court imposed a separate penalty on each company and then discounted each penalty having regard to the fact that there were two companies involved.

Effectively the discount applied to each penalty was 40%. It is difficult to guess the penalty that might have been delivered if only one company was involved, however by only discounting the penalties by 40% it appears that the Court effectively imposed a penalty on the two companies which would have exceeded the penalty on a single company. It should be noted that this can make a substantial difference where the maximum penalty for a company that is a second offender is \$875,000.00.

In addition, New South Wales has introduced fines of up to \$1.6m for fatal injuries. The structuring of companies for asset protection may not provide the benefits it once did, as the result is that increased OH&S penalties may flow. A good example of this problem is demonstrated in our article on page 5-Don't Stack the Crates.

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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