

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

Diving Is Dangerous

In NSW an injured person is not entitled to recover damages if their injuries occur as a consequence of the failure to warn of an obvious risk or from the materialization of an obvious risk of a dangerous recreational activity. So what is a dangerous recreational activity? Does it include a dive from a wharf? In previous editions of GD News we have discussed decisions such as RTA v Dederer in which the High Court emphasised the importance of personal responsibility. The NSW Court of Appeal has recently handed down yet another decision which demonstrates the difficulty for injured claimants particularly where an activity is classified as an obvious risk of a dangerous recreational activity.

Bilal Jaber, then 19 years of age, was injured in October 2003 when he dived headfirst from a pylon or bollard located on a wharf at Dolls Point that was under the care, control and management of Rockdale City Council ("the Council"). Jaber entered the water from the beach and as he swam out towards the pier observed people diving from the wharf. Jaber then decided to dive from the wharf himself and ascended the steps and climbed onto the bollard at the top of the steps before diving into the water.

As a result of the dive Jaber struck his head on the seabed and sustained significant injuries to his cervical spine. Jaber sued the Council in negligence alleging that he should have been warned that it was dangerous to dive from the wharf.

In the District Court the trial judge found in favour of the Council. Jaber appealed.

There were 2 major difficulties for Jaber - firstly, in NSW there is no duty to warn of an obvious risk, and so if it was found that diving off the bollard constituted an obvious risk then Jaber's claim could not succeed as the negligence alleged was a failure to warn. Secondly, in NSW a defendant has no liability for harm suffered from obvious risks of dangerous recreational activities. The Council argued that as a consequence of the relevant Civil Liability Act provisions Jaber's claim must fail.

The Court of Appeal agreed with the Council. Justice Tobias who delivered the leading judgment stated:

"The appellant accepted that he knew in a general sense that diving into shallow water or water of uncertain depth might result in injury and so was aware of what the primary judge referred to as "the potential for danger." It was that "potential for danger" that constituted the relevant risk. It was, on the appellant's own evidence, one that was apparent to him. If so, it was also readily apparent to a reasonable person in his position. It matters not that it had a low probability of occurring.

The fact that the appellant believed that the water was deep enough, because he had purported to check its depth by treading water, does not militate against a finding that there was an "obvious risk" that would be readily apparent to a reasonable person in the appellant's position."

On this basis alone Jaber's claim would have been unsuccessful. However the Court went on to

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We thank our contributors

David Newey dtn@gdlaw.com.au

Amanda Bond asb@gdlaw.com.au

Stephen Hodges sbh@gdlaw.com.au

Michael Hayter mkh@gdlaw.com.au

Michael Gillis mjg@gdlaw.com.au

Marcus McCarthy mwm@gdlaw.com.au

Naomi Tancred ndt@gdlaw.com.au

David Collinge dec@gdlaw.com.au

Gillis Delaney
Lawyers

Level 11,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

consider the question of whether or not this was a dangerous recreational activity. The answer to this question was academic, but Jaber was again unsuccessful in his argument. The Court of Appeal was of the opinion that diving off the bollard constituted a dangerous recreational activity.

A 3-0 loss for Jaber in the Court of Appeal - a total of 4 judges including a District Court judge deciding that the claim must fail. The provisions in the Civil Liability Act relating to obvious risks and dangerous recreational activity do have an impact on claims and make life very much more difficult for injured claimants who seek to blame others for their own failings.

Building Contracts- Indemnity and Insurance Clauses

Accidents on a building site are inevitably the result of the actions of more one party. Allocation of risk is fundamental in the contracts that govern the relationships between those on a building site. It is routine to find indemnity and insurance provisions in building contracts to deal with the obligations of the parties when something goes wrong. But those provisions may not always have the desired effect.

Contractual indemnities continue to cause problems for sub contractors. A difficulty is that, if the clause in the contract is particularly onerous, the sub contractor may end up liable for the whole of the head contractor's damages. Another difficulty is that liability policies of insurance - which respond to claims in negligence - will usually contain an exclusion clause whereby the policy does not respond to contractual liabilities. This means that the sub contractor will not be insured for their contractual liability which has been assumed pursuant to the indemnity provision.

The NSW Court of Appeal in *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton* has recently considered the effects of an indemnity provision in a contract between the head contractor and a sub-contractor and its effect in relation to a claim against the head contractor by an employee of another subcontractor who was injured on the building site.

Erect Safe and Australand Constructions Pty Ltd ("Australand") entered into an agreement whereby Erect Safe were sub-contracted to carry out scaffolding work on a site in St Leonards. Clause 11 of the agreement provided that:

"11. The Subcontractor must indemnify Australand Constructions against all damage, expense (including lawyers' fees and expenses on a solicitor/client basis), loss (including financial loss) or liability of any nature suffered or incurred by Australand Constructions arising out of the performance of the Subcontract Works and its other obligations under the Subcontract."

Ian Sutton was employed by a different entity working on the site as a subcontractor, and was injured on the building site. He commenced proceedings against both Erect Safe and Australand. Australand argued that they ought to be indemnified by Erect Safe pursuant to Clause 11 of the agreement. Judge Goldring in the District Court agreed and found that Erect Safe were liable to indemnify Australand in relation to their liability to Sutton pursuant to the agreement. Erect Safe appealed.

So what was the Court of Appeal's view?

Justice Giles noted that Australand had incurred liability to Sutton and it was necessary that the liability meet the description of a liability "arising out of the performance of the Subcontract Works and its other obligations under the Subcontract." In Justice Giles' opinion although Erect Safe had created a problem and failed to rectify it, the basis of the liability of Australand to Sutton was that it had breached its own duty of care that it owed to Sutton through its own default and in these circumstances Erect Safe were not liable to indemnify Australand.

Justice Basten was of a different view and concluded that Erect Safe were liable to indemnify Australand. Justice Basten commented:

"Adopting this approach, it may be understood that the performance of the contract by Erect Safe gave rise to duties of care imposed by law on Australand. The duty to the injured worker, specifically, arose out of the performance of the sub-contract by Erect Safe. It was the unsafe condition of the scaffolding created by Erect Safe that gave rise to a contingent liability on the part of Australand, if it failed in its duty to take reasonable care for the safety of the worker. As will be seen below, the cases recognise different degrees of causal connection required by different language. Thus, a question may arise as to whether there is a sufficient causal connection between the performance of sub-contract works and the liability of a head contractor where the only causal link is the presence of the injured party on the construction site as a result of the performance of the sub-contract. There is no doubt that the causal link will be

stronger in circumstances such as the present where the default of the sub-contractor both contributes to the injury to the worker and creates the pre-condition of the liability of the head contractor."

So what was the end result? The deciding vote was that of Justice McClellan. Justice McClellan agreed with Justice Giles that Erect Safe were not liable to indemnify Australand. In Justice McClellan's opinion Sutton's injuries were partly caused by the negligence of Australand and the liability of Australand was a consequence of its own negligent act rather than arising out of the performance of the subcontract works by Erect Safe.

In these circumstances Erect Safe's appeal was successful and they were not liable to indemnify Australand. It was a close call though.

The Court of Appeal was careful to emphasise that the operation of any contractual indemnity must be found in the application of the words of the relevant clause construed as a whole and decisions in different contexts are unlikely to be of assistance where different contractual indemnities are considered.

A lucky escape for Erect Safe who are now likely to be insured for their liability to Sutton in negligence.

The decision again demonstrates that care should be taken when examining indemnity and insurance provisions in building contracts. No doubt in this case Australand expected that its indemnity clause would extend to a claim which occurred during the carrying out of the works, but here Australand's acts rather than the performance of the sub contract works was seen to be the cause of the liability for Australand and Erect Safe were only liable to indemnify Australand for losses arising out of the performance of the subcontract works.

Effectively in this case the indemnity clause operated in a way that it did not extend to the negligent acts of the head contractor. The effect was the same as if the clause had been drafted to exclude liability for the negligence of the head contractor.

Head contractors and subcontractors should carefully consider risk allocation in any indemnity provision and the possibility that the clause may not have its intended effect. The intent of the parties to a contract is an important issue in the interpretation of a contract but the words and their application to the factual matrix surrounding an accident will determine the effect of the clause.

Employer and Third Party Negligence

What happens in NSW when an employee is injured during the course of their employment and both the employer and a third party are responsible? Can the employee sue both the employer and the third party? Why go to that trouble if you can recover damages from either party?

The *Worker's Compensation Act 1987 (NSW)* governs claims made by injured employees against employers and there are thresholds which must be met before a claim can be made and there are limitations on the damages which can be recovered. The *Civil Liability Act 2002(NSW)* governs claims by those employees against third parties. The thresholds in the Civil Liability Act are different and the damages that can be recovered are greater. No wonder an injured employee also seeks to blame someone other than his employer when he is injured! The employee will receive more damages and will skirt around the thresholds in the Workers Compensation Act.

In NSW in order to bring a claim against their employer an employee must have sustained at least a 15% whole person impairment (as agreed between the parties or assessed by an Approved Medical Specialist) whereas to bring a claim against another negligent party pursuant to the *Civil Liability Act* the claimant's non-economic loss must be at least 15% of a most extreme case, a threshold that is far easier to satisfy. This means that sometimes an injured worker will not be entitled to sue their employer but will be able to sue a third party.

The scenario is complicated even further when you take into account that even if a worker has not sustained a 15% whole person impairment, in the assessment of damages under the Civil Liability Act the percentage of the employer's liability must be taken into account when assessing damages.

Further complications arise by virtue of the fact that an employer pursuant to section 151Z of the *Worker's Compensation Act 1987* is also entitled to recover from the third party the compensation payments it made over and above its theoretical or

actual liability for damages.

The Court of Appeal has recently handed down two decisions which demonstrate how claims against employers and negligent third parties operate where a claimant cannot bring a claim against their employer as the claimant's whole person impairment is less than 15%, or the claimant's whole person impairment has not been assessed but there is a liability on the part of their employer as the impairment is greater than 15%.

In *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* Clint Pollard was a concrete agitator truck driver whose services were provided to Pioneer Construction Materials Pty Ltd by his employer Dependable Personnel Pty Ltd a labour hire company. Pollard was injured on 16 March 2001 when he slipped and fell on the surface of a wash bay while cleaning the truck's tyres after making a delivery of concrete to the M5 East motorway project. Pollard sued Baulderstone Hornibrook and Bilfinger Berger AG, the head contractors for the project. Pollard could not sue his employer as his whole person impairment was less than 15%. This also meant that cross-claims could not be issued against his employer by Baulderstone Hornibrook and Bilfinger Berger AG. However section 151Z(2) of the Workers Compensation Act in essence operates in a manner akin to proportionate liability and as a consequence the percentage liability of the employer was deducted from Pollard's damages.

The trial judge assessed the employer's liability at 20% which Pollard argued before the Court of Appeal ought to be reduced. The less the liability of Pollard's employer the less the deduction from his damages. 20% is often cited as an appropriate deduction where a labour hire company is involved but the Courts have emphasised the extent of responsibility must be determined on the facts of each case. The Court of Appeal agreed with the trial judge that in this case a 20% liability on the part of the employer was appropriate.

So what was the result? As Pollard did not satisfy the threshold for the award of damages under the Worker's Compensation Act 1987 an assessment of damages would have resulted in no damages however Pollard's damages assessed under the Civil Liability Act against Baulderstone Hornibrook and Bilfinger Berger AG were still reduced by 20% being the proportionate responsibility of the employer.

In *Erect Safe Scaffolding (Australia) Pty Limited v Sutton* Ian Sutton, an employee of Dalma Enterprises Pty Ltd was injured at work on 21 October 2002. At the time Sutton was working on the construction of a large multi-storey residential and commercial building. Australand Constructions Pty Ltd was the head contractor whilst Erect Safe Scaffolding supplied scaffolding pursuant to a contract with Australand and was responsible for erecting and maintaining the scaffolding on site. Sutton was injured whilst constructing formwork to enable concrete to be poured for the external wall of level 9 of the building. Sutton has not had his whole person impairment assessed but the trial judge (with whom the Court of Appeal agreed) found that as Sutton's non-economic loss was assessed at 38% of the most extreme case this was sufficient to support a finding that Sutton was impaired so as to be entitled to recover damages under the Worker's Compensation Act.

The trial judge found both Australand and Erect Safe Scaffolding liable but found that Dalma was not responsible as the employer as Dalma was entitled to rely on the Safety Committee to ensure that Erect Safe had remedied the hazard.

Both Erect Safe and Australand appealed arguing that Dalma should have a liability to Sutton The Court of Appeal agreed and found Dalma 15% liable. It was not enough for Dalma to have relied on the Safety Committee and Dalma should have warned its employees or excluded them from working within the area of danger. As a consequence of the Court of Appeal's finding Sutton's damages would be reduced.

So what was the result. The total damages were assessed under the Civil Liability Act 2002 and under the Worker's Compensation Act 1987 (as if the worker brought a claim against his employer) and then 15% of each assessment was calculated. 15% of the worker's compensation assessment was then deducted from the 15% Civil Liability Act assessment to calculate the figure to be deducted from the damages assessed under the Civil Liability Act in the claim against Erect Safe and Australand.

The circumstances of each case differ and as a consequence the liability of an employer will vary on a case by case basis. The deduction for negligence of an employer from a Civil Liability Assessment against a third party will generally be proportionately greater when workers have an impairment less than a 15% whole person impairment. Does this effect a trial judges views on apportionment between employers and third parties? That is something that the wise can only speculate on.

How Do You Assess Damages In A Compensation To Relatives Claim?

In NSW the Compensation to Relatives Act 1897 provides that if a person sustains fatal injuries through negligence, then their spouse, parent, brother, sister or child can bring a claim for damages. The damages that are recoverable include funeral expenses, loss of earnings, and loss of domestic services. Often the claims will be difficult to quantify and subject to much speculation when attempting to assess damages. Just how difficult the assessment of such claims can be is demonstrated by the recent NSW Court of Appeal decision of *Black v Walden*.

Edwin Walden's wife was fatally injured in a motor vehicle accident in August 1997. Walden brought a claim pursuant to the Compensation to Relatives Act 1897 against the driver of the vehicle in which the deceased was travelling, claiming damages on behalf of himself and his son Matthew. Liability was admitted by the driver and the matter went to trial for damages to be assessed. Walden was not happy with the assessment and appealed to the Court of Appeal, who ordered a re-trial. The current decision was an appeal by the driver Black who was unhappy with the assessment at the re-trial. There were two main issues for the Court of Appeal to consider - how loss of dependency and how loss of domestic services ought to be assessed. Whether or not the damages assessed should be reduced for any benefit a person receives from inheriting assets following a death was also an issue.

At the time of the deceased's death the family income was derived from several sources to which the deceased contributed her services. The deceased and Walden were living on a dairy farm which they operated in partnership and the deceased worked part time on the farm. The son Matthew worked full time on the farm. In addition, Walden was employed as a carpenter with Bega Joinery Pty Ltd a company which he and the deceased jointly owned and for which the deceased also worked on a part time basis. To complicate the situation further, a family trust, the Edwin Walden family trust, was the beneficial owner of six units at Tarthra and the deceased and Walden jointly controlled the trustee Pynwatch Pty Ltd. The deceased managed the units.

The trial judge assessed damages at \$1,305,306.00. The largest portion of the damages related to the loss of benefit of the deceased's services to the dairy farm which totalled \$895,853.00 although \$429,284.00 related to loss of domestic services, in itself a substantial amount.

On appeal Black argued that there ought to be a reduced award for the loss of the deceased's services to the dairy farm, a greater sum ought to have been deducted for acceleration in the benefits to Walden from the death of the deceased, and the allowance for loss of domestic services (21 hours per week) was too high.

The evidence before the Court demonstrated that the deceased spent an average of 27 hours a week working on the dairy farm. The deceased was skilled at riding a horse and was able to inspect the property and round up stock on horseback. The dairy farm was a registered Holstein stud and at the time of the deceased's death the farm had approximately 200 cattle. The deceased worked approximately 20 hours per week for Bega Joinery performing secretarial and office management tasks. The deceased and Walden were recorded in the books of the joinery and drew combined salaries of \$795 per week.

In the trial judge's opinion the deceased was likely to have spent even more time on the dairy farm following her retirement and her hours would not have fallen below 27 hours per week for the remainder of Walden's working life. The trial judge deducted 15% for vicissitudes. It was with this figure that the Court of Appeal disagreed - the Court was of the opinion that 20% ought to be deducted for vicissitudes taking into account the difficulty that the deceased would have had working on the dairy farm in her old age.

There was no deduction for loss of domestic services. The main complaint was that since the deceased's death a Ms Smith and Ms Wiley had been performing domestic tasks for Walden and these took 8 hours per week. Whilst the defendant conceded that these were not a complete replacement for services provided by the deceased it was an indicator and the defendant argued that 11 hours per week was a more appropriate figure for domestic services for Walden and Matthew.

The evidence before the Court was that the family home was a large house which the deceased swept or vacuumed virtually every morning. The deceased did all the laundry and all of the cooking, which included the preparation of a hot meal every night. There was no suggestion that the deceased performed these tasks for herself. In these circumstances the Court of Appeal found that an allowance of 3 hours per day - or 21 hours per week - was open to the trial judge.

In relation to the argument as to acceleration of benefits the Court was of the opinion that the trial judge was wrong in treating Walden's acquisition of the deceased's interests of their jointly owned assets (excluding the Tarthra units) as conferring no

benefit on the deceased. Walden had gained rental income that would not have been otherwise obtained, and had inherited shares in the Bega Joinery and West Street premises and his damages (but not Matthew's) ought to be reduced accordingly.

A complicated scenario where numerous factors were taken into account to ultimately reduce damages to \$857,714.00. It was certainly not an easy task for the Court to assess any of the heads of damage, particularly where the ultimate damages were complicated by a necessary reduction for benefits that had been conferred on Walden as a consequence of the deceased's death.

Compensation to Relatives Claims are difficult to quantify and this was certainly one of the harder ones.

Attendant Care - No Need For An Expert?

Exactly what limits the Civil Liability Act 2002 (the Act) places on awards for attendant care damages continues to exercise the minds of insurers, lawyers and the courts.

Many would have thought that the provisions of the Act dealing with attendant care were intended to, and should rein in some of the excesses in this area of personal injury damages. The Court of Appeal, however, in a recent decision - *Westfield Shoppingtown Liverpool v Jevtich* [2008] NSWCA 139 - appears to have left the door wide open.

The plaintiff was a 62 year old who had a history of health difficulties, including suffering from Parkinson's disease. He fell at a shopping centre as a result of the negligence of Westfield and its cleaning contractor, suffering injuries to neck, jaw and leg.

The plaintiff sought damages for gratuitous attendant care services provided by his wife. Such a claim is governed by section 15(2) of the Act which precludes the award of such damages unless the court is satisfied that:

- (a) there is (or was) a reasonable need for the services to be provided, and
- (b) the need has arisen (or arose) solely because of the injury, and
- (c) the services would not be (or would not have been) provided but for the injury

The only medical evidence in support of the claim was simply that the plaintiff needed assistance from his wife in some personal and domestic activities. This evidence did not address how any need for care created by the injury was to be distinguished from any need created by the plaintiff's Parkinson's disease.

There was no other expert evidence to support the claim.

The defendant did not offer any expert evidence as to whether there was a need which had arisen solely because of the injury. It did, however, lead some evidence of the expected progression of Parkinson's disease.

The plaintiff and his wife gave evidence as to the minor tasks that the wife had performed for the plaintiff before the injury. These were because of his Parkinson's disease symptoms. They also gave evidence of what services the wife performed since the injury. These were much more involved, and the wife said she had given up some paid employment to perform them. The plaintiff and his wife said that these tasks were performed to meet needs which had arisen solely because of the injury.

Was this enough under section 15 (2) for an award? Put another way, was this lay evidence - and partisan lay evidence at that - sufficient to overcome the statutory hurdle?

The trial judge found that it was, and awarded the plaintiff half of what the wife said she now did that she didn't do before. The Court of Appeal agreed with this approach.

Bell JA said "In my opinion, the absence of medical evidence was not fatal to the claim for future attendant care services."

The Court found that it was sufficient to accept the evidence of the wife, and then to apply a broad 50% discount to take account of the inevitable deterioration because of the underlying Parkinson's disease.

This sets the bar relatively low. To meet such a claim, defendants will need to have expert medical evidence that directly addresses whether there is any need for attendant care which arises solely because of the injury. In the absence of such material, the authority of *Jevtich* will lead to many and significant awards for gratuitous attendant care.

Changes to NSW Workers Compensation

From 4pm on 30 June 2008 employers will no longer be required to obtain a workers compensation insurance policy for workers if they pay, or expect to pay \$7,500 or less in annual wages. This includes private households employing domestic staff and paying \$7,500 or less in annual wages.

However, a workers compensation insurance policy will still be required if you engage an apprentice or trainee, or are a member of a Group for workers compensation purposes regardless of the amount of wages paid.

If your circumstances change or you underestimate your annual wages From 30 June 2008, you must contact a Scheme Agent immediately to take out a workers compensation insurance policy, if at any time it appears that you will pay more than \$7,500 in wages for the financial year to workers or contractors deemed to be workers.

If you are no longer required to hold a workers compensation insurance policy from 30 June 2008, your workers will still be covered for workers compensation benefits.

If one of your workers makes a claim for workers compensation, you will need to contact WorkCover to report the claim. WorkCover will allocate a Scheme Agent to manage the claim. Employers will still have the same injury management and return to work obligations even though you do not have a workers compensation policy. In addition an administrative fee of \$175 will be payable for any claim.

In addition, from 20 May 2008, wages information will be required to be kept for five years only. NSW workers compensation legislation previously required employers to retain all records relating to wages for a period of seven years. Under the changes, the administrative burden on businesses will be reduced, by decreasing the requirement to retain workers compensation insurance records to five years which is with Australian Taxation Office requirements.

New Planning Laws in NSW

The NSW Government has introduced sweeping changes to planning laws in NSW substantially reducing the role that Councils will play in development applications. The Legislation was passed on 18 June 2008 and the commencement date for the changes is likely to be proclaimed shortly.

The system is designed to remove the red tape in the development application process and expand the role for private certifiers in the management of the development approval process.

The Environmental Planning and Assessment Act 1979 enables certain types of development to be approved as complying development. Complying development can be certified by either a private accredited certifier or Council. Currently the different Councils in NSW approach exempt and complying developments differently with some Councils significantly limiting the applications that can be considered by private certifiers. But this will change.

The new planning laws will provide a consistent approach for development applications across NSW through the development of building codes specifying minimum standards. Provided an application complies with the code a private certifier will have authority to approve the application.

This code contains non discretionary standards that relate to complying development. If a proposal complies with these standards, a complying development certificate must be issued within 10 days. If the development does not comply with these standards, it is not classified as complying development and requires approval via a merit based development application.

The new rules will support a major expansion in the use of exempt and complying development for minor works such as single-storey homes, two-storey homes, alterations and additions and barbecues, pergolas and backyard decks. Codes for new single storey homes, alterations to single storey homes and internal alteration to two storey houses have been released by the Government already.

In addition where an application has to proceed to a merit assessment as it does not comply with a code there will be a new process for applicants that appeal from a Council decision. The new system of planning arbitrators will consider applicant appeals against Council decisions on small-scale development proposals, and can conduct hearings, removing the need for expensive court proceedings.

There will also be clear rules defining which infrastructure councils can levy new homebuyers and developers for – including local roads, bus infrastructure, parks, and sporting, recreational and community facilities (such as libraries). Councils must consider affordability, reasonable costs and timely spending when introducing levies.

To regulate private certifiers there will be new limits on the annual income that can be earned from any one client and the number of certificates that certifiers can issue to any one client will also be restricted. Maximum penalties for breaches of the legislation by private certifiers will also be increased from \$11,000 to \$110,000.

The Government is further simplifying the planning process for live entertainment by removing the need for venues to obtain a 'place of public entertainment' (POPE) license from Councils.

The process of development application for the home owner /renovator is about to become much easier. The idea is that a code defines an envelope for a typical house on a average sized lot. The envelope will be determined by setbacks and height controls to protect neighbours amenity and preserve streetscape. If your design fits into this envelope then approval should take less than 10 days – a dramatic reduction on the current time taken for these types of development.

OH&S Roundup

\$190,000 Fine Following Fatality

Stowe Australia Pty Limited were recently fined \$190,000 as a result of a prosecution under the OH&S Act. The prosecution arose out of an incident when an employee of Stowe Australia Pty Limited was electrocuted whilst installing a new exit light. The electrocution occurred at a Telstra telephone exchange. The company has operated in Australia for approximately 98 years and is one of the largest electrical contractors operating in the industry, employing 1,400 persons of whom 900 were electrical staff licensed and unlicensed, with a further 280 apprentices.

The company's Safe Work Method and Procedure Statement specifically referred to and contemplated the risk of electrocution, however many aspects of the procedures were not followed. The Court found the primary failure was a failure to ensure that the Method of Procedure, the Occupational Health & Safety Plan and Safe Method Statement were on-site and were followed. The significance of the absence of those documents was that the site plans of circuitry could not be taken as accurate and there was a risk of confronting unusual and complex circuitry such as occurred at the exchange. The Court noted it was vital for there to be prior identification of the circuitry before work was carried out and there was a failure to enforce the company's safety rules. The Court noted effectively at the exchange and in the upgrade program there was no more than a paper system. The Court noted that the risk from being electrocuted was obvious and the gravity of the risk was significant. A significant fine of \$190,000 was imposed even where the company had pleaded guilty to the offence. Once again, the Court's approach to the fine demonstrates that employers need more than a well-documented safety system. The system must be in operation at all times and implemented in all situations.

\$100,000 Fine For Unguarded Machinery

Rockdale Beef Pty Limited were recently fined \$100,000 following a plea of guilty to an offence under the Occupational Health & Safety Act. It was alleged that the company failed to ensure that plant used by people at work and over which it had limited control in the course of a trade or business, were safe and without risk to health when properly used.

The incident that led to the prosecution occurred at abattoirs. The owners and operators of the abattoirs were two companies. Rockdale Beef Pty Limited was the manager of the abattoir. In the boning room there were a number of machines and conveyors used to process beef products.

An employee of a labour hire company was directed to operate a bagging machine. He bent down to retrieve a parcel of meat which had fallen under the head of the conveyor which had stopped. The conveyor suddenly started and the employee's arm was dragged into a shear hazard at the head of the conveyor. At the time of the incident there was insufficient guarding to prevent persons gaining access to the shear hazard. It was not clear from the evidence whether the employee was aware that the machine could start while he was in the process of retrieving the parcel.

A person who has control of any plant or substance used by people at work must ensure that the plant or substance is safe and without risk to health when properly used. In this case a failure to guard resulted in a penalty of \$100,000.

Suitable Duties When A Compensation Claim Is Declined

The Workers Compensation Act 1987 in NSW has more far reaching effects than one might first think.

Rehabilitation of injured workers and a timely return to durable employment are key objectives of the legislation.

The aim of injury management is to enable a timely, safe and durable return to work at the highest possible level of earnings for injured workers.

Insurers are obliged to establish an injury management plan including treatment, rehabilitation, retraining, pain management and employment practices. Employers have an obligation to provide suitable duties. Injury management plans developed will incorporate plans for the worker's return to suitable duties.

Early intervention is seen as essential and the legislation provides that payments made by an insurer for injury management do not constitute an admission of liability by the employer in relation to a claim for workers compensation benefits.

The Workers Compensation Act 1987 actually imposes obligations on an employer to act promptly and manage a claim even before any decision on liability has been made.

The recent decision of the President of the Workers Compensation Commission in *Divertie - v - Star Track Express Pty Limited* highlights the full impact of these early intervention provisions where liability for a workers compensation claim has been denied.

Divertie was injured during the course of his employment with Star Track. Star Track obtained a medical report indicating that any ongoing incapacity was not related to the injury at work but was related to a pre-existing condition. Accordingly, the insurer denied liability for the claim. Divertie had been co-operating with his injury management plan which included the provision of suitable duties. As liability for the claim was declined, Star Track ceased to provide suitable duties.

Divertie immediately lodged an application to resolve a Work Injury Management Dispute and sought the continuation of suitable employment.

The original injury management dispute was determined by a Registrar of the Court. The Registrar ordered that a new return to work plan be devised which identified suitable duties and was to be signed off by all parties and that the suitable duties in accordance with the agreed return to work plan be provided by Star Track immediately following their identification. In essence, the effect of the Registrar's decision was to require the employer to provide suitable duties to the worker.

Star Track appealed from the decision of the Registrar to the President of the Workers Compensation Commission. Ultimately the President determined that leave to appeal should not be granted but in doing so he made comment on the intention of the workers compensation scheme. The Registrar's decision was not overturned.

In considering the claim, the President of the Commission confirmed that the language of the Workers Compensation Act was simple. The provisions with respect to workplace injury management apply even when there is a dispute as to liability for a claim. The payment of injury management expenses does not constitute an admission of liability for the employer nor will the provision of suitable duties to the worker.

The obligations in the Workers Compensation Act 1987 apply notwithstanding the fact that liability has been declined.

The obligations include:

- When it appears that a workplace injury is a significant injury, an insurer who is or may be liable to pay compensation, must establish an injury management plan for the worker.
- The injury management plan must be established in consultation with the employer, the treating doctor and the worker.
- The insurer must provide the employer and the injured worker with information with respect to the plan.
- The insurer must give effect to an injury management plan established for an injured worker.
- An employer must participate and co-operate in the establishment of the injury management plan.
- If a worker has been totally or partially incapacitated for work as a result of an injury and is able to return to work, the

employer who is liable to pay compensation in respect of the injury must, at the request of the worker, provide suitable employment for the worker.

The Registrar's decision has far reaching effects as does the President's decision not to grant leave to reconsider the issue.

The decision crystallises for all employers the far reaching potential of the injury management provisions found in the Workers Compensation Act 1987. Employers are obliged to provide suitable duties when a claim for compensation is made even when the claim is denied.

Workers Compensation- Does Going To The Shops On The Way To Work Increase Risk?

The recent decision of ISS Facility Services Australia Pty Limited - v - Antonios (2008) examined the journey provisions of the Workers Compensation Act 1987 to determine whether a worker who would have usually walked to work but on this occasion decided to drive with a visit to the shops would constitute a material increase of the risk of injury.

The journey provisions under Section 10 entitle a worker to compensation if they suffer an injury on a periodic journey to and from work. A worker will be disentitled to the protection of that section if they interrupt or deviate from that periodic journey and that interruption/deviation materially increases the risk of injury. In this particular case the worker would have normally walked 20 minutes from his home to his employment in a south easterly direction. On the day he was injured he drove to his employment via the West Ryde shops which resulted in a total deviation of 14.2 kilometres west. President Keating of the Workers Compensation Commission noted that there was no obligation upon a worker to take the shortest or most direct route from the worker's abode to his place of employment provided the journey still had the character of a journey to employment. Noting the worker at the time was in his work clothing/uniform and it was the worker's stated intention of travelling directly to work from the shops the Deputy President accepted it was a periodic journey to work. He further commented that a worker may choose a longer route to allow him to achieve a purpose additional to the journey provided the journey still retains the character of a journey.

Once it was accepted the worker was on a journey but there is a deviation, the President then examined whether the worker would be disentitled to compensation on the grounds the deviation on the journey materially increased the risk. The employer had argued that driving some 28 kilometres from Naremburn to West Ryde shops and return of itself was a material increase of risk when compared with walking from the worker's home to his cleaning job at Naremburn Public School. The President commented this was a question of fact and in this matter he highlighted a number of other factors which suggested that it was not a material increase of the risk of injury. This included the fact that the Applicant sometimes drove to the school from home, the traffic to and from West Ryde on the day of the accident was light, the worker was not travelling in peak hour, was travelling in daylight and he was travelling on a back route from West Ryde to his place of employment to avoid heavier traffic on the main roads. Other important considerations were that the weather conditions were fine, the worker had allowed himself sufficient time to complete the journey from West Ryde, there was no evidence of excessive speed and the accident was caused by a vehicle other than the workers.

The President also commented different factors such as travelling in darkness, travelling in inclement weather, travelling over rough terrain or travelling when affected by alcohol may be factors which could elevate a risk of injury to be material.

This decision confirms the Commission's approach to approaching the legislation beneficially for workers. It is also a timely reminder to employers that seemingly excessive deviations from a periodic journey may still entitle a worker to the benefits of the *Workers Compensation Act*. Nevertheless the Commission still acknowledges there are potential limits to the ambit of the journey provisions such as the presence of inclement weather or drink driving.

Valid Reasons For Termination But Termination Was Harsh

The Australian Industrial Relations Commission Young - v - Regional Publishers Pty Limited recently found that although Regional Publishers Pty Limited ("Regional") had a valid reason for terminating Young's employment, the manner in which he was dismissed rendered the termination harsh.

Young had nearly 40 years experience in newspaper and had been in charge of the same local newspaper for the previous eight years as editor. During his time as editor of the local newspaper the financial performance of the newspaper was marginal.

Regional became the newspaper's new owner. Regional came to the view that it could not improve the paper's performance

whilst Young remained in the role of editor. In particular, there was sufficient evidence for the Court to find there was a conflict of personality between Young and Regional's manager.

Regional advised Young, in April 2007, he was not to continue in his current role as editor. He was offered a lesser position of a senior journalist. He was encouraged by Regional to sign a letter confirming he agreed to the change of his position from editor to that which he was offered as a senior journalist. There was evidence he was also told, if he did not agree to sign the letter changing his position, he would be dismissed. Young refused to sign the letter.

Four days later Young visited his general practitioner and was certified unfit for work due to an ongoing anxiety disorder with workplace stress. Whilst he was absent from his work on sick leave Regional sent Young a letter terminating his employment.

The Australian Industrial Relations Commission found Regional had a valid reason to terminate Young's employment. The paper was not performing financially and there was a conflict between Young and Regional's manager. The Commission also found Regional held a view that Young would not be able to properly implement its intended changes.

The Commission found Young was dismissed at Regional's initiative when they offered Young a lesser position and told him he had no option but to accept it. Having regard to Young's age and length of service at the paper, the manner of termination was determined by the Commission as harsh. As reinstatement was not an appropriate remedy, the Commission ruled Young should receive damages equivalent to eight weeks pay.

As the termination had occurred when he was offered a lesser position, the issue of terminating Young in breach of Section 659 of the Workplace Relations Act, 1996 which prohibits employers from dismissing employees while they are temporarily absent because of illness or injury did not need to be considered.

Regional had valid reasons to terminate Young's employment. However, in Young's case, the employer negated the valid reasons for terminating Young's employment by advising him that if he did not accept a lesser position within the organisation, he would be terminated. The Commission took into account Young's position, length of service and seniority in determining the manner of terminating Young's employment was harsh.

Terminating Sleeping Security Guards Warranted

A security guard at the Villawood Detention Centre brought a claim in the Australian Industrial Relations Commission for unfair dismissal when he was dismissed by his employer for falling asleep on the job.

Miszczuk was employed as a security guard. His post was in a small sized shelter running along the boundary fence of the Villawood Detention Centre. He was found asleep by two auditors. When the auditors approached Miszczuk he had his shoes off and his feet were resting on the desk. Miszczuk's chin was also on his chest. Miszczuk did not stir or otherwise indicate he was alert or aware of the auditor's presence until one of the auditors, who was right next to Miszczuk, said, Hello.

The employer dismissed the employee for serious misconduct. The employer relied upon the Detention Service's Code of Conduct and alleged sleeping on his shift was a serious dereliction of his duties and amounted to serious misconduct.

Miszczuk claimed it was a very hot day and he was tired. His feet were sweating so he had momentarily removed his shoes and sat on the chair to rest and cool off. He denied being asleep when the auditors arrived, claiming he had not heard the men approach until they were by his side because of the noise of a radio. He also claimed they approached from his left side where his line of sight was slightly towards the right.

The Commission accepted the guard was asleep on the basis of the auditors' evidence. The Commission found it was a fundamental element of the guard's role that he was required to remain alert at all times. It was completely unacceptable for Miszczuk to remove his shoes, put his feet up on a desk and fall asleep. The Commission found the guard's actions amounted to misconduct which constituted a valid reason for termination of his employment.

Employers should be aware it is not acceptable for employees whose duties are fundamental to the successful operation of the employer to abandon a role which is fundamental to the purpose of their employment whilst at work. The security guard's main role was to stay alert and report to his employer any circumstances which may give rise to an alarm needing to be raised. By falling asleep, the employee abandoned his position. His termination was justified.

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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