GD NEWS

Gillis Delaney Lawyers

Welcome to our latest edition of ***GD NEWS*** that brings to you information on new trends and issues that impact on the employment and insurance market in Australia. In this month our feature article deals with the High Court's decision dealing with a local council's obligation to erect warning signs. We can be contacted at any time for more information on any of our articles.

Shallow waters-No warning necessary?

When should a Council warn of the dangers of diving? The High Court has recently considered this issue in the long awaited decisions of Vairy v Wyong Shire Council and Mulligan v Coffs Harbour City Council.

Ernest Vairy was rendered a quadriplegic after diving off a rock platform into the sea at a popular Central Coast beach. Vairy succeeded in his claim before the trial judge who found that the Council ought to have erected a sign warning of the dangers of diving from the particular rock platform. The New South Wales Court of Appeal overturned the trial judge's decision and found that there was no obligation on the Council to warn of the danger of diving from the rock. According to the Court of Appeal the risk was an obvious one and no warning sign was necessary.

Garry Mulligan was rendered quadriplegic after he dived into a creek in Coffs Harbour. Mulligan lost at trial and for a second time before the New South Wales Court of Appeal where his case was heard with Vairy's. Both the trial judge and the Court of Appeal found that no warning sign was necessary.

Vairy and Mulligan both appealed to the High Court where their cases were again heard together. The Vairy decision in particular afforded the High Court an opportunity to consider the notion of obvious risk and the law of negligence as a whole.

In the Vairy case the High Court was divided as to the outcome but united in their criticism of the NSW Court of Appeal.

The minority comprised of Chief Justice Gleeson, Justice Kirby and Justice McHugh were extremely critical of the approach of the majority of the New South Wales Court of Appeal. In their opinion Vairy should succeed in the claim and the trial judge was correct in finding that there should have been a sign warning of the dangers of diving off that particular rock platform. Justice McHugh in particular was critical of the concept of obvious risk and commented that "it is not the law that a defendant has no duty to take reasonable care for the safety of the plaintiff or that no warning is required if the risk of injury is, or ought to be, obvious to the plaintiff."

The majority of Justice Gummow, Justice Hayne, Justice Callinan and Justice Heydon disagreed. They found that no warning sign was necessary. Essentially the Court applied the approach which has become known as the Wyong Council v Shirt calculus and looked at what a reasonable Council's response would be to the risk that a person would be injured by diving or plunging into water that was too shallow. This response in the majority's view did not include a warning sign.

Justice Hayne commented "It was not reasonable to expect the Council to warn of this particular danger. The Council had done nothing to make the danger worse and had no knowledge of some feature of this particular area that was not readily discoverable by someone contemplating diving or plunging into the water at some point." Justice Hayne continued to join in the criticism of the Court of Appeal and stated "The conclusion that a reasonable council would not have warned of this danger does not depend upon what the Court of Appeal referred to as the obviousness of the risk. Reference to a risk being "obvious" is apt to mislead and cannot be used as a concept determinative of questions of breach of duty."

Vairy's appeal was dismissed. There was no such division in Mulligan's case. The unanimous opinion was that no warning sign was necessary and his case should fail.

There is now some guidance from the High Court as to how to approach the concept of obvious risk.

The law has not really changed. There must still be a three step analysis. Was there a duty of care, what was that duty and was there a breach of that duty.

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Clear guidance on the application of the analysis is found in the majority judgment in Vairy. Rather than attempt to summarise that judgment it is more useful to set out critical sections of the judgment to gain a proper understanding of its application. Guidance is best provided by those who have determined the outcome. To gain a good understanding of the application of the appropriate analysis to determine a claim in negligence we suggest you read the following extract of the majority judgement:

"Duty of care

It is sometimes said that a statutory authority having the care, control and management of a reserve is in a position analogous to that of an owner of private land. Like all analogies, however, it is dangerous to assume that the analogy is perfect. For example, a statutory authority having the care, control and management of land may not be able to control entry on the land in the same way as a private owner. It may or may not be able to close the area or part of it. And its task of care, control and management of the various areas committed to its care may be much larger and more complicated than any obligations a private owner of land may encounter.

It is long established, however, that a statutory authority, having the care, control and management of land to which the public has access, owes a duty of care to those who enter. To this extent, the analogy with private land owners is apt. But what reference to the breadth of a council's obligations reveals is that the analogy is not perfect. In particular, the content of the duty is not necessarily identical.

That may suggest that an attempt should be made to define the content of the Council's duty of care more precisely. Subject to one qualification, that would not be a useful exercise. The qualification is that it is necessary to recognise that the duty of care, owed by a statutory authority to those who enter land of which the authority has the care, control and management, is not a duty to ensure that no harm befalls the entrant. It is a duty to take reasonable care. Beyond that, however, it is not possible to amplify the content of the duty without reference to particular facts and circumstances. In each case, the content of the duty will turn critically upon the particular facts and circumstances.

Breach of duty

Recognising that the Council owed those who entered the Norah Head Reserve, including the appellant, a duty to take reasonable care, the central question in this case is what performance of that duty required………..

It is necessary to examine more closely the way in which the question of breach should be approached in this case. Although it was not disputed that this is a task requiring the application of the so-called Shirt calculus, there are some particular aspects of the way in which that is to be done which require further elucidation. Those matters can be grouped under two headings:
(a) the particularity of the inquiry; and
(b) look forward or look back?

<u>The particularity of the inquiry</u>

A plaintiff in a negligence action must prove that the defendant owed the plaintiff a duty of care. That duty may be proved to exist by showing that the defendant owed a duty of care to a class of persons of whom the plaintiff was one. But the duty thus established is a duty which the defendant owed to the particular plaintiff. If the analysis is interrupted at this point, the focus in the present case upon what, if anything, the Council ought to have done about diving from the rock platform is well justified. It is well justified because the question is whether the Council breached the duty of care which it owed to the appellant. And it is clear, therefore, that to ask what was to be done about diving from the rock platform near Soldiers Beach was a relevant, indeed a central, question to ask and answer. …….while it is necessary to look at what ought to have been done in relation to activities on the rock platform, attention cannot be confined to the precise place at which the events in question took place. In deciding what the response of a reasonable council would have been to the risk of diving injuries it is necessary to recognise that that council would be bound to consider all of the land of which the council had the care, control and management. That consideration may yield different answers for different places but all would have had to be considered. And it is a consideration that must be set into a much wider context than is provided by focusing only upon diving injuries. The duty of care which a council owes to those who enter land of which it has the care, control and management is a duty which is not limited to taking reasonable care to prevent one particular form of injury associated with one particular kind of recreational activity.

At once it can be seen that the inquiry may not be simple. The risks of injury may differ from place to place. They may differ because of the number of people who resort to one place rather than another; they may differ because one place differs from another in relevant respects; there are many reasons why the risks may differ. But the question for a council having the care, control and management of land to which members of the public may resort is: what is to be done in response to the various foreseeable risks of injury to those persons?
In an action in which a plaintiff claims damages for personal injury it is inevitable that much attention will be directed to investigating how the plaintiff came to be injured. The results of those investigations may be of particular importance in considering questions of contributory negligence. But the apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that has happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be "nothing".

Look forward or look back?

When a plaintiff sues for damages alleging personal injury has been caused by the defendant's negligence, the inquiry about breach of duty must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered. That inquiry must attempt, after the event, to judge what the reasonable person would have done to avoid what is now known to have occurred. Although that judgment must be made after the event it must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury.

There may be more than one place where this risk of injury may come to pass. Because the inquiry is prospective there is no basis for assuming in such a case that the only risk to be considered is the risk that an injury will occur at one of the several, perhaps many, places where it could occur……. Because the inquiry is prospective, all these possibilities must be considered. And it is only by looking forward from a time before the accident that due weight can be given to what Mason J referred to in Shirt as "consideration of the magnitude of the risk and the degree of the probability of its occurrence". It is only by looking forward that due account can be taken of "the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have".

If, instead of looking forward, the so-called Shirt calculus is undertaken looking back on what is known to have happened, the tort of negligence becomes separated from standards of reasonableness. It becomes separated because, in every case where the cost of taking alleviating action at the particular place where the plaintiff was injured is markedly less than the consequences of a risk coming to pass, it is well nigh inevitable that the defendant would be found to have acted without reasonable care if alleviating action was not taken. And this would be so no matter how diffuse the risk was - diffuse in the sense that its occurrence was improbable or, ……. diffuse in the sense that the place or places where it may come to pass could not be confined within reasonable bounds………………

Before the appellant suffered his injury, a reasonable council would have recognised that there was a risk that a person diving or jumping off the rock platform would suffer catastrophic spinal injury if the water was too shallow. That this was foreseeable was amply demonstrated by the fact that, before the appellant suffered his injury, another man (Mr von Sanden) had sustained spinal injury when he dived off that rock platform. The occurrence of this accident was found to have been "common knowledge within the Council", but the Council took no steps to warn or prevent others diving from the rock platform. It may be that Mr von Sanden leapt off a point on the platform higher than the point from which the appellant dived. It matters not whether that is so. What matters is that it was reasonably foreseeable that a person entering the water from this point could suffer injury if the entry was head first and the water was too shallow.

In this connection it is important to notice that it was not alleged in this case that the Council had done anything to make the risk of diving injury at Soldiers Beach any greater than it was. Nor (subject to the contentions about littoral drift) was it alleged that there were any particular hidden dangers of which the Council was or ought to have been aware but a visitor to the area would not. Rather, the essential complaint of the appellant was that the Council should have warned that the water near the rock platform may be too shallow. …….

In the present case, would a reasonable council have erected a warning sign? It was found that the appellant would have heeded a warning sign and would not have dived off the rock platform. ………….

A warning sign seeks to convey information which an observer would not or may not otherwise have known, or seeks to remind the observer of something that otherwise would not or may not be considered. In this case the subject of the warning would be diving into water the depth of which is unknown or is too shallow. A warning would remind those considering diving of this risk. It may inform the young or the ill-informed of something they did not know or understand. But just such a warning would be apt to many other places…….

Every form of physical recreation carries some risk of physical injury. The more energetic the activity, the greater are those risks. Fatigue, lack of fitness, slowness of reaction, general ineptitude can all contribute to injury. The magnitude and probability of occurrence of those risks rise if the activity is one in which there may be a collision between the participant and others, or between the participant and his or her surroundings. That risk of collision is evidently present in contact sports, but the solitary bike rider pedalling along a dedicated cycle track may fall from the bike and suffer serious injury. So too, the solitary swimmer may collide with an obstacle or strike the sea bed.

There are many dangers associated with bathing in the sea - not least the danger of drowning. The form of danger with which this case is concerned - the danger of diving into water that is too shallow - is only one of the risks that attend this form of recreation. And the Council had to consider many forms of recreation conducted in many different areas of which the Council had the care, control and management. Swimming was but one of these many forms of recreation, every one of which had its risks and dangers. And even if attention could be confined to the risks associated with swimming, the risk of spinal injury brought about by a swimmer's collision with his or her surroundings is not confined to those who dive or plunge into the sea from a natural launching pad like the rock platform.

Only by looking back at what actually happened in this case would it be right to confine the attention of a reasonable council to the foreseeable risks of swimming in the sea. When judged from the proper standpoint - looking forward at all forms of risk associated with all forms of recreation on or from land of which the Council had the care, control and management - what would the response of a reasonable council have been to the foreseeable risk of a diving injury like the appellant suffered?

It was not reasonable to expect the Council to warn of this particular danger. The Council had done nothing to make the danger worse and had no knowledge of some feature of this particular area that was not readily discovered by someone contemplating diving or plunging into the water at this point. "

The Court has made it abundantly clear that each case should be decided on its own facts and not simply decided by reference to others. A detailed analysis of the facts will always take place however the law must be applied and the analysis must consider, the relationship of the parties, whether a duty was owed, the nature of the duty and whether there was a breach having regard to what was reasonable.

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High Court puts a brake on damages payouts

In a move insurers and underwriters will welcome, the High Court has decided that *Sullivan v Gordon* damages are not recoverable under the common law of Australia.

It had been held by the NSW Court of Appeal in *Sullivan v Gordon* that damages were available where a personal injury prevents a plaintiff from providing gratuitous personal or domestic services for another person. That is, the injured plaintiff was awarded the 'value' of the services he or she would have provided to, say, a spouse or a child, but for the injury.

Additionally, damages for loss of services were awarded on this basis for the 'lost years' - that is for the period the plaintiff ought to have lived but for the injury - even though now there was no real prospect of he or she living that long.

Like awards of *Griffiths v Kerkemeyer* damages, there was controversy as to whether such compensation was justified and reasonable to impose on a defendant.

Now in a judgment handed down on 21 October 2005 in *CSR Limited v Eddy* the High Court has made the position clear.

The majority were of the view that the extension made by *Sullivan v Gordon* to the category of available damages was impermissible. If it is desired to confer such rights on plaintiffs, the correct course is for the legislature to deal with the issue. They concluded:

> *"All the Australian cases supporting Sullivan v Gordon as a principle of Australian common law should be overruled."*

Injured persons will be prevented from bringing claims for damages based on the loss of services to a third party allegedly caused by the injury. The correct question will be whether the service for which compensation is claimed is being performed in response to an injury-caused need of the claimant. The needs of the injured will still be compensated but the needs of third parties who received gratuitous services from the injured prior to their injury will no longer increase the damages payable to the claimant.

In the past claims were generally framed on the basis that the injured's "loss of capacity" included:
"(a) an incapacity to garden the family home and to perform general house maintenance including gardening and lawn care, maintenance and operation of an irrigation system, the cleaning of gutters, and the repair and fixing of fences; and
(b) an incapacity to undertake mechanical work on the family car, such as the performance of light mechanical repairs, the rotation of the tyres, the changing of oil and oil filters; and
(c) an incapacity to assist in undertaking domestic duties required in and around the house."
This type of claim will need to be looked at closely as the claimant can still recover damages for his needs created by his injuries but not for the loss of services that he provided to others.

The High Court by eliminating the claim for damages for loss of services provided to others also eliminated that part of the claim that was based on the loss of those services in the future for the years lost due to a reduced life expectancy caused by an injury.

Who pays for criminal injury to a contractor?

Issues concerning contractors, criminal activity and psychological injury - and who should bear the liability for these - continue to exercise the minds of the courts, underwriters, lawyers and employers.

What emerges clearly from the recent cases is that it is difficult to know where liability and therefore risk is likely to fall.

The NSW Court of Appeal in *English v Rogers* considered just such a case. An employer contracted to a hotel to provide cleaning services. The employer employed Mr R to perform some of the duties under the contract.

Late at night, as Mr R was in the course of his duties, he was taking out some bins to a lane at the rear of the hotel. He was assailed by an armed gunman lying in wait. Mr R (and his wife) were assaulted and held captive for several hours. Mr R suffered a severe psychological injury as a result.

Was the employer liable for the injury resulting from the criminal attack? Yes, essentially because Mr R was more vulnerable than daytime employees, and there were simple measures which the employer could take to lessen the risk of attack.

Was the hotel also liable for the injury resulting from the criminal attack? Yes, because of the coordinating role it played in relation to the situation which created the risk and the employer-like role it adopted towards the performance by Mr R of his duties, the hotel owed him a duty of care to take measures to reduce the risk.

How was the liability apportioned? The contributions were determined at 60% on the employer and 40% on the hotel. The hotel was in a better position to assess and respond to safety at the premises, but the employer had the ultimate authority to direct Mr R as to how he should go about his tasks.

The result emphasises the fact that merely contracting out workplace tasks is no guarantee for avoiding liability. The cases also underline the importance of including seemingly random criminal activity in risk assessment, underwriting consideration and workplace safety.

Liability for Employees Working Overseas

It may seem a little odd, but NSW employers can be held liable in negligence for injury suffered by an employee - even if the employee is performing duties overseas and their entitlements can be assessed in proceedings in NSW.

The NSW Supreme Court in *Atkinson v Gameco (NSW) Pty* considered a claim by an employee - Mr A - who was on the premises of a prospective customer in Thailand. He was injured whilst inspecting burner tubes on bitumen tankers in the course of carrying out a part of his duties.

The cause of the accident was a defective ladder on one of the tankers. The entity responsible for the defective ladder was the third party. Mr A sustained significant damage to his back.

Proceedings claiming damages for negligence were brought by Mr A against his employer in the Supreme Court of NSW. He claimed essentially that his employer had failed to provide him with a safe system of work, and that it had failed to provide him adequate risk and safety training.

Ultimately, these claims were unsuccessful on the state of the evidence before the Court. The decision, however makes clear that just because an employee is working overseas does not necessarily mean that an employer is not exposed to liability.

The following points can be made:

- the mere fact that injury occurs on premises occupied by a third party does not mean that an employer has no duty of care;
- the fact that the premises are in the control of a third party will be a relevant matter when considering whether the employer has taken reasonable care for the safety of the employee;
- other relevant matters to consider are:
  - the employer's opportunity to inspect the premises;
  - the length of time the employee has been at the premises;
  - the capacity of the employer to remove or reduce the danger.

From a risk management point of view, out of sight is not out of mind.

Employers need to include employees engaged overseas in risk and safety planning, with appropriate consideration of the local conditions they may meet. Arming employees with the skills to assess and respond to risks will go a considerable way to discharging the employer's burden.

OH&S penalties snapshot

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

The inherent dangers of heights

On 5 June 2003 Mr Pietraszek fell a distance of some 3.5 metres and sustained spinal fractures and fracture to his left hip. As a result of his injuries Pietraszek was unable to return to suitable employment for a period of one and a half years. The job in which Pietraszek was seriously injured involved construction of a walkway within a building. Pietraszek was a sub-contractor engaged by ABB Australia Pty Limited ("ABB")to carry out an upgrade in relation to a coal conveyor at Lake Munmorah Power Station.

On the day of the incident Mr Kerseboom was employed by ABB as the workplace supervisor. Pietraszek was an experienced rigger who had a rigger certificate and 11 years experience in the industry. A Job Safety and Environment Analysis ("JSEA") was carried out at the site and provided to all the workers on site. The JSEA listed 12 types of personal protective equipment required when working on the site, all of which were relevant to Pietraszek and the task he was undertaking. On the day of the incident two toolbox meetings took place at which Pietraszek was present. At both meetings there was no discussion concerning safety requirements relating to jobs being performed at heights. Nor were there any directions given by Kerseboom of the requirement to wear safety harnesses as outlined in the JSEA. Following the first toolbox meeting, Pietraszek signed a work permit which indicated safety harnesses were to be worn when working at heights. He did not wear the harness.

The Commission noted that the unfortunate incident that led to Pietraszek's injuries occurred in circumstances where the evidence otherwise showed a comprehensive approach to occupational health and safety. It occurs from time to time in dealing with prosecutions under the Occupational Health and Safety Act that the Court is provided with evidence from employers who have safe systems of work but are in a documented form, often referred to as mere paper systems, but in this case the Commission was not satisfied that this was a mere paper system. The totality of the evidence established that there was a genuine system of safe work in operation and that this incident was something of an aberration.

The Commission found this was one of those cases where the evidence does not demonstrate a negligent or careless approach to safety, but a gap in its system. Here, on any analysis, working at this height, Pietraszek was on the day in question, required some attention to be paid to fall protection. That was all the more to the fore once the nature of the work changed and it became clear that they would be working in circumstances where they were over a substantial void.

Following the incident ABB reviewed their OH&S policy for working at heights. ABB reprimanded and retrained Kerseboom in the application of the JSEA and arranged for all supervisors to undergo retraining in the safety, responsibility and accountability of supervisors in relation to work OH&S accidents. ABB pleaded guilty to the charge brought by the NSW WorkCover Authority and were fined $70,000.00 and were ordered to pay the costs of WorkCover for the prosecution.

Fall from roof

Supreme Poultry & Chicken Pty Ltd operated a poultry processing business. In about mid-August 2002, it was relocating its business to new premises. This undertaking included the stripping and partial dismantling of buildings located on the old premises. Peter Attard, was the sole director of the first defendant.

Attard and a number of employees of the first defendant were at the old premises and engaged in stripping and dismantling various structures. One such employee, Garry Ian Pickard, was on the roof of the freezer room located inside the factory at the old premises. This freezer room was somewhere between 2 and 2.5 metres high and surrounded on three sides by panelling 30 to 40 centimetres high. The roof of the freezer room was not fitted with a guard rail or any scaffolding around its perimeter. Nor were any other fall prevention devices provided to Mr Pickard. At some point another employee of the first defendant, Scott Becker noticed that the roof of the freezer room was sagging. He informed Attard who then advised Pickard that they should both get off the roof. The roof then collapsed. Attard prevented himself from falling by grabbing the top of one of the freezer room's side walls. Pickard fell from the roof to the ground. Pickard died on 19 August 2002 at Nepean Hospital as a result of an intra-cranial infection arising from complications related to the head injuries which he had sustained as a result of the fall.

What the evidence clearly disclosed was the Company's' lack of experience in relation to the type of work being undertaken at the time of the offence. Nor were any systems, procedures or methods for conducting the task of stripping and dismantling the factory roof discussed, devised or implemented prior to work being undertaken. The Company's relevant experience was in the poultry processing business. The Company and the director were charged with failing ensure the health, safety and welfare at work of all its employees, in particular, Mr Pickard. The Company and Attard pleaded guilty. It was the first offence for both. A fine of $110,000 was imposed on the Company and $11,000 on Attard.

Employee fined as well

Buddy Challita, was employed by Mr Pump Pty Ltd (the "Company") as a "boom pump operator" and was licensed to drive a concrete placing boom. The Company carried on business as a supplier of concrete pumping and placing services, including the provision of a truck with a mounted concrete placing boom, and a crew to set up and operate the equipment to various builders undertaking construction work on sites in and around the Sydney metropolitan area.

On 8 January 2003, the Company was placing concrete at 10 Stanley Street, Putney. Challita was assigned to drive and operate the concrete placing boom and Marcel Budwee was employed to assist. Challita positioned the concrete placing boom in the driveway at 10 Stanley Street, Putney, with the rear of the concrete placing boom extending beyond the front boundary of the site, across the footpath to the gutter line.

A combination of low voltage, street lighting and high voltage power lines, were slung immediately adjacent and parallel to the front boundary of the site. The low voltage mains were slung at a height of 6.6m above the footpath. The street lighting mains were slung at 7.2m above the footpath. The high voltage mains were slung at 9.5m above the footpath. Each of these sets of power lines passed directly over the rear of the concrete placing boom once it was in place and set up in the driveway of the site ready for the concrete placing boom to be deployed. A tree was adjacent to the power lines. During the concrete pour, a storm passed through the Putney area consisting of rain, light hail and very strong wind conditions. The very strong wind conditions persisted when the first defendant commenced the "take down" procedures for the concrete placing boom.

As Challita commenced to fold the first of the three sections of the boom to a closed position which required the boom to be slewed towards the front boundary of the site, the boom came into contact with the foliage of the tree. As a consequence of the very strong winds, the power lines were blowing back and forth within the foliage of the tree. At about this time, Budwee was observed lying on the ground near the rear of the truck. A post mortem revealed injuries to Budwee's right hand and right foot consistent with electric burns which caused fatal injuries to Budwee.

As a result of the accident, the first defendant was charged with an offence arising pursuant to s 20(1) of the *Occupational Health & Safety Act* 2000 ("the OH&S Act") and the Company was charged with an offence arising pursuant to s 8(1) of the OH&S Act. It was alleged that Challita failed to take reasonable care for the health and safety of persons who were at his place of work and who may have been affected by his acts or omissions at work, in particular Marcel Budwee. The Company and Challita pleaded guilty. Challita was fined $600 where the maximum penalty was $3,300 and the Company $65,000 where the maximum was $550,000. The fact that Challita had left the concrete pumping industry played a part in the determination of the fine he received.

Fines for the company, its directors and a manager

Lovells Springs Pty Ltd ("Lovells Springs") was a company that had been in the hands of the Lovell family for generations and had largely operated without incident until 22 February 2002. On that day, an employee of the company, Mr Wayne Cheers, while operating the No 1 John Evans Tapering Machine had his left hand crushed between the jaws of a hydraulically operated vice within the machine which was located at the company's Carrington site, New South Wales. As a result of this accident Mr Cheers sustained injuries to his left hand involving the insertions of pins into his ring and middle finger. He suffered two dislocated knuckles and the skin was stripped from two fingers, requiring 17 stitches.

Following an investigation by WorkCover, a number of proceedings were commenced against Lovells Springs for breaches arising under s 8(1), s 11, s 13 and s 94 of OH&S Act. In relation to two directors, Robert Lovell and his wife Beverley Lovell, it was alleged that being a director of Lovell Springs employing Cheers they were liable under s 26 of the 2000 Act because of the corporate defendant's breaches with reference to the piece of machinery known as the No 1 John Evans Tapering Machine. In relation to Simon Crane it was alleged that being a manager of Lovells Springs, he was also liable under s 26 of the 2000 Act by reference to offences of the corporate defendant.

Cheers had not been adequately inducted into the workplace and had been simply shown around the site by Crane for about ten minutes. Cheers did not receive a duty statement or job description when commencing employment and had not been adequately instructed as to the tasks he was carrying out at the time of the accident: he had watched others perform the task and had assumed that he knew what to do from watching them. Cheers had not received any training in making adjustments to the No 1 tapering machine, was not adequately supervised at the time of the accident being left to his own devices even though this was the first time he had attempted to adjust the machine on his own. At the time of the accident there was no safe operating system or procedure in place for the operation of or method of making adjustments to the tapering machine. The Tapering Machine was inadequately guarded with no guards whatsoever to protect persons from the operation of the vice or the centrifugal rollers of the machine. The foot pedal that triggered the vice was also inadequately guarded and the tapering machine was not fitted with an emergency stop button or lockout switch. There was no system for employees to report hazards, incidents or near misses to management. The defendant had been alerted to have these types of machines guarded on numerous occasions with over 38 notices including infringement, prohibition and improvement notices being issued to the defendant, the majority being for unguarded machinery. It was alleged that the directors and management, including Crane, were aware that the tapering machine was being used in an unsafe condition.

The Commission noted Crane was well qualified to assess the machinery and all of the machinery, not just that which was to be commissioned. He was aware that the old machinery was, amongst other things, unsafe. It was also note Crane was now the majority shareholder of Lovell Springs. All charged pleaded guilty and Lovell Springs was fined a total of $112,125 with Robert Lovell being fined $4,225 his wife being fined $1,525 and Crane being fined $7,475.

Fall from ladder

A company that was involved in the supply of blinds and awnings provided a quote for work that contemplated that aspects of its work would take place at a height of between 6 and 6.5 metres. The work was undertaken. The photographs of the site show a steep side passage and the use of ladders when attaching the awnings to the building. During the course of the works an employee Richards, suffered severe injuries when he fell from the ladder. Richards, had been employed by the company since around 1999. On 17 March 2004, with another person from the company, he was involved in installing awnings in a way that had been performed by the company over a number of years. Both were involved in applying the normal method of work when installing awnings. Illawarra Canvas Blinds Pty Limited and Michael Vimpany pleaded guilty to offences under the Occupational Health and Safety Act 2000. The company pleaded guilty to a breach of section 8(1) of the Act and Mr Vimpany, as a director and by operation of section 26(1) of the Act, was deemed to have also been in breach of section 8(1) of the Act. The Company was fined $70,000 and the director $7,000.

Construction manager liable for crane mechanism failure

On 21 June 2002, at George Street Parramatta, Buildcorp Australia Pty Ltd ("Buildcorp") was operating as the construction manager at a building site. Next door to the building site was an office block, from time to time occupied by persons employed or acting on behalf of tenants. Part of the work on this day required precast panels to be fixed on the side of the construction which overlooked the office block next door. A crane was required to perform this work. During the task of manoeuvring the slab by crane over the side of the building so it could be affixed to the structure, the crane mechanism failed and the precast panel fell through the roof of the adjoining building and, fortunately, injured only slightly a person who was working on the top floor of that building.

Following an investigation conducted by WorkCover, proceedings were commenced against Buildcorp alleging a breach of s 8(2) of the Occupational Health and Safety Act 2000. The charge alleged that Buildcorp, being an employer, on 21 June 2002 at 9 George Street Parramatta failed to ensure that persons not in its employment and in particular Chris Wilfert were not exposed to risk to their health and safety arising from the conduct of its undertaking, to wit, the construction of a building while they were at its place of work. The Company pleaded guilty to the charge but disputed the particulars of the charge in an attempt to argue that WorkCover could not prove every particular alleged in the charge, no doubt to suggest that the nature and gravity of the true offence was less than alleged by the prosecutor. Ultimately some of the particulars in the charge were not proved but others were. The Company was ultimately convicted and fined $110,000.

Plant Hire Company Convicted

Sherrin Hire operates an equipment hire business. On 19 November 2002, an employee of Integral Energy Pty Limited, Malcolm Fletcher was injured while working on the upgrade of overhead power lines located in the bush at Mt Wilson. Fletcher was working some 11 metres above ground, using an elevated work platform mounted on a truck, supplied to Integral Energy by the defendant in August 2002. The truck when it became unstable as the boom of the machine was extended, toppled with Fletcher in the bucket of the machine. At the time of the incident, the machine had been located so that it was pointed at the pole with the cab of the vehicle of the machine nearest the pole. The ground was uneven and sloped up towards the pole. The ground also sloped down from the right of the machine to the left of the machine

Sherrin Hire pleaded guilty to an offence brought under s 11 of the *Occupational Health and Safety Act* 2000 ('the Act').The charge provided Sherrin Hire to ensure that the plant was safe and without risk to health when properly used and further failed to provide or arrange for the provision of adequate information about the machine, to the persons to whom it was supplied to ensure its safe use. Expert evidence demonstrated the plant was unstable. The Company was fined $48,750.

Excavation Dangers

In late October 2001 Mr Stimson engaged Mr Clissold to dig a 50 metre long, 3 metre deep ditch along the side of a dam he had on his property. On 31 October 2001 Clissold was buried in the trench after it collapsed and was fatally injured. On the day of the incident Simpson suffered a severe heart attack as a result of witnessing the accident, however later recovered. Stimson was charged under the OH&S legislation for a failure to carry out an adequate risk assessment of the excavation site to comply with the WorkCover Authority of NSW Code of Practice in respect of excavation work and the use of front end loaders during excavation activities. Stimpson pleaded not guilty to the charge although he conceded he was in breach of the Code of Practice.

Stimson submitted that he had no option but to plead not guilty to the charge as the incident occurred as a result of the willful disobedience of Clissold. Stimson indicated that only moments before the incident took place, he had told Clissold to *"get out of it (the trench) and stay out of it".* On saying this to Clissold, Clissold made his way into the trench. Stimpson then told Clissold *"Go home and stay home and when I finish I'll come and have a cup of coffee on the way home."*

In consideration of Stimson's case, the Commission took into account the fact Stimson did not have any prior convictions, was a man of considerable age, he showed considerable remorse, and also took into account the poor health and age of his wife. A fine of $5,000 was imposed out of a possible maximum fine of $55,000.00.

The Dangers of Power lines

In mid 2002 Vaughan Constructions Pty Limited ("Vaughan") engaged Royce Roofing Services Pty Limited ("Royce") to supply, deliver, erect and install roofing on a large warehouse under construction. Royce in turn engaged the services of G & P Coupland Cranes Pty Limited ("G & P") to assist in the lift and manoeuvring of the roofing materials.

Mr Moffatt and Mr Elliott were employed by G & P as the mobile crane driver and dogman. Mr Patton was employed by Royce. On the morning of 24 May 2002 Moffatt and Elliott were in the process of manoeuvring the large pieces of construction material for the roofing. On the fourth load of roof materials being hoisted the material began to sway. Patton grabbed the pack whilst it was in mid air in order to guide it onto the roof. As he was guiding it onto the roof, the crane came into contact with overhead power lines, carrying 11,000 volts electricity. The electricity current entered Patton's body through his right hand and exited through his left foot. As a result of the electric shock, Patton fell forward onto safety mesh and subsequently went into convulsions. Patton sustained first, second and third degree burns to his right hand, left foot and left shoulder as well as scratches to his face. As a result of the incident both G & P and Mr Coupland, company director, were prosecuted. Both parties pleaded guilty.

In pleading his case Coupland requested the Commission not proceed with the conviction on account of his personal circumstances. Coupland was 59 years old with minimal assets, some $10,000.00. He suffered from a number of medical conditions which subsequently make him unfit to work in the construction industry. As a result of the sicknesses he received approximately $400.00 per fortnight to support him and his wife. Coupland indicated he had no direct involvement with the incident on 24 May 2001 and was merely relying on the skill, competence and experience of his employees, in particular Elliott and Moffatt who were both experienced workers of some 16 years and he indicated he ought to have been able to have relied upon his experienced staff. Based upon these submissions the Commission found the offence proven but dealt with the matter under the first offenders provisions which in limited circumstances permit the Court to dismiss a charge despite the fact it has been proven.

In the prosecution against G & P, WorkCover led evidence indicating no "tiger tail" covers were attached to the power lines to increase their visibility over the crane working area, nor did the company specifically identify the power lines as posing a risk in the work area, nor did they provide adequate control measures to address the risk of the crane coming into contact with those power lines. Ultimately the Commission fined G & P $35,000.00

Summary

The above cases highlight the importance of not only having extensive OH&S workplace safety protocols but also having the necessary experienced employees to enforce them. OH&S legislation exposes employers, plant suppliers, directors and managers and employees to prosecution for lapses in safety practices.

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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