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Professional Indemnity Insurance Does Not Cover Construction Claim

A recent decision handed down by the New South Wales Court of Appeal in relation to works carried out on the third runway at Sydney Airport has demonstrated the limitations of some professional indemnity policies when construction works are carried out (Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd & Ors.)

A dispute arose between the Federal Airports Corporation ("FAC"; later Sydney Airports Corporation Ltd "SACL") and Baulderstone Hornibrook Engineering Pty Ltd ("BHE") in relation to the design of reinforced earth walls which formed the perimeter of the third runway at Sydney Airport, and the adjacent area which was known as the Millstream Channel Diversion. BHE was the head contractor on the project and had engaged a number of subcontractors for the project including Reinforced Earth Pty Ltd, in relation to the design of the reinforced earth walls on the project, and Connell Wagner Pty Ltd in relation to the provision of engineering services, including the reinforced earth walls.

FAC had put in place a program of insurance that would benefit all the consultants undertaking responsibilities in the design and construction of the third runway. The policies that were in place covered professional indemnity risks rather than construction risks and provided total cover of approximately \$50 million. In addition, BHE had in place professional indemnity insurance underwritten by AMP General Insurance Limited which provided cover of \$20 million.

In early 1993, work commenced, and practical completion took place in August 1994. As at late 1996, subsidence of backfill behind the facing panels of the reinforced earth walls was discovered.

In June 2002, SACL sued BHE for damages. In June 2004 the proceedings were settled with BHE undertaking to rectify the defects at a sum of approximately \$65 million.

BHE sought indemnity in relation to the claim from its own insurer (which accepted liability but cover was only \$20 million) and the insurers of the policy arranged by SACL. The SACL insurers denied indemnity for the claim, primarily on the basis that the policy did not provide cover for negligent construction work, only negligent design.

The primary issue at the original trial in the Supreme Court was whether or not the negligence of BHE was a consequence of design and engineering, which would have been covered by the policy, or construction, which was not covered by the policy. The professional indemnity policy contained an exclusion in respect of "*construction work performed involving the means, methods, techniques, sequences, procedures and use of equipment, of any nature whatsoever which are employed by the Insured's contracting staff or others in executing any phase of any Project.*"

The trial judge in the Supreme Court found that neither policy responded, as the liability of BHE for SACL's claim against it could be described as a construction risk rather than a professional indemnity risk.

BHE appealed.

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The Court of Appeal agreed with the trial judge that the proximate cause of the subsidence was the defective construction of the wall by BHE and the exclusion clause therefore applied. BHE had failed to carry out the compaction of the backfill and test it properly. BHE argued on appeal that it was the designs of the subcontractors that were negligent and the policy should therefore respond however the Court of Appeal found that even if the failing in design and engineering were covered the exclusion clause still applied as the subsidence arose out of the construction work being carried out poorly.

The Court of Appeal therefore found that the policy did not respond and the appeal should be dismissed. It did not matter that negligent design would have been covered by the policy; as soon as the exclusion clause was activated by the negligent construction then the policy would not respond. Once liability is excluded on one ground, then the insurance policy will not respond.

The Court of Appeal also noted that acceptance of money from an insurer where the level of insurance does not completely cover the loss does not prevent an insured from seeking indemnity from another insurer. In essence, an insured can seek indemnity from as many insurers as it has until it has been fully indemnified. Once this has occurred, an insurer may be liable to contribute to the insurers who have indemnified the insured but will not be required to make payment to the insured.

The case provides a reminder that professional indemnity policies do not provide cover against all types of claims that flow from negligent design and it is necessary to carefully consider the exclusion clauses in a policy. If damage occurs as a consequence of negligent construction even where there has been negligent design, this will be excluded by a policy that has exclusion clauses that seek to exclude claims arising from construction works.

When carrying out design and construction work care should be taken when arranging insurance to ensure that the professional indemnity policy arranged does not contain exclusions that exclude liability for construction work, if the builders intention is to obtain cover for such risks through professional indemnity insurance. Builders must carry out a careful analysis of their construction risk insurance and their professional indemnity insurance to ensure there is no possible gap in cover.

Costly Failure To Detect Breast Cancer

In a landmark decision a terminally ill woman suffering from breast cancer has successfully sued Sydney South West Area Health Service ("SSWAHS") after BreastScreen NSW Sydney South West, for which SSWAHS was responsible, failed to detect cancer in the left breast in a mammogram screening in 2006.

In January 2007, Christine O'Gorman was diagnosed with breast cancer that subsequently spread to her lungs and brain. O'Gorman sued SSWAHS in the Supreme Court alleging that they were negligent in, amongst other things, failing to exercise due care and skill in interpretation of the 2006 mammogram and failing to properly compare the 2006 mammogram with a mammogram undertaken in 2004. In addition, it was alleged that O'Gorman was not informed that there was a suspicious mass visible on the scans.

O'Gorman first attended BreastScreen in 1994 and attended again in 1996, 1998, 2002 and 2004 and then on 23 February 2006. At each attendance O'Gorman filled out and signed a consent form which included the statement "there is a small risk that a breast cancer may not be detected by a screening mammogram." On 17 January 2007 following self detection of a lump in her left breast O'Gorman was diagnosed with breast cancer and as a consequence had her lymph nodes removed and underwent chemotherapy. As a result of the chemotherapy the tumour shrank to 5.5cms but did not shrink any further and so it was determined that O'Gorman should undergo a mastectomy. This took place on 23 August 2007. O'Gorman subsequently underwent radiation treatment which burnt her badly. On 13 May 2008 it was found that the cancer had spread to both of her lungs.

Justice Hoeben found that SSWAHS owed O'Gorman a duty of care and this duty had been breached. There was an important change between the 2002/4 mammograms and the 2006 mammograms in that the mass had increased in size, in fact, approximately doubled. This should have been detected. It was then necessary for the trial judge to consider whether or not the tumour would have been discovered had an ultrasound of the plaintiff's left breast been carried out in March 2006. The trial judge determined that this would have been the case. Finally, it was necessary for the trial judge to consider what difference a diagnosis in 2006 would have made to the plaintiff's outcome. Again the trial judge accepted that if the cancer had been detected earlier this would have made a difference.

The trial judge awarded O'Gorman damages approximately at \$400,000.00.

Given the significance of the decision it is likely that there will be an appeal. Time will tell if the Court of Appeal will uphold the decision.

The NSW Court Of Appeal Process

In NSW there is an automatic right to appeal to the Court of Appeal where the amount in issue is greater than \$100,000.00. If the amount in issue is less than \$100,000.00 then leave to appeal is required. Section 75A of the Supreme Court Act provides that a rehearing should be conducted by the Court of Appeal. This rehearing is done by way of examination of the pleadings, the transcript and the exhibits which are reproduced in appeal books - no witnesses are called. Written submissions are also prepared by both parties. However the witnesses are not recalled to give evidence. So what happens if a party in the appeal doesn't believe the Court of Appeal has reconsidered the evidence? Is there an appeal from the decision of the Court of Appeal?

The High Court of Australia has unanimously allowed an appeal from the NSW Court of Appeal finding that the Court of Appeal had not discharged its legal duty on the appeal which required the Court of Appeal to review the evidence that was before the trial judge (*Martina Lujans v Yarrabee Coal Company Pty Ltd and Jal Grid Pty Ltd*).

In Lujans case the issue for the High Court was whether or not a rehearing had properly been carried out by the Court of Appeal.

Martina Lujans was rendered a quadriplegic as a consequence of a motor vehicle accident on 18 September 1998. Lujans was driving along a haul road about 35 kilometres long from the Capricorn Highway in Central Queensland. The haul road ran north to various mines, one of which Lujans worked at. Yarrabee Coal Company Pty Ltd was one of the mining companies and controlled the road. Jalgrid Pty Ltd maintained the road. About 5.9 kilometres from the Capricorn Highway, the left side wheels of Lujans' vehicle gradually entered the shoulder of the road from the hard running surface at the start of the sweeping right hand bend. The vehicle then swung sharply to the right, travelled across the road and rolled over. There were no witnesses to the accident. In the immediate area of the accident the width of the road from rill (the ridge of soil left after grading operations at the edge of the road on each side) to rill varied from 10.8 metres where Lujans' vehicle left the road to the left to 11.2 metres when Lujans come back to the right. The variation in the road width continued over 33.3 metres.

The haul road was graded every week to remove a build up of the coal dust and was graded in 7 kilometre sections from Sunday to Thursday nights. The section where the accident occurred had not been graded since the Sunday night.

Lujans commenced proceedings in the Supreme Court against Yarrabee and Jalgrid and the trial judge found that as a consequence of coal and dust being spread over the road from rill to rill, drivers had difficulty distinguishing between the roadway and the softer shoulder area. The trial judge deducted 20% for contributory negligence as a consequence of Lujans' failure to stay in the centre of the road. Damages awarded after this deduction totalled \$8,759,510.55.

Yarrabee and Jalgrid appealed and the NSW Court of Appeal and the NSW Court of Appeal allowed the appeal finding that the sole cause of the accident was driver error by Lujans.

Lujans appealed and was granted special leave to appeal to the High Court. The High Court allowed the appeal but remitted the matter back to the Court of Appeal for rehearing. Why was this the case? The Court of Appeal had not properly performed their function and reviewed the evidence that was before the trial judge. The Court of Appeal had wrongly relied on copies of the photographs of the road taken shortly after the accident that were contained within the appeal books; the original photographs arguably showed a layer of black coal dust across the road. The trial judge and witnesses at the trial had looked at the original photographs. The copies had only been prepared as part of the appeal process. In addition, the High Court found that the Court of Appeal had overlooked the cross examination of the experts (the Court of Appeal had commented there was none; in fact cross examination continued for about 60 pages of the transcript). Further, the Court of Appeal had not analysed evidence about the motor vehicles speed properly.

So what was the end result? As the Court of Appeal had not properly reviewed the evidence before the trial judge it had not discharged its function. The matter will therefore return to the Court of Appeal where a review of the evidence will be carried out and a judgement delivered after the evidence is reviewed.

Judges Need To Give Adequate Reasons Which Support Findings

In personal injury claims it is not uncommon for a claim to proceed to hearing without any medical experts giving evidence. In the majority of cases a District Court Judge will be required to assess the medical condition of the claimant based on medical reports and there will be no cross examination of any of the doctors who provide reports. This places a District Court Judge in a difficult position to determine the state of conflicting evidence without the benefit of oral evidence from doctors. Notwithstanding, it is still incumbent on District Court Judges to come to a reasoned views based on

the medical evidence and failure to provide a reasonable judgement supported by the evidence can result in the need for a new trial. A recent decision of the NSW Court of Appeal highlights some of the difficulties that are faced when a judge must determine a claim without the assistance of oral evidence from a doctor.

The NSW Court of Appeal has recently considered an appeal by a claimant where the claimant received a small award of damages based on findings that he suffered a relatively modest injury which the claimant argued was against the weight of the expert evidence.

In *Majkic - v - Bananno* the Court of Appeal determined that Majkic had established that the District Court Judge's reasons in his judgment revealed an inadequate process of reasoning, the judgment contained factual errors and the findings were not supported by the reasoning.

Majkic was injured when he was struck by a motor vehicle. The claim proceeded to hearing before a District Court Judge for an assessment of damages. Liability had previously been determined. Not long after the accident the claimant underwent an MRI scan of his back which revealed a significant disc protrusion. A critical issue at the Trial was whether the accident caused or materially contributed to the discal injury. The only witness who gave oral evidence was the claimant. A number of medical reports were tendered by the claimant and the defendant. No doctors were required for cross examination. There was a marked divergence of opinion on the question of causation between the medical opinion relied on by the claimant and the medical opinion relied on by the defendant.

The claimant, on appeal, argued that the judgment contained no analysis of the competing cases. The Court of Appeal noted it was not sufficient for the Judge to simply adopt the defendant's analysis of the medical evidence. The District Court Judge had accepted and adopted the analysis of the medical evidence set out in the defendant's written submissions which he incorporated into his reasons. In essence, the District Court Judge accepted that the doctors who supported a causal link between the accident and the discal injury were based on a history of immediate thoracic and lumbar back pain and in the absence of a record of complaint of back pain in the ambulance officer's notes and the hospital's Emergency Department records, the claimant did not experience back pain in the accident. Therefore without immediate complaint of back pain there was no causal connection as the claimant's experts reports could not be accepted as they were based on an assumption that was not proven.

The Court of Appeal noted the problem with the judgment was that none of the expert opinions were predicated on the existence or absence of pain in the lumbar or thoracic spine immediately after the accident although the date of onset was a relevant factor. The submission by the defendant adopted by the Trial Judge that immediate thoracic or lumbar back pain was a necessary condition for the conclusion that the accident materially contributed to the discal injury was not supported by the evidence.

The Court of Appeal noted that:

"It is common for cases in the District Court to proceed with a tender of conflicting medical reports, without the authors being required for cross examination. This places an added burden on the Judge, who must carefully analyse the assumptions upon which each report is based against the facts that have been established to determine which opinion is to be accepted. Where the expert evidence is in conflict and no rational basis emerges for preferring one opinion to another, the result is likely to be that the party with the onus fails."

The Court of Appeal noted that the District Court Judge failed to engage in a reasoned analysis of the conflicting evidence and ultimately the Judge's decision did not depend on discharge of the onus of proving a fact but rather on the acceptance of a theory, which was not supported by the expert evidence and which in any event, overlooked the claimant's direct evidence on the topic.

Both the claimant and defendant accepted the only option where the appeal succeeded was a retrial. No doubt next time around medical practitioners are likely to be called to give evidence and be required for cross examination.

The case serves to demonstrate that claimants and defendants are entitled to expect reasoned judgments, identifying reasons why one side's expert evidence is preferred over the other's expert evidence particularly where experts do not give oral evidence.

Perhaps for Majkic the next time around the result may be different but no doubt the length of the trial and the costs incurred will be much greater.

Fresh Evidence After A Trial Finishes - Can You Apply For A Retrial?

A claimant brings a damages claim which proceeds to hearing and a judgment is delivered. After the trial fresh evidence is discovered. That fresh evidence may be the result of further investigations or may be undiscovered documents rather than fresh evidence. So, can the unsuccessful party seek a retrial?

The common law principles which a Court is bound to apply on an application for a new trial on the ground of fresh evidence are well settled. As recently noted by the NSW Court of Appeal in *Preston - v - Harbour Pacific Underwriting Management Pty Limited*:

"... it is essential ... that the verdict, regularly obtained must not be disturbed without some insistent demand of justice. The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or ... it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial."

Generally a new trial will only be ordered where there is no lack of reasonable diligence on the part of the unsuccessful party and it is reasonably clear that fresh evidence would have produced an opposite result.

As the Court of Appeal noted

"... it would be unfair to the successful party if he were to be deprived of a verdict obtained after a trial on the merits and be subject to the expense, inconvenience and uncertainty of a further trial merely because some relevant evidence had, without fault on his part, been unavailable to the unsuccessful party at the time of the trial ..."

The Court of Appeal did however note that the position is different where the unavailability of evidence at the trial results from a significant failure by the successful party to comply with an order for the discovery of relevant documents in his possession or under his control.

In *Preston's* case, Preston brought an action for slander, allegedly committed during a telephone conversation with an insurance investigator enquiring into a fire. A new trial was sought relying on the discovery of fresh evidence which comprised a second and longer note of the telephone conversation which gave rise to the slander claim.

In *Preston's* case a new trial was not ordered by the Court of Appeal and the application for the retrial failed as the Court of Appeal concluded that the fresh evidence was readily available by due diligence. In this case, the second note had not been identified or a copy supplied to Preston notwithstanding an order for discovery in the proceedings requiring the other party provide discovery of all relevant documents (a list of relevant documents and copies of those documents). However the Court of Appeal determined that due diligence would have led Preston to identify the note notwithstanding it had not been discovered by Harbour Pacific Underwriting as documents that were discovered would have led Preston to the other note which was in a file with other documents. The Court of Appeal in *Preston's* case also found that the new evidence was not so compelling that it would displace a requirement of reasonable diligence.

So, in this case Preston was not successful in convincing the Court that there should be a retrial, however the case serves as a reminder that despite a judgment parties are entitled to a retrial where fresh evidence is obtained and where that fresh evidence could not have been obtained from reasonable diligence on the part of the person who seeks the retrial.

Tax Deductibility Of Legal Costs In Employment Disputes

Litigation is an expensive game. Particularly if the costs that are incurred are not tax deductible. So are the legal costs that an employee incurs when he sues an employer deductible?

What happens if an employee who sues his employer for termination payments claims a tax deduction for the legal costs incurred? What is the ATO's attitude?

In a recent decision of the Federal Court in *Frank Romanin v Commission of Taxation of the Commonwealth of Australia*, Justice McKerracher, has confirmed that legal costs incurred in pursuing an employer for termination payments were in Mr Romanin's case deductible overturning the ATO's rejection of the claim for a deduction for legal expenses.

Romanin was employed by the University Co-operative Bookshop Limited (the "Co-op"). In June 1999 Romanin was recruited by Drake Personnel Ltd as Acting General Manager and Company Secretary for the Co-op. In July of that year Romanin started negotiating a permanent employment contract with the Co-op. He was offered a position as General Manager and Chief Executive Officer on a full time basis earning a salary of \$4,692 per week plus superannuation. Romanin was not willing to accept the position until he received confirmation from the Chairman of the Co-op that he would be entitled to 12 months' termination notice or payment in lieu if his employment was terminated.

A letter of employment was issued by the Co-op. The letter noted the separation / termination provisions and payments were to be agreed. A draft employment contract was ultimately prepared which included a 6 month termination notice period. Romanin complained about the draft service agreement which was inconsistent with the termination period that he had agreed with the Chairman.

Subsequently the Co-op suddenly terminated Romanin's employment and gave him 7 days' notice. The Co-op denied that the employment contract ever existed and denied Romanin was ever entitled to a 12 month termination notice period or payment in lieu.

Romanin found alternate employment, but was unemployed for some time. Romanin consulted a barrister to provide an opinion as to whether or not an employment contract existed with the Co-op and whether he was entitled to enforce the terms of the employment contract. Proceedings were commenced in the Industrial Relations Commission in NSW which upheld Romanin's claim for 12 months' termination pay, less any other earnings that Romanin had earned in alternate employment in the 12 months following the termination. Romanin received an award of compensation plus interest on the amount owing plus an award of costs.

Romanin received legal advice that he should treat the compensation as an Eligible Termination Payment ("ETP"). The interest component was treated as assessable income by Romanin in his tax returns and the compensation component was treated as an ETP in Romanin's tax returns. The total legal fees amounted to \$283,565.15. Romanin recovered \$210,000 from the Co-op pursuant to the costs order. As a result he was out of pocket \$73,565.14 being the total of what he had to pay for his own costs and costs he had to pay to the Co-op in respect to a costs order made against him in relation to part of the proceedings less the amount recovered from the Co-op. The full amount of the costs incurred were claimed as a tax deduction.

The tax deduction was ultimately disallowed by the ATO following a tax audit and penalty tax was imposed on Romanin as he had claimed the deduction for legal costs.

An objection to the assessment was lodged by Romanin and the issue ultimately came before the Federal Court. Romanin argued that the legal expenses were incurred in enforcing a contractual payment of income arising from his employment under the employment contract. Romanin argued that the legal expenses incurred were in relation to revenue and not capital.

The ATO had disallowed the claim arguing the expenses were not incurred in the course of deriving assessable income from undertaking duties of employment as the employment had ceased. The ATO also argued that the expenses were capital in nature and should not be allowed. The ATO also argued that in the event that the expenses were deductible the monies received from the other side in payment of the costs order should be classified as an assessable recoupment, or alternatively Romanin should not be entitled to claim deduction for any part of expenses claimed which exceeded his actual loss.

Justice McKerracher noted that:

"for expenditure to form an allowable deduction as an outgoing incurred in gaining or producing assessable income it must be incidental or relevant to that end. The words incurred in gaining or producing the assessable income mean in the course of gaining or producing such income ... in my view the test of deductibility of legal expenses is not whether the employee's conduct or activity that resulted in the need to take defensive proceedings is conduct or activity engaged in for the purpose of producing of an assessable income ... rather it is whether the expenditure was incurred in the course of gaining or producing the assessable income, in the sense that the occasion of the expenditure is found in what is productive of assessable income."

Justice McKerracher also noted:

"the Commission contends that the advantage sought in incurring the legal expenses was to secure a lump sum payment by way of relief for the summary termination of the employment contract and that it did not relate to the process of carrying out the duties which produced income under the former employment. I find this argument difficult to accept in the circumstances where the payment constitutes an enforcement of an entitlement to income, not to

compensation or damages.”

The Court held there was the requisite connection between the outgoing claimed (legal expenses) and the incurrance of assessable income. The Court accepted that Romanin had pursued income that was contractually owed to him and that the costs incurred in doing so were deductible.

At the end of the day the Court accepted that Romanin was entitled to claim a deduction for the full expenses that he paid. The Court also held that Romanin could not make the full claim for the deduction without allowing for the receipt of his contribution to his costs recovered from the Co-op but noted that this needed to be dealt with in the tax returns for the year that the contribution was recovered.

Whether or not legal costs are linked to producing income and are deductible or are aimed at protected income and capital is a difficult issue and each case will need to be considered on its own merit. Nevertheless, Justice McKerracher in this case found that there was a sufficient link between the legal expenses incurred and the enforcement of contractual rights to income to permit the legal costs to be claimed as an expense.

In times of financial crisis senior executives may find themselves in dispute with their employers in relation to contractual entitlements under employment contracts. With the legal costs to pursue a dispute deductible there is an immediate easing of the pain and burden that those employees face when they need to seek legal advice and commence legal proceedings. The enforcement of legal rights arising from an employment contract may not be as expensive as originally thought. Employees seeking to enforce their rights will be able to do so with the benefit of a tax deduction for any shortfall in the legal costs incurred compared to the costs recovered provided the expenses relate to producing assessable income.

The question of deductibility will turn on the nature of each claim and no doubt in this case the fact that the award for Romanin resulted in an ETP swayed the Court towards the view that the costs were incurred in connection with the production of assessable income.

Employees who bring claims similar to Romanin's claim will be entitled to claim deductions for the legal expenses they incur and pay in the year the expenses are paid which is of significant benefit if proceedings run over a number of financial years.

Remember however it will be necessary to carefully consider the nature of the claim made and to seek advice from a tax expert before you seek to claim a deduction for legal expenses incurred in pursuing an employment claim as not all claims will lead to the production of assessable income.

Homeowner Sues Builder In Relation To Fire Damage And Loses

The NSW Court of Appeal in *Nguyen - v - Cosmopolitan Homes (NSW) Pty Limited* has recently delivered a judgment vindicating a District Court Judge's decision to reject a claim by homeowners against a builder where the homeowners alleged that a fire that had broken out in the premises was the result of defective electrical wiring that had been installed when the house was constructed, approximately four years before the fire.

Mr and Mrs Murray engaged Cosmopolitan Homes to build a two storey home which was completed in April 2000. Cosmopolitan Homes sub-contracted the electrical work. The Murrays moved into the home and some three years later sold the house to the Nguyen's. The Nguyen's subsequently sued Cosmopolitan Homes for a breach of the warranty implied by Section 18B of the Home Building Act, 1989.

Section 18B of the Home Building Act, 1989 provides:

"Warranties as to residential building work

The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:

- (a) a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract,*
- (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,*
- (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,*
- (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,*

- (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
- (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment."

The subsequent successors in title of a property are entitled to the benefit of these warranties as well.

The District Court Judge rejected the claim, concluding that the Nguyen's did not discharge the onus of proof on the balance of probabilities that the fire was caused by negligent installation of wiring so as to constitute a breach of Cosmopolitan's statutory warranty and a breach of the electrical sub-contractor's duty of care.

Nguyen appealed.

The Court of Appeal examined the evidence and concluded it was open to the District Court to conclude that the evidence did no more than raise possible causes of fire and did not prove, on the balance of probabilities, what was the cause of the fire. The expert evidence relied on by the Nguyen's suggested that the location of cables across brick ties could lead to the degradation of a cable. The Court of Appeal noted that the experts in the case conceded:

"That there is always a proportion of fires where the most likely cause cannot be assessed or there are two or three plausible alternative explanations or potential explanations for the ignition."

It was not enough for the plaintiff to produce expert evidence that would support that one of the possible causes of the fire was a negligent act. Rather, it was necessary to establish that the negligence was a necessary condition of the occurrence of the harm. If it were accepted that laying the wires over the ties was negligent, it was still necessary to establish that this negligence was a cause of the fire.

It is not necessary to demonstrate that negligence is the sole cause, however the Court of Appeal noted that when considering evidence it is necessary to distinguish between an inference and speculation. As Justice McDougall noted:

"An inference may be drawn from other facts where, as a matter of reason, those other facts make it more probable than not but the thing to be inferred exists. If they do no more than show a possibility that the thing in question exists, then its existence is a matter of conjecture, not inference."

At the end of the day in this case the competing expert evidence and the existence of a number of explanations for the possible cause of the fire resulted in a conclusion that the Nguyen's had not proven their case on the balance of probabilities. It is not enough to point to a negligent act and argue that that negligent act must have caused the loss. There must still be evidence that there is a causal relationship between the negligence and the loss.

In this case it was necessary to demonstrate that the fire was caused, in part by negligence of Cosmopolitan Homes or the electrical sub-contractor if the Nguyen's were to succeed. The evidence did not measure up and the Court of Appeal upheld the original judge's decision that the Nguyen's case was not proven on the balance of probabilities.

Proof is one thing. Speculation and conjecture is another. One must remember that where there are competing expert opinions there can be competing scenarios as to the cause of damage and unless there is evidence to support a finding that one scenario is more probable than the other, a claimant may well fall short in their attempt to prove their case.

OH&S Roundup

Partners Share the Penalty

The NSW Industrial Relations Commission has confirmed in the decision of *JT & LC Tippet Pty Limited & RD & LF Tippet Pty Limited - v - WorkCover Authority of New South Wales* that where a partnership is prosecuted by the WorkCover Authority for a breach of the Occupational Health & Safety Act only one penalty will be imposed for a breach of the Act although the partners will be obliged to share the penalty.

JT & LC Tippett Pty Limited & RD & LF Tippett Pty Limited were convicted of breaches of the Occupational Health & Safety Act by Justice Backman following an incident when an employee was injured when attempting to clean an area of a grimme windrower which harvests potatoes. The employee was injured when attempting to clear away blocked dirt and debris and pieces of potato on a conveyor system. The lack of guarding was seen as a cause of the accident and was the reason that there was an unsafe system of work.

The Industrial Relations Commission has originally fined each of the defendants which were companies \$60,000.00. The two companies effectively operated as a partnership and despite this, the original trial judge imposed separate penalties on each of the companies.

The two companies had been established as trustees of trusts to do no more than income split with family members. The two companies operated in partnership. There was one ABN number for the partnership. The ABN Register noted that the type of entity was a family partnership and the group certificate issued to the employee was issued by the partnership.

The two defendants appealed. The Full Court of the Industrial Commission noted that in the circumstances there was only one employer entity in law and although the two defendants had been found guilty of the same offence that was in the same terms and arose out of the same circumstances, their offences related to corporate co-offenders who were in partnership. The reality being that there was one employer meant there should only be one penalty.

This is great news for partnerships who, as a consequence of the original judge's decision, potentially faced a fine for each of the partners whenever an occupational health & safety prosecution arose.

The Full Court of the Industrial Relations Commission noted that there had been no cases before the Industrial Court where there had been a corporate or non corporate partnership as was the case in Tippett's case and to compare a partnership to two entities carrying on separate businesses would be incorrect.

Unfortunately for the Tippett's the Court decided that it was necessary to redetermine the penalty. The Court determined that the appropriate penalty should be \$80,000.00 for the offence, shared equally between the two defendants rather than \$60,000.00 for each defendant.

A small win but nevertheless a win for the defendants.

The law is clear. Where there are two entities involved in a workplace incident there will be two penalties imposed unless the entities are actually partners in a partnership. That means businesses need to be aware that their business structures may ultimately result in multiple prosecutions where there is more than one entity involved in the undertaking of the business, however if the two entities are partners in a partnership and it is the partnership that undertakes the business there will only be one penalty.

\$150,000 Fine For Fatalities

Provimi Australia Pty Limited manufactures animal food stock and an employee engaged in cleaning the number one mixer of its current product was fatally injured when employees of the company failed to isolate the electricity to the mixer before the employee entered the mixer to clean out residue. The mixer could be turned on and off from a set of switches alongside the power board as well as being isolated at the power board. Once the mixer was isolated from inside the power board the power board was locked and the employee would keep the key in their pocket to prevent anyone else from having access to the power board.

The company pleaded guilty and readily accepted there was a clear system failure. One of the failings accepted was that there was no assessment of performance of newer members of the workforce to see if they understood what was required when operating and attempting to isolate the mixer.

The company employed a medium sized workforce in a business that has inherent dangers in its daily processes. The company was a first offender with a good industrial record and the Court noted it was entitled to leniency. A fail safe system was installed after the incident which fitted guarding and interlocking devices which would prevent reoccurrence and this was installed at a modest level of expenditure. The Court granted a discount of 25% on the fine imposed and ultimately imposed a penalty of \$150,000.

An early guilty plea will moderate the penalty, however as seen, a fatality will ultimately lead to a significant penalty.

Downsizing Your Workforce

In hard economic times businesses may need to decrease their workforce in an effort to save costs. Once a decision has been made by a business to decrease its workforce, that decision has to be supported by careful planning to avoid:

- penalties by way of fines, reinstatement orders by Courts or Tribunals and orders for compensation which may effectively reduce, or worse, wipe out any savings to the business from the reduction in employee numbers, and
- legal costs of litigation with ex-employees; and
- distraction from the continuing business as employees and management are involved in any ensuing litigation by terminated employees; and
- ill feelings generated in retained employees who disapprove of the treatment of the terminated employees.

Here are some issues for employers to consider.

Redundancy

- (1) The concept of redundancy or "genuine operational reasons" provides businesses with a basis for terminating employees during any economic downturn which will not expose a business to a claim for unfair or unlawful termination. The employer must ensure:
 - (a) the employee's position is made redundant, ie. it no longer exists and will not be replaced;
 - (b) the employee is not selected for redundancy because of the employee's race, age, religion, sex, position as an employee representative or because of a mental or physical disability, notwithstanding the disability did not arise at work;
 - (c) reasonable notice or notice required by any agreement or award is paid to the employee on termination;
- (2) Where an employee has been a poor performing employee there is no prohibition from selecting the poor performing employee over other better performing employees where job numbers are to be reduced from employees in the same class or area.
- (3) Where a higher paid employee is made redundant rather than a lower paid employee, employers should ensure the selection of the employee's position to be made redundant is not internally replaced by a lower paid employee and there are no issues of discrimination in the decision to terminate.
- (4) Employees who have not had as long a period of service with a business will cost the business less in redundancy and long service leave entitlements than an employee that has been there for longer periods. Again, the selection of shorter term employees to be made redundant on the basis of a less cost to the company can be made without the concern of breaching any equal opportunity or discrimination laws so long as the company can demonstrate it has not chosen the employee on discriminatory grounds.

Voluntary Redundancy

- (5) Where an employer embarks on a programme of voluntary redundancy, the employer can, at its discretion, choose what areas and/or positions within its organisation are to be offered voluntary redundancy. However, employers should be very careful when offering voluntary redundancy that they are seen not to discriminate against classes of persons that they employ who are not offered voluntary redundancy. Voluntary redundancy should be offered, without restriction, to all employees within a class of employees and be available to all employees within that class notwithstanding variables to the employees in that class including age, mental or physical disability, sex, religion, etc.

Injured Employees

- (6) In New South Wales employees injured at work are given the added protection by Part 8 of the Workers Compensation Act, 1987 (as amended) ("WCA"). The Workplace Relations Act, 1996 ("WRA") provides protection for disabled employees or employees that are temporarily absent because of illness. It is unlawful to terminate those employees on the ground of their disability or absence.
- (7) The WCA provides added protection for employees injured at work by:
 - (a) providing an \$11,000.00 fine for employers who dismiss injured employees within six months of an injury or first period of incapacity; and
 - (b) imposing an obligation on employers who dismiss injured employees to reinstate those employees within two years of the dismissal if the employee, within two years of the dismissal, provides the employer with a medical certificate certifying they are fit for the position or a similar position from which they were dismissed.
- (8) An exception to the \$11,000.00 penalty for dismissing an employee within the first six months of an injury or period of incapacity is where the employer proves the dismissal was not related to the employee's injury or incapacity. If the employee's position was genuinely made redundant, an employer should be able to rely upon the redundancy as a

defence to the section of the WCA.

- (9) Similarly, an order for reinstatement would be difficult where an employee was dismissed as a result of a genuine redundancy. The Court would be unlikely to order an employer to reinstate an employee to a position that was genuinely made redundant and no longer exists. However, there remains the obligation on the employer to reinstate the employee to a suitable alternative position if one exists.

Employees Performing Light Duties

- (10) Employers have an obligation under the Workplace Injury Management Act, 1988 ("WIM") to provide suitable duties unless it is not reasonably practicable to provide the suitable duties. A decision in hard economic times to withdraw suitable duties would fall within the exception of not being reasonably practicable. Where an employer has made a decision to downsize the number of employees, those employees on suitable duties are available to be terminated. However, care must be taken by employers to ensure they are not in breach of discrimination legislation or the protection provided by the WCA and WRA.

Conclusion

Where businesses have decided to downsize their workforce they must carefully review each employee's circumstance to ensure the selection of those employees to be made redundant does not expose employers to liabilities under the discrimination legislation, equal opportunity legislation, WCA, WIM and WRA.

Employer Has Valid Reason For Dismissal But It Was Harsh

In the matter of *Royle - v - Cheetham Salt Limited* the Australian Industrial Relations Commission decided an application by Royle seeking reinstatement or compensation after she was dismissed from her employment after she had obtained unauthorised access to salary information and had disseminated that information to others.

Royle had been employed as a receptionist for 18 years. She had not received any formal warning nor had she been the subject of any disciplinary action in the course of her employment.

Royle's employment was terminated in March 2008 after it was alleged she had accessed information about senior executive salaries. It was also alleged she had told other persons about the senior executive salaries.

The AIRC was satisfied Royle had accessed information she was not authorised to have and had, in breach of her duties as an employee, disseminated that information to other employees. As a result the Commission determined the employer did have a valid reason to terminate her employment.

However, the Commission found the termination by the employer was harsh as:

- the employee was not given an opportunity or time to consider the allegations made against her; and
- the employee was not given an opportunity to respond to the allegations; and
- the employer did not properly consider the responses provided by Royle.

The Commission was satisfied that reinstatement to her position was not appropriate. It determined the employer had to pay the employee five weeks compensation which represented the proper notice Royle should have been provided by the employer.

Where an employer has determined to terminate a person's employment arising from poor performance, misconduct or breach of obligations owed to the employer, and it employs more than 100 employees, the termination must be procedurally fair. In other words, the allegations must be put to the employee and the employee given time to consider her response. This may include the employee speaking to other employees, looking at documents and investigating the allegation. It may necessitate the reconvening of the meeting at a later time. The employee's response should be considered and only then should a determination be made on the appropriate course of action to take which may include termination of employment.

Where employers are meeting with employees to put allegations and consider responses, an independent person should always be present who can, if necessary, give evidence of the process followed.

Increase In Risk Of Injury Or Cause Of Injury In Journey Claims?

A Deputy President of the Workers Compensation Commission recently examined the journey provisions contained in Section 10 of the Workers Compensation Act, 1987. Section 10 provides that if the material risk of injury has increased due to an interruption or deviation to a journey to or from work then compensation is not payable.

In *Target Australia -v- Woolnough*, Acting Deputy President Deborah Moore examined whether two brief stops on the way home from work to deliver eggs to friends would materially increase the risk of injury. Approximately twice per month the worker drove home from her employer to home making two stops, firstly at the home of one of her friends to collect a quantity of eggs and secondly at another friend's home to deliver some of the eggs. Whilst returning to the car parked in the second friend's driveway, she tripped and fell on the steep driveway injuring her right hand and wrist.

Both parties agreed it was a material deviation. Once the interruption or deviation from the journey had been established, the onus was then on the worker to establish that the risk of injury was not materially increased due to the interruption or deviation. Examining previous decisions, Deputy President Moore commented that the cause of the injury was irrelevant. What must be considered is not the actual injury which occurred but the increase of the risk of injury generally as a result of the interruption or deviation. In the circumstances, a finding of fact was made that it was mere inadvertence that caused the worker to fall over. The general increase in the risk of injury was not a material increase as prescribed by the Section. The visit to the home of her friend, even with the knowledge of risk of her friend's steep driveway, was an acknowledgement of an increase of risk. However, this was not the test and confused the cause of the injury with the general and material risk of injury due to the deviation. In this case, due to the worker being forewarned of the steep driveway, she was thus forearmed and there was no material increase in the risk of injury.

This decision is a reminder that each deviation case should be treated on its facts. Simply because the deviation caused the injury this does not remove rights to compensation if there had not been a material increase in the risk of the injury occurring. Interestingly, The Deputy President commented that had the worker undertaken the journey in inclement weather, had been distracted by talking on the phone etc, then this may have shifted the decision in the employer's favour.

No Compensation For A Work Ski Trip Injury

President Keating of the NSW Workers Compensation Commission recently determined in *Nexon Australia Pacific Pty Limited -v- Badawi* that the employment of a worker injured skiing whilst on a business trip was not a substantial contributing factor to her injury.

The worker and her supervisor had travelled to Perisher Blue ski resort to pursue a business opportunity with Perisher Blue. A representative from Perisher Blue had arranged to ski with the worker, her supervisor and the worker's partner. The representative with Perisher Blue was to discuss over lunch a business proposal and had organised skiing equipment and clothing for all the parties. Nevertheless, at short notice the Perisher Blue representative cancelled the skiing activity and the lunch arrangement. Notwithstanding the absence of their client, the worker and her supervisor decided to ski anyway.

The evidence was that whilst she skied, she continued to receive phone calls and check her emails. However, crucially in the afternoon she then paid for and took a skiing lesson with her partner. Shortly after the conclusion of her lesson she took a phone call from her supervisor requesting a meeting to discuss the business proposal with Perisher Blue. Whilst skiing down the hill towards her supervisor she suffered an injury to her left knee.

Whilst it was accepted by all parties that the worker suffered an injury to her knee in the course of her employment, an examination was undertaken as to whether an employment was a substantial contributing factor to the injury as required by Section 9A of the Workers Compensation Act 1987 (NSW). President Keating dismissed employment was a substantial contributing factor. He commented that once the client's representative withdrew from the skiing and lunch arrangement, the worker was then on her own time. By deciding to undertake a lesson and buy a lift pass, the nature of the activity became primarily recreational, so at the time of her injury she was not performing positive work activities. Furthermore, there was no evidence that the worker was injured because she was hurrying to meet her supervisor. President Keating remarked that with or without the telephone call from her supervisor, the worker would have descended the mountain in any event. The telephone call from the supervisor did not strengthen the causal link to employment.

As you would recall from our article on *Haider -v- JP Morgan* in our August 2007 newsletter, the substantial contributing factor provisions in the New South Wales Workers Compensation legislation are proving a reasonable defence to employment injuries outside the generally accepted realms of employment. The President of Commission and the NSW Court of Appeal have reinforced that for an injury to have an employment connection, there must be some positive benefit being obtained by the employer. Both in the *Haider* decision and this case, if it can be determined there was a shift from a work focus to primarily recreational, then the worker's claim for compensation will fail.

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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