GD NEWS

Gillis Delaney Lawyers

September 2005 Issue

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

Record Damages Award For Workplace Bullying

The Supreme Court of New South Wales has well and truly rung the alarm bells for all employers and users of contract labour. It has sent a clear message that workplace bullying and other similar misconduct can lead to awards of significant damages.

In *Naidu v Group 4 Securitas Pty Limited [2005] NSWSC 618* Mr Justice Adams has awarded a bullied employee exemplary damages of $150,000 - a record - and more damages for the psychological injury he suffered are yet to be determined. In all, the verdict is likely to easily exceed half a million dollars.

How did all this come about? Essentially, because both the employer and the business to whom the worker was lent on hire failed to take the worker's claims of bullying seriously.

The facts were simple. Mr N (the worker) was employed by Group 4 (the employer). He was lent on hire to News Limited (the host) where he performed security duties. The worker was under the direction and control of C an employee of the host.

Over a period of several years, the Court found, on the evidence before it, that C subjected the worker to ongoing verbal and racial abuse, physical impropriety, sexual harassment, intimidation and other gross misbehaviour. The host in its submissions to the Court said: "[We do] *not seek to defend or in any way excuse* [C's] *conduct which is indefensible and outrageous.*"

In short, the worker was the object of sustained workplace bullying. The Court found that C created a structure of oppression that was built on the power that his position gave him over the nature and course of the worker's employment.

The result was severe mental injury to the worker.

The conduct of C was so brutal, demeaning and unrelenting that it was reasonably foreseeable that if it continued for a significant period of time, it would be likely to cause significant, recognisable psychiatric injury. Both the employer and the host had a duty of care to provide a safe place of work and a safe system of work for the worker. Both were found, in the circumstances of the case, to have breached that duty.

The Court made a number of important observations as to the nature of the duty of care an employer and a host user of labour should heed.

First, it said "*Whatever the effect of the Anti-Discrimination Act 1977 or similar legislation, I do not doubt that an employer has a duty by virtue of an implied term in the contract of employment to protect all employees from racial or personal vilification. Racial or personal vilification is a direct attack upon the personal integrity of the employee and an employer is obliged, by virtue of the contract of employment, to take reasonable steps to prevent it from being inflicted during the course of employment – as by taking action against the offending employee or moving the offended employee elsewhere. This is necessarily implicit in the duty to provide a safe place and a safe system of work."*

As to what steps an employer should take once a complaint of bullying is made, the Court said:

"Accordingly, even one complaint of serious misconduct should initiate in any employer acting reasonably an enquiry both of the person against whom the allegation is made and of the affected subordinate about the truth of the allegation and the extent of the misconduct. That process should also involve an enquiry of the employee about that employee's response to and ability to cope with the conduct of which he or she has complained. Of course, in every case this will be a matter of fact and degree but the appropriate response of the employer must be gauged against the duty to take seriously its obligations to provide a safe place of

We thank our contributors

David Newey dtn@gdlaw.com.au
David Collinge dec@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Cameron Cuffe cgc@dlaw.com.au

Inside

Page 1 Bullying in the Workplace

Page 2 Tripping on driveways

Page 2 NSW OHS laws catch interstate manufacturer

Page 3 International negligent act leads to legal action in NSW

Page 5 Times are changing in NSW

Page 5 Transporting loads can be a problem.

Page 6 Intercompany arrangements lead to increased risk

Page 7 OH&S penalties in NSW

Gillis Delaney Lawyers
Level 6,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

work"

An argument that bullying and conduct like C's is outside the scope of his employment duties, and therefore not something for which it should be liable, was raised by the host. In large part, the Court rejected that reasoning.

As between the employer and the host, the Court found that, broadly speaking, the worker's injury was 65% attributable to the host (as C's employer) and 35% attributable to the employer of the worker.

For all employers (whether direct or host) the clear lessons from the case are:

- make clear that bullying like behaviour is not tolerated in the workplace;
- publish complaint procedures and protocols;
- take all complaints or allegation of such behaviour seriously;
- properly investigate any allegations;
- document the findings of the investigation;
- take appropriate action - which may involve a change in work duties.

Important Note: C was not a party to or a witness in the litigation which this article discusses. As a result, he has not had the opportunity to deny or refute the very serious allegations made about him.

Persons That Trip Over On Footpaths & Intend To Sue Face An Interesting Issue

Obligations owed by Councils and Highway Authorities differ to the obligations and responsibilities owed by owners of a residential driveways.

This issue was recently highlighted by the NSW Court of Appeal in *Bartolo - v - Strata Plan No. 10535*. Bartolo was injured when he tripped on a raised lip on a driveway between two blocks of flats. Bartolo was attending the premises to install cables for cable television and he had never been there before. He tripped on the driveway as there was a height differential of two inches which ran the length of the driveway between two slabs of concrete.

The original Trial Judge found that it was quite obvious that the driveway was not in good condition at all but there was no liability because Bartolo should have seen the obvious concrete lip.

The Court of Appeal did not like the Trial Judge's reasoning and ultimately ordered a retrial in the District Court. The Court of Appeal noted that the duty of care owed by a private owner of a relatively short driveway differs to the duty of care owed by a Council that is responsible for hundreds of kilometres of footpath. Factors which the Court will need to consider in the retrial include the magnitude of the risk, the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action. There is little doubt that the accident was foreseeable but the scope of the owner's duty will need to be determined. The reasonable steps that need to be taken by the owner of a residential driveway may differ from the steps that must be taken by a Council responsible for hundreds of kilometres of footpath.

The retrial may not lead to a different result. The retrial was ordered as the Court of Appeal considered that the trial judge failed to address these issues that must necessarily arise in the case.

Implications

The judgment highlights a real anomaly. A person who trips on a defect in a footpath owned and maintained by a Council may not recover damages but if an identical defect is found in a footpath on residential premises the duty owed by the owner can differ to the duty owed by the Council and the owner may be negligent.

Strata Managers are not able to rely on recent decisions of the Courts concerning Councils that significantly limit the liability of Councils for defects in footpaths. Strata Managers will need to maintain driveways and accessways to buildings and remove and repair obvious defects to avoid liability for damages claims that arise from trip and fall claims.

NSW OH&S Laws Catch Interstate Manufacturer

The Industrial Relations Commission has recently delivered a judgment convicting a Victorian manufacturer for a breach of NSW OH&S legislation.

Lyco Industries Pty Limited ("Lyco") is a manufacturer based in Victoria. Lyco manufactured hydraulically powered post driving machines. Lyco did not have offices in NSW but its product was sold by an agricultural equipment supply depot based in NSW.

In May 1999 an inexperienced casual employee was fatally injured whilst operating a Lyco post driving machine. There were two persons operating the machine and they had received only a few hours training before the accident. There were no eye witnesses to the fatal

accident, however the evidence led to only one conclusion and that was that whilst operating the machinery the employee placed his head on or near a post in an attempt to re-straighten the post and whilst doing so accidentally engaged the lever which released the hammer resulting in a 600 lb hammer striking his head and fatally injuring him.

Expert evidence demonstrated that it was possible for someone other than the operator to come into contact with the falling hammer which ultimately meant the machine was inherently faulty. The evidence also revealed that the information contained in the instruction manual was not only scant but at times confusing which also made the equipment unsafe.

The equipment was found to be unsafe and the instruction manual inadequate and this gave rise to an offence under Section 18 of the NSW OH&S legislation which has a maximum penalty of $550,000.

Lyco was convicted despite attempts to avoid prosecution through an argument that NSW Courts had no jurisdiction over a Victorian manufacturer. Lyco was responsible for the supply of goods to NSW. The relevant act was the giving of physical possession of the goods to the end purchaser. The Court concluded that to find otherwise would create a dangerous precedent as manufacturers of goods based outside of NSW could escape their obligations under NSW OH&S legislation by simply ensuring that they themselves did not deliver the goods.

The case has been adjourned for sentencing at a later time.

Implications

The judgment sends a clear message to interstate manufacturers that they cannot escape responsibilities imposed by OH&S legislation in NSW where their products find their way into NSW.

Interstate manufacturers need to be aware of OH&S legislation in all jurisdictions where their products are supplied. Interstate manufacturers are subject to prosecutions for breaches of OH&S legislation in NSW where the equipment they supply is unsafe or their instruction manuals are inadequate. It is no answer to a prosecution in NSW for a breach of OH&S legislation that a manufacturer does not have a presence in NSW.

Importers of equipment also need to carefully visit the instruction manuals supplied with machinery they sell as they too will be liable for any OH&S legislation breach that flow from inadequate instruction manuals.

International Negligent Act Leads To Legal Action In NSW

The Supreme Court of NSW has upheld an Australian company's right to maintain a damages action in NSW against a number of USA companies arising out of damage to the Australian company's mining equipment which occurred in the USA.

Colosseum Investments ("Colosseum") and Cherrington Asia Pacific ("Cherrington") are Australian companies that carry on business in NSW. In July 2003 Cherrington entered into a contract to perform drilling work for an oil pipeline project in China. Cherrington leased certain drilling equipment from Colosseum. Colosseum purchased the drilling equipment from the manufacturer, a company located in Ohio, USA. Cherrington allegedly entered into an agreement with Vanguard Logistics ("Vanguard") to arrange for the transportation of the drilling equipment from the factory in Ohio to China. Transportation was arranged with COSCO, a shipping line that operated as a common carrier. The equipment was transported to the port of Seattle and whilst the shipment was being loaded onboard a vessel the drilling unit fell and was damaged beyond repair. The terminal operator and a stevedoring company were also implicated in the incident. A right royal battle thereafter ensued.

Colosseum and Cherrington commenced proceedings in NSW naming Vanguard as a defendant and subsequently joining the terminal operator and the stevedore as defendants. Vanguard brought a cross-claim against COSCO, the terminal operator and the stevedore. In addition, Vanguard and other companies commenced proceedings in the USA against COSCO and an associated company, COSCO North America ("COSCO NA") and in those proceedings sought indemnity in respect to any liability that Vanguard might have in the proceedings commenced in NSW.

A veritable lawyers feast seemed inevitable.

COSCO, the terminal operator and the stevedore are not residents of NSW nor do they carry on business or have any presence in NSW or indeed in Australia. The companies did not submit to the jurisdiction of the NSW Court.

Colosseum and Cherrington needed approval from the NSW Court to proceed with their claim. Colosseum and Cherrington argued that their damage had been suffered in NSW by reason of a negligent act in Seattle. The economic loss claimed was a claim for loss of profits which otherwise would have been derived from the drilling equipment had it not been damaged beyond repair. The NSW Supreme Court held that a company incorporated in NSW which has its principal place of business in NSW and is located in NSW suffers damage in NSW when its economic loss is loss of profits from a negligent act regardless of where the negligence was committed. The Court therefore held that the proceedings could be maintained in NSW. But that was not the end of the matter.

There was also a challenge to the jurisdiction of the Court by the defendants. The defendants argued that NSW was not a convenient forum for the resolution of the claims and that the Court should decline to exercise its jurisdiction on discretionary grounds. When considering such an application there are a large number of indicators which are considered. After considering the indicators the Court determined that it was appropriate for the proceedings to continue in NSW. The Court was not persuaded that NSW was an inappropriate forum.

The Court found that the proceedings had been properly commenced as:

- They were the only proceedings which involved all relevant parties as the Seattle proceedings did not involve Colosseum and Cherrington.
- The resolution of all issues between the parties involved the application of the laws of NSW and the laws of the United States whether or not the proceedings were heard in NSW or the United States.
- The first proceedings were commenced in NSW.
- The ease of enforcement of orders made in NSW against the shipping line, the terminal operator and the stevedore was no easier or more difficult than enforcement of orders which might be made in the United States.
- The unavailability of or inconvenience to witnesses who are United States residents required to give evidence should not be given undue weight and video link evidence was a viable option.
- There would still be witnesses in NSW who would need to be called in proceedings in the United States if the proceedings in NSW did not proceed.

It is important to note that the onus of demonstrating that NSW was an inconvenient forum rested with the defendant and the Court was not convinced by the defendant's arguments.

The judgment confirms that the substantive law for the determination of the claims for Colosseum and Cherrington in negligence against Terminals is United States law and the NSW courts will need to apply those laws.

The judgment also provided a convenient list of the indicators which are weighed up to determine whether or not a Court is an appropriate forum to hear a claim where an international tort is involved. Those indicators include:

- "a consideration of the true nature and full extent of the issues involved in proceedings in the local court and in the foreign court;
- whether, in the light of that consideration, the foreign court has jurisdiction to deal with the same subject matter as is before the local court;
- the degree of connection which both proceedings share with the law of the foreign court and the law of the local court;
- where the relevant acts or omissions occurred;
- where the parties reside and carry on business;
- whether local professional or other standards of care have a bearing on the legal quality of the relevant acts or transactions or the liability of the parties;
- where and how the damage was suffered;
- where the relevant evidence in the action is to be found;
- whether the application to the local court for a stay or dismissal has been made with reasonable promptness;
- the stage which proceedings in the foreign court have reached in comparison with the stage of proceedings in the local court;
- the order in which the two sets of proceedings were instituted and the costs which have been incurred in each;
- whether each court recognises the orders and decrees of the other;
- which court can provide more effectively for the complete resolution of the whole of the controversy between the parties;
- that a party properly invoking the jurisdiction of the local court has a prima facie right to insist upon the exercise of that jurisdiction, so long as that prima facie right is not given undue emphasis;
- that considerations of comity and restraint should be taken into account where a defendant carries on business in a foreign country and the jurisdiction of the courts of that country would be recognised under local conflict rules;
- the undesirability of allowing two independent actions involving the same question of liability to proceed contemporaneously in the courts of different countries;
- whether the dominant purpose of a party in commencing proceedings in one jurisdiction or another is to prevent another party from pursuing remedies available in the courts of another country having jurisdiction."

Implications

Colosseum and Cherrington are still a long way away from recovering damages. Even if they succeed in proceedings in NSW against the international companies they will be forced to seek to enforce those judgments against international companies who have no assets in Australia. COSCO may need to be wary about the transit of its ships throughout Australian territorial waters.

If Colosseum and Cherrington don't arrest a passing ship they will need to execute any judgment against companies with assets in China

and the USA. There is no bilateral treaty or multi-lateral international convention enforced between the United States and any other country whereby reciprocal recognition and enforcement of civil judgments is facilitated. The USA Rules of Court in Washington where the terminal operator and stevedore are located will not recognise a judgment of the Supreme Court of NSW as conclusive as the NSW Court does not have personal jurisdiction over those parties.

Colosseum and Cherrington will continue their pursuit of damages. They may also find themselves on the way to the Court of Appeal in NSW should this recent judgment be challenged.

International companies that cause damage to NSW companies as a result of damage to property located outside Australia can face proceedings which can be maintained in NSW but the enforceability of any NSW judgment against assets which are not found in Australia will continue to present difficulties.

Times Are Changing In New South Wales

For some time NSW has imposed caps on legal costs that can be recovered by an injured plaintiff where their award is less than $100,000. The only way around the cap was for a plaintiff to make an offer of compromise, obtain a result more favourable to the plaintiff than the offer and then the defendant would be penalised with a costs order which would effectively remove the cap on costs. A practice developed where plaintiff's solicitors would serve offers of compromise at an early stage at quite low figures when the defendant had not had the opportunity to investigate liability or quantum. The defendant could let the offer lapse and risk an adverse costs order or accept the offer on commercial grounds and resolve the claim. At last that conundrum has been addressed.

With the commencement of the *Civil Procedure Rules* in NSW on 15 August 2005 defendants now have an opportunity to challenge the appropriateness of an early offer when insufficient information has been supplied by a plaintiff.

The Rules prescribed a regime for the provision of information. Plaintiffs must provide detailed particulars of their claim and documentation to support their claim. The Rules also provide that offers of compromise should not be made until all particulars and documents have been supplied to allow a defendant to properly consider the offer.

A defendant who considers that an offer of compromise has been made without the supply of adequate information must challenge the plaintiff within fourteen (14) days of receiving that offer. A simple letter is forwarded to the plaintiff disputing the validity of the offer. It is important to document the deficiency in the information or documentation supplied and the reason why the defendant is not able to properly consider the offer.

Implications

Plaintiffs will need to be well prepared before offers of compromise are made and will need to supply detailed information and documentation to defendants to facilitate the proper evaluation of offers otherwise plaintiffs will be at risk of not receiving favourable costs orders despite well pitched offers of compromise.

Defendants will also need to act quickly. They will need to evaluate the information they have received before receiving the offer of compromise to ascertain whether or not sufficient information has been supplied (as required by the *Civil Procedure Rules*) and if not challenge the offer within 14 days.

Transporting Loads Can Be A Problem

The NSW Court of Appeal recently handed down a judgment in *Herning v GWS Machinery Pty Ltd & Anor*. The Appeal concerned an unsafe system of work. The District Court's judgment dismissing the claim was set aside and the Court of Appeal found the employer failed to provide a safe system of work but reduced the damages (to be assessed) of the employee by 25% for contributory negligence.

The Facts

Herning was a sales representative employed by GWS Machinery Pty Ltd ("The Employer"). Herning's duties included picking up and delivering heavy farm machinery. On 5 December 1997, the Employer requested Herning to pick up a 200kg agricultural mower from Jarrett Implements Pty Ltd ("The Supplier"). An employee of the Supplier used a tractor with a small crane to lift the mower onto the back of the Herning's truck. Herning and an employee of the Supplier attached a single high tensile strap across the mower to hold it in place on the back of the truck. The strap was tightened by way of a ratchet. There was only one strap available on the truck at the time. Herning then started the journey back to his depot. He had travelled less than a kilometre and while proceeding past a roundabout, he felt the load shift. He stopped and attempted to manually reposition the mower, but in doing so injured his back. Herning commenced proceedings in the District Court. The trial judge found no liability in negligence on the part of the Employer or the Supplier.

What caused the load to shift?

The Court of Appeal found there appeared to be three possible causes:

- the strap was not securely fastened;
- one strap was not sufficient to secure the load
- Herning drove too fast around the roundabout.

The Supplier was also a defendant to the proceedings, presumably as one of its employees may have assisted in securing the load with the strap.

The Court of Appeal found there was really no evidence put before the District Court to support any of these possible causes and accordingly was unable to determine why the load had shifted. Accordingly, the Supplier was found to have no liability.

Was the risk foreseeable?
There was unequivocal evidence before the District Court that loads secured by a strap move. The Court of Appeal's view was that it was readily foreseeable that Herning would seek to reposition the mower after it had shifted during transit. Although the mower weighed 200kg, Herning was not attempting to lift the whole load but just "hoik" one corner to reposition it on the tray of his truck. There was no equipment on the truck to assist Herning with the task and the incident occurred shortly before 5pm (some 45 minutes drive from the depot) on a Friday evening (the staff at the depot normally left by 5pm) making it at least unlikely that he would obtain any assistance from the depot. The Court of Appeal found that these factors would have been known to the Employer.

Did the Employer breach their duty?
The Court of Appeal concluded that the Employer had a duty to ensure that their driver was fully aware of the risks involved in seeking to manipulate such machinery by hand and given clear instructions as to what action he should take if a load shifted during a journey. There was no suggestion from the evidence that Herning was given any instruction as to what he should do once a load required repositioning. It was not established in this case that the risks were properly understood by Herning. The Court of Appeal inferred from the evidence that no assistance would have been available from the depot, considering the time of day and distance from the depot. The Court of Appeal found that it is at least likely that appropriate instructions would have resulted in Herning not seeking to reposition the load as he did which gave rise to the injury.

Contributory Negligence
Herning's damages were reduced by 25% for his share in the responsibility for the injury. The Court of Appeal considered the following:

- Herning was away from his depot, undertaking a task that was within the scope of his duties and in circumstances where the manner of performance was a matter largely left to him; and
- Herning should have been aware that he was in danger of placing undue stress on his back in attempting to reposition the mower without assistance (mechanical or other) as he was only able to shift the mower a "few inches" at a time and that it took three attempts to reposition it. He felt the injury occur on the second attempt

It is interesting to note that only two of the three Court of Appeal judges believed there was contributory negligence.

Implications

Transportation of loads, particularly heavy loads will always present a risk to a business. It is important to ensure that the mode of transportation is appropriate and loads are properly stored and secured so they do not move. More importantly those persons transporting the loads need to be carefully instructed on actions which must be taken when loads do shift during transport. Employers need to consider the number of employees utilised during the transportation of the load and the equipment supplied for the purposes of the transportation. Employees cannot be left to go it alone and rely on their own instincts. Employees need proper instruction and training to ensure that they do not expose themselves to the risk of injury.

Intercompany Arrangements Can Lead To Increased Risks.

A recent decision of the Supreme Court of New South Wales highlights the risks corporate groups can face under loose intercompany arrangements, and the continued narrowing of the scope of cover under the motor accidents legislation.

Large infrastructure projects inevitably seem to lead to instances of personal injury to workers on the project. They also inevitably seem to lead to litigation between parties to the project and, usually, their insurers.

Portlock v Baulderstone Hornibrook Engineering Pty Limited [2005] NSWSC 775 is one such case. The decision is of Hoeben J and was handed down on 4 August 2005.

The facts were relatively simple. Mr P was working in connection with the construction of the M5 motorway. He suffered significant personal injury on 12 January 2001 when the mobile crane he was operating tipped over whilst attempting a lift. Mr P was trapped in the incident and suffered, among other things, a right leg amputation below the knee.

Who owned the crane?
It might seem surprising just how difficult the answer to this question came to be.

Baulderstone Hornibrook Engineering Pty Limited (**Engineering**) and another company had formed an unincorporated joint venture which had been contracted by the RTA to construct the M5 Motorway. Another Baulderstone company - **Hornibrook** - supplied labour and plant to

the joint venture.

(Another issue complicated things: at first, Mr P said he was employed by Engineering. Engineering admitted that. Later Hornibrook said it employed Mr P. Engineering sought to withdraw its admission. The case proceeded on that basis.)

The legal title (ownership) to the crane was held by Hornibrook. It paid for its maintenance, received income from its use, and ultimately received the proceeds when it was sold. Under the Motor Accident legislation, however, that is not the end of the story.

By section 4(1) of the *Motor Accidents Compensation Act 1999* (**the Act**), the concept of 'owner' has an extended meaning which goes well beyond ordinary legal concepts of ownership. The fundamental concept seems to be lawful possession and not registration or legal title.

Under section 4 the first potential owner for the purposes of the Act is the "registered operator of the vehicle within the meaning of the *Road Transport (Vehicle Registration) Act 1997,* unless the owner has sold or ceased to have possession of the vehicle." The evidence showed the registered operator to be yet another Baulderstone company (**Asset Management**), but that it had ceased to have possession in 1998. So Asset Management was not the owner.

The next possibility under section 4 is "each person who, although not a registered operator …, is a sole or joint owner …, unless that person has sold or ceased to have possession…" The evidence was that Hornibrook was 'a sole or joint owner' because it held the legal title. Had it, however, ceased to have possession?

Hornibrook was paid a substantial sum by Engineering each month for the 'dry hire' of the crane. It was constantly on site. It was being used for the purposes of Engineering in the M5 project. Although it was driven by an employee of Hornibrook, the Court concluded that Engineering had possession of it and was thus the owner for the purposes of the Act as " any person who solely or jointly …. is entitled to the immediate possession of the vehicle."

The key then seems to be - who actually has the vehicle in their possession? If the evidence establishes which entity that is, it does not matter, for the purposes of the Act, who is the registered operator or who is the legal title holder.

Many construction and infrastructure operators might find this disconcerting. It will have implications for insurance, intercompany arrangements, and joint venture and contractual obligations.

Was the incident covered by the Motor Accidents legislation?

This issue was a little simpler. The Court reinforced the position that the definition of 'injury' in the Act (the trigger for insurance cover) is intended to narrow the scope of circumstances which come within the broad concept of 'use and operation' of a motor vehicle.

According to Hoeben J there is a distinction between operating a crane as a crane (on the one hand) and driving it in the sense of actual control and management of the vehicle while it is moving.

Injuries within the definition in the Act are "those which can be characterised as being a consequence of its driving or its running out of control, and [are] further cut down by the requirement that the causal relationship must be characterised as being direct and not something wider."

Here, the crane was stationary when the incident occurred. No locomotion was intended or attempted. All that [Mr P] was doing was controlling the lifting mechanism of the crane. In those circumstances there was no 'injury' within the terms of the Act.

Essentially therefore, if the activity does not involve propelling the vehicle as its nature intends, there will not be a Motor Accident injury. If there is not, there is no cover by the CTP policy, and no requirement to comply with the procedural requirements of the Act.

Implications

Clearly, large corporate groups need to review which entity is likely to be the 'owner' for the purposes of Motor Accidents legislation. A review of intercompany arrangements may provide some surprises. The provisions of contractual agreements should also be examined.

For CTP insurers, the decision provides further ammunition for limiting the range of incidents which attract indemnity under the statutory policy.

NSW Industrial Relations Commission Snapshot

This month we review a number of decisions of the Industrial Relations Commission of NSW and fines imposed for breaches of OH&S legislation in NSW.

Forklift Collision

On 21 January 2003, Mr McNevin sustained fractures to both his right and left arm, right leg, jaw, skull and ribs along with bruising to his

brain and a punctured lung, severed ear and a puncture to his right thigh together with severed tendons in his right knee and multiple cuts to his torso during his employment with Amway of Australia ("Amway"). He was moving stock around a storage facility located at Castle Hill using a stockpicking forklift when he collided with another stockpicker. The collision caused the forklift Mr McNevin was driving to topple over.

Investigations carried out by WorkCover found that at the time of the accident, Amway did not have any formal guidelines stipulating how many forklifts were able to operate in one aisle of the storage facility. Further WorkCover uncovered evidence which suggested Amway only undertook its occupational health and safety obligations in an ad hoc manner and Amway could not demonstrate specific training of their employees relating to the operation of forklifts.

Following the incident Amway completely overhauled their safety procedures and on the job training and all personnel received detailed briefings on warehouse operations and control in relation to their specific duties. The Commission noted Amway had shown remorse for its actions by the exemplary assistance provided to Mr McNevin following his recovery from injuries. Amway had provided Mr McNevin with a rehabilitation program which was retraining him as a graphic designer.

The company pleaded guilty and was fined $110,000.00.

Telecommunication Tower Fall

On 29 May 2003, Mr Keepa-Hunuhunu was seriously injured when a 80m telecommunications mast he was dismantling with the assistance of two other employees toppled over as a result of another employee unhooking one of the three support wires. As a result of the incident Mr Keepa-Hunuhunu sustained serious injuries to his face and head, along with fractures to his left arm and ribcage as well as a punctured lung and punctured diaphragm.

All three workers carrying out the dismantling of the communications tower were experienced riggers. WorkCover led evidence before the Commission contending the offence was a serious one given the obvious and foreseeable risks associated with the dismantling of a 80m communications tower. The defendant had a detailed and prominent system for ensuring the safety of their workers in relation to the dismantling of communication towers and it was deficiencies in the danger assessment process within their safety procedures that had led to the injury occurring. Telecommunication Infrastructure pleaded guilty to charges brought by WorkCover and was subsequently fined $71,250.00.

Sydney Cricket Ground Lighting Tower Upgrade

In September 2002 Cabra Electrical Conducting Pty Limited and its director, Mr Sheriff was engaged by the Sydney Cricket & Sports Ground Trust to undertake an upgrade on the six light towers situated at the Sydney Cricket Ground. An employee of Cabra, Mr Simonit was on top of one of the lighting structures carrying out work when as a result of heavy rain was requested by Cabra to descend the light tower due to safety reasons. As Mr Simonit descended the internal ladder systems and platforms within the lighting tower he fell and sustained serious injury.

As a result of the incident Cabra was charged along with its sole director, Mr Sherif by WorkCover as too was Sydney Cricket Ground. WorkCover led evidence before the Commission indicating an internal fall arrest system had been installed in the lighting towers, however they had not been made available for the use of Cabra employees. Further to this at no time prior to the accident did the Sydney Cricket Ground provide Cabra with any form of safety instructions, work statements or methods of workplace safety while using the internal ladders and platforms of the lighting towers.

Sydney Cricket Ground contended they had put in place a safety system which Cabra employees were to use. However, in response Cabra stated they had noticed the fall arrest system inside the lighting towers and had on a number of occasions requested Sydney Cricket Ground to provide them with the safety harnesses to use on the system but on each occasion had been informed that the necessary equipment, namely the harnesses were not available. Despite the factual dispute all defendants pleaded guilty.

Ultimately the Commission concluded that although a system of workplace safety had been put in place by Sydney Cricket Ground it was not in a state of readiness for Cabra and its employees to use. The Commission considered the fall arrest safety system was not operational because the harness and its associated equipment had not been supplied to Cabra at the time before the incident. In reaching its conclusion the Commission took into account the fact that Sydney Cricket Ground is a long standing and respected entity for employing many employees directly and indirectly within the community. Further to this the Commission noted Sydney Cricket Ground had not been the subject of any OH&S prosecutions for an extended period of time, and the likelihood of Sydney Cricket Ground re offending was slim. In relation to Cabra and its sole director Mr Sherrif, the Commission noted given that Mr Sherrif was the sole director of a relevantly small company, any fine imposed upon him will directly affect the Sherrif family as a whole. In consideration of these factors the Commission imposed fines on the Sydney Cricket Ground of $84,500.00, Cabra of $45,000.00 and Mr Sherrif of $4,500.00.

Summary

It is interesting to observe the importance and weight the Commission places on aspects of a defendant's business structure and the significance of an early guilty plea, and the importance of having established and clear OH&S training procedures within the workplace. The importance of providing an injured worker with a comprehensive post-accident rehabilitation program is also significant.

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.

Gillis Delaney Lawyers specialise in the provision of advice and legal services to businesses that operate in Australia. We can trace our roots back to 1950. The name Gillis Delaney has been known in the legal industry for over 40 years. We deliver business solutions to individuals, small, medium and large enterprises, private and publicly listed companies and Government bodies.

Our clients tell us that we provide practical commercial advice. For them, prevention is better than cure, and we strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service.

The changing needs of our clients are met through creative and innovative solutions - all delivered cost effectively. We make it easier for our clients to face challenges and to ensure they are 'fit for business'.

We look at issues from your point of view. Your input is fundamental to us delivering an efficient, reliable and ethical legal service. We like to know your business, and take the time to visit your operation and develop an in depth understanding of your needs. Gillis Delaney is led by partners who are recognised by clients and other lawyers as experts in their fields. Our service is personal and 'hands on'.

Our clients receive the full benefit of our ability, knowledge and effort in our specialist areas of expertise. We provide superior and distinctive services through a team approach, drawing the necessary expertise from our specialists. Our mix of professionals ensures that clients enjoy high level partner contact at all times.

To serve our clients better we make a significant investment in our people. Our success comes from contributions from all of our team. Lifestyle and a rewarding career go hand in hand at Gillis Delaney. We are known as a well balanced firm where lawyers are nurtured and develop skills that will benefit our clients.

Our position as an efficient and cost effective organisation is underpinned by our commitment to emerging technology, and our program of training and education. That means our clients obtain the best advice without the biggest cost.

Our clients have the right to expect that services will be provided efficiently and economically with fairness, impartiality and integrity and we maintain standards of professional behaviour from employees that promote and maintain confidence and trust in our services. We have a code of conduct that provides a framework for the decisions, actions and behaviour of our employees.

We are committed to delivering a quality legal service in a manner which will exceed your expectations and we maintain a focus on business and commercial awareness whilst delivering excellence in legal advice.

We have a proven track record of delivering commercially focused advice. Whether it be in advisory services, dispute resolution, commercial documentation or education and training, a partnership with Gillis Delaney offers:

- practical innovative advice
- timely services
- expert insight
- accessibility
- cost effective solutions

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtn@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.

Gillis Delaney Lawyers