GD News

Gillis Delaney Lawyers

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

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Council Facilities - They Come At A Cost

At what cost does a Council provide facilities to the public? If facilities are provided and an accident happens, can a Council be held liable? If so, in what circumstances? What duty does a Council owe to members of the public and is the duty more onerous when the young are involved? Interesting issues!

Balancing the consequences of risk and reward in providing facilities for the public will always be an issue for Councils. The Court of Appeal has recently visited these issues in a judgment that has delivered more than $1.6 million in damages to a young girl injured on a BMX track on Council land.

Rhiannon Rigby, a 13 year old, was riding her bicycle along a BMX track situated in a sporting complex at Albion Park. The sporting complex was located on community land and the track was open to the public. She cycled down the starting ramp, built up speed in an attempt to ride over a speed hump and as she took off over the speed hump her bike became airborne and she fell to the ground. Rhiannon suffered brain damage as a result of the accident and successfully brought proceedings in the Supreme Court against Shellharbour City Council and the BMX Club.

The Trial Judge originally found that by failing to fence off the starting ramp to prevent it from being used by inexperienced riders, both the Council and the Club were in breach of a duty owed to Rhiannon. Rhiannon was awarded in excess of $1.8 million. Both the BMX Club and the Council appealed.

The Council was the owner and occupier of the whole of the sporting complex which was a substantial area of land, much of which was heavily wooded and included a football and hockey field, tennis courts, cricket nets and changing sheds. There were numerous unsealed trails running through the area which were mostly used for bicycle riding. A BMX track occupied an area of about 100 metres by 50 metres wide within the sporting complex. The BMX track had been designed and built by the BMX Club. Development consent had been granted by the Council as the development authority. The Council had supervised the construction of the works and provided labour and machinery to undertake the works. The Council had overall management and control of the sporting complex although the ongoing management of the track was the responsibility of the Club. The BMX Club's right of use of the track was granted by means of an annual approval from the Council for the use by the Club from Monday to Friday. The track itself was located on land zoned community land and Council approval was necessary to erect any fencing on any part of the BMX track.

The Court of Appeal was called on to determine whether or not the Trial Judge was right in concluding that both the Council and the BMX Club were negligent. The amount of damages was also challenged as was the respective apportionment of responsibility between the BMX Club and the Council and Rhiannon.

The Court of Appeal upheld the original Judge's findings on negligence. When looking at issues of negligence of an occupier, in this case the Council, it is necessary to identify whether there is a general duty of care and in addition it is necessary to have regard to the content of the duty of care owed to a person in a particular case. The content of the duty of care may be determined by

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reference to the kind of damage suffered and the class of which an injured person is a member. The age of Rhiannon was relevant as was her inexperience in BMX. The Court stated:

> *"In determining the duty of a statutory authority, control is an important consideration, particularly as a statutory authority does not necessarily have the same level of control over access to land or premises in question as does a private occupier."*

The fact that the sporting complex was managed by the Club did not abrogate the Council's duty of care nor did it confine its generalised duty of care that was owed to those persons that used the park.

The Court concluded that the question of obviousness of risk goes to issues of breach of duty rather than whether there was a duty of care. Even if obviousness was relevant to duty, the fact that there was a risk of injury in Rhiannon's case called for a response. The question of what response was called for went to the question of breach of duty and the obviousness of the risk was not determinative of the breach.

The Court of Appeal held that the class of persons who the Council owed a duty to take reasonable care were all persons who were likely to use the track other than under the supervision of the Club and this included Rhiannon.

The Court of Appeal held that the Council ought to have taken reasonable steps to avoid injury to inexperienced riders by fencing off the starting pad and ramp to prevent it being used by such riders. The Trial Judge was correct in that finding.

The Court of Appeal also held that Rhiannon was not engaged in the sport or recreation of BMX racing such as to undertake the inherent risks of the activity. The Council was not entitled to expect an entrant of Rhiannon's age to exercise a degree of care comparable to that of an adult with a similar lack of experience.

In relation to the BMX Club, the Court of Appeal found that reasonable members of the community in the Club's position would consider that the risk required preventative action, namely, fencing off the starting pad and ramp.

When considering issues of apportionment of liability between Rhiannon, the Council and the Club, the Court of Appeal concluded that the Council and the Club were the most culpable parties. The Court concluded the Club, having designed and constructed the track, and the Council, having had day to day management of the track and being the consent authority, should equally share responsibility for the accident. The original Trial Judge had concluded that Rhiannon was 20% to blame for the accident. The Court of Appeal agreed.

A major damages claim to deplete Council funds available to provide facilities to the community. A fair result? Certainly for the young lady injured but was too much responsibility imposed on the Council and the Club?

Councils continue to be exposed to significant claims where members of the public are injured utilising facilities which have been supplied or made available for the benefit of the community. This judgment sounds a further warning that Councils must take heed of the possibility that inexperienced and young persons may use facilities made available to the public. Councils must take steps to protect those of tender years from misusing facilities.

The relatively minor cost of fencing in this case weighed against the catastrophic injury justifying the Court finding that more should have been done by both the Club and the Council to avoid the risk of injury and eliminate a substantial claim for damages.

Head Contractor Escapes Liability

Construction works routinely involves a myriad of parties carrying out work in close proximity to each other. A head contractor may engage a contractor to carry out work. The contractor may utilise employees and independent contractors to carry out some of the sub contracted works. When an accident happens, who is to blame?

The New South Wales Court of Appeal has recently considered this issue in *Mambare Pty Limited t/as Valley Homes - v - The Estate of the Late Simon James Bell.*

The late Mr Bell was employed by A Quality Bricklaying Pty Limited as a brickies labourer. Whilst carrying out work he stepped backwards onto an unsupported section of planking which tilted, throwing him to the ground causing significant injury. Bell sued the head contractor for negligence. The head contractor sought contribution from Bell's employer and joined it as a cross-defendant.

What was the cause of the accident? Scaffolding had been properly erected at the accident site but the accident happened because carpenters were working while the bricklayers and Bell were at lunch and had removed planks from the scaffolding. Bell did not sue the carpenter sub-contractor and neither did the head contractor.

The claim proceeded to hearing and the original Trial Judge upheld an allegation that the head contractor failed to properly co-ordinate and supervise its contractors to ensure that there was no interference with the scaffold. Bell was awarded damages of $363,046.00 and there was no deduction for any contributory negligence.

The head contractor appealed. Bell died while the appeal was pending.

The Court of Appeal held that:

> *"the head contractor was not vicariously liable for the wrongful acts of the carpenters which it had not authorised and it was not the plaintiff's (Bell's) direct employer." The head contractor or principal will be liable for the acts of an independent contractor which it authorised. It will also be liable if the risk of damage from the authorised act arises from the way in which the work will necessarily be done or from the way in which the employer expects that it will be done.*

The Court also noted that a principal or head contractor may also owe a duty to a sub-contractor and their employees to establish a safe system of work. In the original trial, the Judge found that the head contractor knew or should have known that the workers employed by the bricklayer sub-contractor were working on scaffolding and that the eaves carpenters needed to use scaffolding to complete their work but did not have the correct scaffolding. He held that it was the responsibility of the head contractor to co-ordinate the work and to properly supervise the area. The Court of Appeal did not agree.

The Court of Appeal concluded that there was no evidence of a breach of duty to co-ordinate the work trades but even if there was a breach, it was not a cause of the accident. The Court of Appeal held the Judges' findings that the head contractor failed to properly co-ordinate the work and that this was the cause of the accident could not be supported. The Court concluded:

> *"where trades can work safely side by side, whether as a result of proper co-ordination or just common sense, the head contractor does not have a duty of constant supervision of the work."*

The Court of Appeal also noted that cases which establish that employers may owe a duty to sub-contractors and their employees do not suggest that this duty extends to checking that they have on-site the equipment and materials necessary for the job. The Court commented that:

> *"There is something odd about the idea of the site supervisor or clerk of works checking a sub-contractor's tools, counting nails, screws, bags of sand, bags of cement and items of scaffolding to ensure their adequacy for the days of work. It is not self-evident that such a person would have or should have the necessary knowledge or experience to do this in any event."*

The Court of Appeal in its judgement noted that

> *"Sub-contractors are not subject to the directions of head contractors as to the manner in which the sub-contract will be done. The scope of work for a sub-trade should state whether the head contractor is to supply and install the necessary scaffolding or whether the responsibility falls on the sub-contractor.… A sub-contractor required to supply his own scaffolding has to decide what equipment he will use for this purpose and again will not be subject to the directions of the head contractor."*

In this case the Court of Appeal held that the head contractor had no duty to ensure the carpenters had sufficient scaffolding on site.

The Court of Appeal also commented that although it was not necessary to decide the issue of contributory negligence, where someone like Bell knew that three of the planks were missing and knew how the scaffolding worked where he had helped to erect it and test it for safety, it was equally obvious that no-one should step onto the unsupported overhanging section of the back plank. The Court noted that Mr Bell had been also been negligent and the Trial Judge had erred in failing to find so but the Court did not need to apportion that responsibility as it concluded that the head contractor had not been negligent.

Onerous obligations do arise as a consequence of the utilisation of sub-contracting practices but in this case the head contractor escaped liability for a substantial damages claim. The Court of Appeal recognised that there must be some limitations on the responsibility of head contractors who cannot be responsible for every event on a construction site.

Priest's Mesothelioma Not Foreseeable

Is it foreseeable that a priest who works with asbestos cement sheeting over about 12 hours over several days could ultimately suffer from mesothelioma due to asbestos exposure? If so, does the manufacturer of the asbestos cement sheeting owe the priest a duty of care? This was a question that the Court of Appeal recently considered in the decision of Seltsam Pty Limited - v - McNeill.

There is no issue in dust disease cases that employees who have been exposed to asbestos products are owed a duty of care by their employers but what if you are not an employee. Can a person who has only had a small exposure to asbestos claim compensation from the manufacturer or supplier of the material that contained the asbestos?

Father McNeill was born in 1927 and was ordained a priest of the Roman Catholic Church in 1952. He spent his working life as a priest until he retired in 1990. In July 2003 symptoms of lung disease were noticed and after extensive investigations, in January 2005 he was diagnosed as suffering from mesothelioma. Due to the nature of Father McNeill's employment, there were few occasions on which he could have been exposed to asbestos dust and fibres. This included a time in 1961 when Father McNeill fixed corrugated asbestos cement sheeting in a roof to a rumpus room in the back yard of the home of his sister and brother-in-law. Seltsam Pty Limited manufactured the asbestos cement sheeting.

The real question for the Court of Appeal was whether or not it was foreseeable that a person in the priest's position would sustain injury. The fundamental issue was whether or not Seltsam should have reasonably known about the risks in 1961. There was a great deal of expert evidence before the Dust Diseases Tribunal in relation to this issue.

The Dust Diseases Tribunal awarded damages to Father McNeill with the trial judge finding that the priest was in the same position as an injured person exposed to asbestos in their occupation over a long period of time. The trial judge found that the plaintiff was a member of a class comprised of end users of asbestos sheeting and it was therefore not unreasonable that a warning be placed on the product.

Selstam successfully appealed.

As Justice Bryson who delivered the leading judgment in the Court of Appeal commented, this was not a case where there was judicial guidance as to whether or not a duty of care should be found. The facts of the case and the law needed consideration. The Court of Appeal concluded the trial judge had wrongly determined foreseeability of the injury.

Justice Bryson, in his judgment, concluded:

> *"The reasons which the Trial Judge gave … and the course of the judgment generally show that the Trial Judge conflated all persons exposed to risks of injury associated with inhalation of asbestos dust and fibres, and used the results of this consideration to reach a conclusion about the reasonable foreseeability of a risk of injury to the respondent. In my opinion this was an error in point of law, because the material which the Trial Judge considered in reaching this conclusion does not provide a basis for concluding that a risk of injury was reasonably foreseeable in relation to a person whose exposure to asbestos was of the extremely low intensity of the respondent's exposure. Almost all the references to exposure relate to occupational exposure and to continuing situations of exposure, and while they vary greatly in periods of time and intensity, they were all of a completely different and much greater order of intensity than the exposure of the respondent. . . . The conclusion that risk of injury to the respondent (Father McNeill) or to a person in the respondent's position, was reasonably foreseeable is not a conclusion which could be reached by reasonable persons finding the facts, on the material which the Trial Judge considered…. Indeed, unless the case of the respondent and persons in his circumstances is conflated with cases of altogether different intensity of exposure, there is not in my opinion any material upon which, avoiding hindsight and judging matters from the point of view of the information of which the appellant ought to have been aware in 1961, the Trial Judge could find that there was any exposure to risk at all."*

It must be remembered that foreseeability reflects the state of knowledge at the time of injury. In 1961 it was too early for manufacturers to know about the risks of injury arising from low level asbestos exposure. An escape for the manufacturer this time.

However, manufacturers will not be able to rely on this judgment as protection for all similar claims.

The knowledge base available to manufacturers of asbestos, regarding the risks of asbestos use, expanded significantly with the passing of time. What a manufacturer did or did not do in light of that knowledge base must change to keep in line with the state of the knowledge at the time. In 1961 the information that was available that warned about the risk of injury from asbestos was minimal. Manufacturers are now well aware that minimal exposure to asbestos can cause injury. The need to warn about the risk of injury whilst using asbestos became a fact of life for manufacturers that produced products that contained asbestos.

With time the foreseeability of injury from low level asbestos exposure has became a reality. Precisely when the risk became foreseeable will be an issue to be decided by the Courts with those who suffer from asbestos related diseases continuing to seek compensation for injury from manufacturers.

Problems With Former Employees?

When key employees decide to change jobs or leave to set up in competition with their employer disputes often arise? Employers worry about misuse of confidential information by former employees. Employment contracts may contain restraint of trade provisions following termination of employment. But do the provisions work?

How does an employer enforce those provisions and prohibit the use of confidential information by a former employee?

Employers may need to take legal action against a former employee to protect their business when an employee leaves to set up in competition.

Can the employer obtain an order from the Court that will prevent competition from former employees?

Will the Court grant an injunction which would prevent the employee acting in a certain way?

Injunctions are available to employers who seek to restrain former employees from breaching their contractual and fiduciary obligations in respect to using the employer's confidential information obtained during the course of their employment.

Recently, Chief Justice Young in Landmark Underwriting Agency Pty Limited - v - Kilborn found in favour of an employer and granted an injunction preventing former employees from competing against Landmark's business for a period of 9 months after the termination of the employees.

Landmark brought an action in the Supreme Court of NSW seeking to restrain two former employees, Hooper and Kilborn from using confidential information that was gained during the course of their employment. The employees were senior underwriting managers with considerable responsibility and their employment contracts included obligations to:

- Devote the whole of their working time to Landmark.
- Not allow any conflict of interest.
- Protect Landmark's confidential information.
- Not directly or indirectly carry on any business in competition with Landmark following termination of their employment for a specified time.
- Not solicit, canvass, approach, persuade or encourage any person who was an employee or client of Landmark to move their employment or business to a business which competes with Landmark.

Hooper and Kilborn gave 6 months' notice of their resignation in January 2006. During the notice period, whilst still employed by Landmark, Hooper and Kilborn began taking steps to establish their own company which would ultimately compete with Landmark.

Landmark terminated Kilborn and Hooper in May 2006 and subsequently sought an injunction to prevent them from competing against Landmark for a period of 9 months after their termination.

The Court found that Hooper and Kilborn had used Landmark's confidential information in establishing their business. The Court reviewed the business plan for the new venture and concluded that the level of detail in the business plan went beyond what the employees claimed was retained in their memory from information they had legitimately acquired during their employment.

The Court held that the employees had breached their fiduciary obligations to their employer and had breached Section 182 of the Corporations Act, 2001 which prohibits an officer of a corporation from improperly using his position to gain an advantage or cause detriment to the corporation.

The devil was in the detail in the business plan.

The terms of the restraint in the employment contract together with the fact that the business plan identified circumstances which the Court concluded amounted to a misuse of confidential information got the employer over the line. There were sufficient reasons to give rise to the employer's concerns that an injunction against wrongful conduct was both necessary and appropriate.

Landmark can now take advantage of Court orders which enforce a non-compete period on the former employees.

Employers need to be careful when preparing employment contracts to ensure that the terms of the contracts are enforceable and contracts for key employees contain provisions which will properly protect the employer from misuse of confidential information and unreasonable competition from former employees after termination.

It is a Motor Accident!

In NSW with different damages regimes for different causes of injury the New South Wales Court of Appeal is frequently called on to determine whether or not an injury suffered by an employee during the course of their employment is a work accident or a motor vehicle accident.

Jamie Dever was employed by Walfertan Processors Pty Limited as a general hand. His duties included driving a tractor. On the day in question Dever was standing at the rear of a tractor that was attached to a trailer, when another employee, Mark Harper, removed a pin from the trailer. According to Dever, Harper held up the pin after pulling it out and saw that it was broken because it was too short. Harper removed the pin in order to share his unfavourable opinion of the pin with Dever and did not intend to separate the tractor and the trailer. However, after the pin was removed there was nothing to prevent the draw bar from falling to the ground as there was no jockey wheel fitted and so the draw bar fell onto Dever's right foot.

It was accepted by both Dever and Walfertan that the tractor and the trailer were motor vehicles within the meaning of the Motor Accidents Compensation Act, 1999 although Walterfan argued that the injury was caused by a work accident. It was more beneficial for the employer for the injury to be defined as a work injury as Dever did not reach the threshold for permanent impairment under the Workers Compensation Act, 1987 and so Dever would not receive any damages. Dever of course argued to the contrary alleging that the incident was a motor vehicle accident.

The Trial Judge found that the accident was a consequence of a defect in the vehicle and was therefore a motor accident within the meaning of the Motor Accidents Compensation Act, 1999. Walfertan appealed.

The Court of Appeal agreed with the Trial Judge that the accident was a motor vehicle accident. The leading judgment was delivered by Justice Giles who in essence found that in this particular case, it was not the system of work that had caused Dever's injury. Dever was injured because of a defective piece of equipment, the missing jockey wheel, rather than a defective system of work.

Another interesting decision of the Court of Appeal which again demonstrates the fine distinction between what is and isn't a motor accident.

When examining whether or not an accident is a motor vehicle accident when the injury is sustained during the course of the injured person's employment it is necessary to closely consider the factual circumstances of the accident.

CTP insurers will try to establish it is the system of work that is unsafe so as to avoid liability.

Employees who have significant injuries will seek to frame claims that are a motor accident claims as the damages regime under the Motor Accidents Compensation Act 1999, is now more generous when compared to Work Injury Damages for the significantly injured.

Employers argue claims are motor vehicle accidents to escape liability and increased premiums. The disputes will continue.

Workers Compensation Commission Medical Appeal Panel Required To Give Reasons

Recently the New South Wales Court of Appeal determined whether the Medical Appeal Panel constituted by the Workers Compensation Commission is required to give reasons for its decision and if so the adequacy of those reasons. The Medical Appeal Panel is part of the appeal process in the Workers Compensation Commission, after workers are examined by an Approved Medical Specialist for claims of permanent impairment. If a worker or employer is not satisfied with the Approved Medical Specialist's determination of permanent impairment, and can demonstrate an error or the application of incorrect criteria, then the Medical Appeal Panel can review the decision.

In the decision of Campbelltown City Council - v - Vegan, the worker had been injured in the course of her employment as a child care worker. She was assessed by an Approved Medical Specialist appointed by the Workers Compensation Commission and provided with a Medical Assessment Certificate. On review, the Medical Appeal Panel revoked that certificate and issued a new certificate which assessed her percentage of permanent impairment at a higher rate. The employer brought proceedings for judicial review of the Appeal Panel's decision which initially had been dismissed by the Supreme Court. The employer appealed against this decision and the Court of Appeal determined that the Appeal Panel had an obligation to provide reasons for that decision. The justification for providing reasons was derived from the right of appeal granted in relation to the exercise of a judicial function. The assessment of permanent impairment undertaken by the Appeal Panel involved the application of a statutory test by which legal rights as between the employee and employer were determined. Accordingly, as this was an exercise in the nature of a judicial function, the Appeal Panel was subject to an implied statutory obligation to give reasons.

As part of the review process conducted by the Appeal Panel, the Appeal Panel had provided only brief reasons for its decision to increase the level of permanent impairment. Whilst the Court of Appeal determined that to fulfil the minimum legal standard the reasons needed not to be extensive or detailed, the reasons nevertheless had to be sufficient to demonstrate why there was a departure from the assessment originally made by the Approved Medical Specialist. The Court of Appeal pointed out that as an Approved Medical Specialist is required to give adequate reasons for an assessment, the Appeal Panel must also provide adequate reasons. This is despite there being no requirement under the Workers Compensation legislation for the Appeal Panel to provide reasons for a decision. The Court of Appeal then set aside the certificate issued by the Medical Appeal Panel and remitted the matter back to the Registrar for referral to an Appeal Panel for re-determination.

Despite the lack of formality and legal process in the legislation dictating the rules and procedures of the Workers Compensation Commission, the Court of Appeal is seeking to keep the Commission in "check" by ensuring that it provides the proper reasons expected by any other authority conducting a judicial review. Since an Approved Medical Specialist has the duty to provide proper reasons, the Appeal Panel in correcting any errors should also give proper reasons for it.

Interestingly, we note the Court of Appeal sought not to penalise the worker in this appeal and only granted the right of appeal on the basis that the employer paid the worker's costs of this appeal.

The Need to Plead Negligence by an Employer

Personal injury claims by employees of labour hire companies or subcontractors present difficulties for insurers and their advisers.

Recent court decisions have made it clear that a 'host' or head contractor can owe a duty of care to the worker of another as if it were that person's employer. From that flows the more onerous scope of the duty of care regarding personal safety.

Such a finding does not, however, mean that the true employer has no duty of care - the employer is still obliged to take reasonable steps to provide a safe place and system of work for its employees.

If a worker sues a 'host' or occupier or head contractor for damages for personal injury - rather than his employer - the issue which arises is whether there has also been some negligence on the part of the true employer. If there has been, the defendant will be entitled to a reduction in any damages awarded against it by virtue of section 151Z(2) of the *Workers Compensation Act 1987*.

Care needs to be taken to obtain the benefit of such a reduction. The case of *B P Australia Pty Ltd v Tarren [2006] NSWCA* decided on 3 November 2006 illustrates the point nicely.

A worker claimed damages from personal injury after manually moving heavy safes. She sued the occupier of the premises where the safes were. She did not sue her employer. The trial judge found that the occupier owed a duty to the worker akin to that of an employer. That duty had been breached, and the occupier was liable in damages.

The occupier appealed, claiming that the award of damages against it ought to be reduced because the plaintiff's employer had also breached its duty of care.

The Court of Appeal dismissed the appeal. It said that the occupier could not take advantage of the reduction in s151Z(2) because, essentially:

- the occupier had not pleaded s151Z(2) in its defence;
- the occupier had not made submissions at trial that s151Z(2) applied; and
- applying s151Z(2) required factual findings and evidence about the employer's actions which were not presented at trial.

The potential benefit therefore was lost.

It can be seen then that it is critical when considering the liability of a non-employer defendant to take careful steps to preserve any benefit which might accrue from negligence by the employer. If that is alleged it needs to be pleaded and proved.

NSW OH&S Roundup

Warning from the Industrial Relations Commission

Wild Geese Building and Maintenance Group were convicted of an offence under the Occupational Health and Safety Act and pleaded guilty to the charge and a penalty of $25,000.00 was imposed. The maximum penalty was $550,000.00.

The employer was prosecuted as it permitted a worker to gain access to the roof of a shed to clean gutters. Whilst doing so the worker stepped on a skylight panel on the roof which gave way causing him to fall a distance of approximately 7.5 metres onto the concrete floor. The prosecutor brought proceedings in the Industrial Relations Commission.

WorkCover were dissatisfied with the level of penalty and appealed, arguing that the penalty imposed was manifestly inadequate. It was argued that the risk in question was serious and foreseeable and there was a causal connection between the relevant failures and the risks to safety. The appeal was heard by the Full Bench of the Industrial Relations Commission and the Full Bench agreed that the risk in question was a most serious one and the work required to be done was inherently dangerous and the risk was plainly foreseeable and could easily have been entirely precluded by the provision of fall protection. The fine was inadequate and was increased to $55,000.00.

Considerable costs were expended by both parties in the appeal to the Full Commission. The prosecutor succeeded in the appeal but in the past it had been the practice of the Commission not to award costs in prosecution appeals where the prosecution has been successful in contending that there was an error because of inadequacy in penalty. In this case no cost order was made against Wild Geese Building and Maintenance Group Pty Limited. Nevertheless, the Commission sounded a warning that in the future a similar outcome is unlikely.

The Commission has indicated that in the future an unsuccessful party in an appeal on the issue of severity of penalty is likely to be ordered to pay the other side's legal costs despite the error in sentencing by the original judge.

The Commission gave a clear warning of a change of approach of the Commission and that cost orders are now likely to become an additional burden for an unsuccessful party in an appeal on severity.

This will have a significant impact where a guilty defendant receives a low penalty. If WorkCover appeals and is successful on appeal, the defendant will face an increased fine, their own legal costs of the appeal and the prospect of paying the prosecutor's costs for the appeal. A small fine that is seen as a win turns sour in some situations.

Labour Hire Company Liable

Labour hire companies continue to attract the attention of WorkCover where their employees are injured at the host employer's premises.

A labour hire company was recently fined $50,000.00 following a breach of the Occupational Health and Safety Act which resulted in an injury to one of its employees who was lent on hire as a storeman and fork lift driver.

The employee, who had been working for the host for about 6 months walked to a semi-restricted zone when he became entangled in either the turning roller decks or the chain under the platform of an elevated transfer vehicle.

The employee was wearing baggy-style three-quarter length shorts which contributed to his entanglement and he suffered injuries which prevented his return to employment for 3 years.

Pursuant to the labour hire agreement, sole responsibility for the day-to-day supervision and control rested with the host employer.

The Commission noted that of critical concern was that, like most labour hire arrangements, the defendant was not in a position to provide day-to-day supervision of its workers at the work place. The Commission confirmed that it is no answer on the part of a labour hire company to contend that it can not properly access and supervise its workers because of security issues and restricted access or that the host had sole responsibility for workers' safety. A labour hire company is required, in accordance with its statutory obligations, to ensure the safety of its workers.

The nature of a labour hire company's relationship with its employees is usually off site and the employer is unable to directly and continuously supervise those employees. The Commission noted it is therefore incumbent upon the labour hire company, in the absence of being able to provide direct day-to-day supervision, to ensure, by appropriate contact with the host employer, that its employees were adequately supervised for example by ensuring that they wore correct clothing while on the job.

In this case it was noted that the risk of the labour hire company re-offending was low as it no longer supplied labour to the host. Nevertheless, the Commission noted the serious injuries suffered by the worker reflect the degree of seriousness of the risk to safety. The labour hire company was fined $50,000.00 and ordered to pay the prosecutor's costs. The host employer had previously been convicted arising out of the same incident and had been fined $75,000.00.

Don't Fix Your Own Vehicle

Joe Attard was prosecuted for a breach of the Occupational Health and Safety Act arising out of an injury to an employee who was working on a vehicle which was defective. WorkCover alleged that Mr Attard failed to conduct a proper risk assessment of the risks involved when a vehicle driven by an employee broke down, and failed to provide a safe system of work which ensured that non-qualified employees did not attempt to repair or work on broken down vehicles. In addition it was alleged that Attard failed to ensure that plant provided for use by employees was safe and without risk.

In essence, one employee who was not a trained mechanic, was under a truck attempting to fix the truck when the truck started to roll away and rolled approximately 6 metres trapping the employee under the truck.

The truck was maintained by a mechanic and various professional repairers. It was noted there was no safe system with respect to what employees should or should not do when they were driving a truck and it broke down. This was the first offence for Attard entered an early guilty plea. The maximum penalty which could be imposed was $55,000.00.

The Commission noted that the truck driven on the day of the incident had a defective braking system and it was entirely foreseeable that braking problems would emerge while the truck was being used by employees. The Commission noted that for a braking system to fail on a vehicle while being driven, the consequences that could arise and the attendant risks to safety are obvious. The foreseeability of the offence made the nature of the offence more serious.

The Commission was critical that Mr Attard permitted employees to undertake work such as adjusting brakes on his trucks as part of minor maintenance work which the employees were expected to perform and in doing so Attard presided over an unsafe system of work by his essentially unskilled employees adjusting truck brakes in circumstances that were inherently dangerous.

Mr Attard was fined $19,500.00 and was also required to pay the prosecutor's costs of the proceedings.

Vee 8 Super Cars - Explosion at the Track

Vee 8 Super Cars is a category owner for V8 super car racing in Australia and is responsible for promoting and developing V8 super car racing. It administers two super car series. Scrutineers examined vehicles participating in an event at Wakefield Park which revealed that some of the vehicles had onboard fire extinguishers that did not comply with the relevant rules. Subsequently Trevor Lansdown was engaged by racing teams to attend the race meeting to service the fire extinguishers at the raceway. Vee 8 Super Cars were aware of these arrangements. Lansdown attended the meet and whilst servicing an extinguisher it exploded and he was injured.

Lansdown was attended to by on-site medical staff and was then conveyed to hospital. Later that day he returned to the raceway and was unable to undertake testing and recharging of the fire extinguishers by himself and therefore instructed two members of a racing team to carry out the task under his instructions. Whilst these two members of the team were carrying out the servicing another fire extinguisher exploded causing injuries to the two involved.

Two separate explosions led to two separate prosecutions and two pleas of guilty.

The offences occurred in circumstances where Vee 8 Supercars and others were attending to a safety requirement for racing. Nevertheless the testing and recharging of the fire extinguishers was done in an unsafe way. Expert testing demonstrated that the explosions with the fire extinguishers were probably caused by over pressurising which resulted from either inadequate equipment or operator error or a combination of both.

The Commission suggested that new fire extinguishers could have been used instead of attempts being made to recharge other fire extinguishers at trackside.

The Commission was critical of Vee 8 Super Cars allowing Lansdown to have a second go and involving other persons when it was aware of the serious consequences of the first attempt to recharge the fire extinguishers.

Vee 8 Super Cars were fined $120,000.00 in total for the two offences despite their somewhat limited culpability in the unsafe system.

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