# GD News

Gillis Delaney Lawyers

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

**May 2006 Issue**

## Local Council Liability

Local Councils in New South Wales continue to keep the New South Wales Court of Appeal busy as the Councils seek to clarify the extent of their liability to persons injured as a consequence of Council operations.

In April 2006 a number of cases came before the Court of Appeal. Councils had appealed from decisions in favour of injured persons made by District Court judges. Interestingly, in the three cases the Councils had been found liable by District Court judges to be liable in negligence but in each case the Councils challenged the finding arguing that they were not negligent. In each case the challenge failed. The original findings of negligence were upheld by the Court of Appeal.

The first case of *Muzic v Randwick City Council* involved an injury to a person who slipped and fell over on algae on the promenade next to sea baths.

Mattea Muzic had lived in Clovelly since 1971. Since she moved to Clovelly she had swum at the Clovelly Baths every year for seven and a half months of the year. On 30 January 2002 she was injured when, whilst approaching the sea baths, she slipped and fell over on algae.

At trial Muzic alleged negligence on the part of the Council in failing to remove the algae and in failing to close off access to the sea baths until access was safe. At trial Muzic succeeded in establishing that Randwick City Council who were responsible for the sea baths were negligent.

An appeal was unsuccessful. Unfortunately for the Council in 1999 a report had been published which recommended that major remedial work be carried out on the promenades near the bathes, including the resurfacing of the promenades. Council documents also demonstrated that the algae had been cleaned off the sea baths until 1997. What is worse, documents demonstrated that during the swimming season on average six people per day were treated by lifesavers for injuries sustained by slipping and falling on the promenades. (It should be noted that this case was not governed by the Civil Liability Act 2002 and so the provisions within that Act relating to the liability of public authorities did not apply. Nevertheless, in these factual circumstances it is unlikely that these provisions would have assisted the Council.)

The Court of Appeal determined:

"Given the frequency with which people were being injured whilst attempting to enter or exit the water, it is far from clear that, by taking care for their own safety, members of the public would be certain to avoid injury. Indeed, it was clearly foreseeable that, unless action was taken by the defendant to convey to users the gravity of the risk, inadvertence or a momentary lapse in concentration could quite easily result in very severe injury. That is what appears to have happened in this case. Accordingly, the defendant's contention that it did not owe a duty of care is rejected."

A sensible judgment that gives some hope to plaintiffs, the judgment is a reminder to Councils that where specific problems are identified action should be taken - and quickly - to avoid expensive legal action and liability to the injured.

The next case of *Theodorakakis v The Port Stephens Council* involved a slip and fall on a footpath.

Maria Theodorakakis tripped and fell on the footpath on Shoal Bay Road on 18 January 2002. She sued Port Stephens Council as a consequence of her fall.

At trial it was found by the trial judge that Theodorakakis had tripped on a lip on the edge of a depression in an otherwise regular concrete pavement. The trial judge concluded that the lip was not obvious to a person exercising reasonable care for his or her own safety and found the Council negligent.

***Inside***




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The Council was unsuccessfully in an appeal.

The evidence demonstrated that around 20 or more years earlier the previous concrete path had been raised and resurfaced and there was a lip at the junction between a depression and the footpath. Records demonstrated that the lip was about 20mm and in around November 2000 the lip had been identified in Council documents as a defect. No work was carried out on the lip until 21 May 2002, after Theodorakakis' accident.

The Council attempted to argue that budgetary constraints were relevant in the failure to fix the defect in the footpath. The Court of Appeal was scathing of this evidence stating:

> "I cannot forebear to observe how stark indeed would be the poverty of a local government authority which was constrained by financial or other resources, or by some general allocation of resources, from carrying out so simple a repair; not for a short time, but for thirteen months and more. A tribunal of fact which applied reasonable scrutiny to fact-finding would not readily decide that repair was impeded for so long by considerations."

The decision is an ominous warning to Councils. Once a risk has been individually identified an argument that budgetary constraints prevent remedial works may be of no real assistance. Action should be taken.

The final case of *Johnson v Shellharbour City Council* involved an injury to a cyclist on a cycleway for which the council was responsible.

Aaron Johnson was injured whilst riding his bicycle along a cycleway in Albion Park. He was 17 years old at the time of the collision. At this time the design of the cycleway was such that three concrete bollards had been erected to prevent access to the oval by motor vehicles. Unfortunately, the bollards were far enough to allow cyclists to ride through. Johnson rode his bicycle through the bollards only to collide with another cyclist. The injuries were serious.

Shortly after this accident, the Council removed two of the three bollards and replaced them with barriers so that cyclists would now have to dismount prior to entering the cycleway.

At trial the Judge found in favour of Johnson. In the trial judge's opinion it was foreseeable that such a collision would occur and the cost of rectifying the problem had only been $500.00. The Judge concluded the Council should have rectified the problem sooner.

The Council appealed. On appeal the Council attempted to argue that as the risk of a collision was obvious to users of the laneway and cycleway and it was reasonable for the Council to do nothing.

The Court of Appeal disagreed. Acting Justice Hunt stated:

> "In my view, obviousness of risk cannot be determinative in this case. The Council invites pedestrians and cyclists onto its land to use the laneway and the cycleway. The Council knew or ought to have known that the blind corner posed a risk of serious injury. It was not a risk which the exercise of reasonable care on the part of the pedestrian or cyclist could have eliminated because no matter how careful he or she was, there would still be a risk created by the potentially dangerous behaviour of other users of the laneway and cycleway who might decide to take the curve at too great a speed."

The Court's conclusion was simple - the bollards should have been replaced earlier. The failure to do so was negligent.

**Summary**

In each case, three judges of the Court of Appeal found in favour of the injured persons. In total seven different Court of Appeal judges were involved in the decisions. In two of the cases Council records had revealed that problems had been detected before the incident and despite problems being identified, the Council had failed to remedy problems. Arguments that the financial capacity of the Council was such that fairly simple remedial works could not be carried out were rejected.

Local Councils hoped that the changes introduced by the *Civil Liability Act* 2002 would have gone some way to limit exposure to personal injury claims. Nevertheless, the decisions sound a clear warning that councils must still remedy defects and deal with areas under their control in a responsible way.

## Don’t Let Them Cross The Road

When someone is injured, quite often the first reaction is to blame someone else for the injury. See a lawyer and the lawyer will look for someone to sue to recover compensation for the injury.

Accidents on roadways generally result in claims being brought against owners and operators of motor vehicles. Nevertheless, in some situations it is clear that a driver or owner of a vehicle has not been negligent. That may not be the end of the matter. Was someone else to blame?

In a recent decision handed down by the New South Wales Court of Appeal, a pedestrian has successfully sued the RTA for failing to maintain fencing on a freeway to prevent pedestrians crossing the roadway.

In *Edson v The Roads and Traffic Authority* the New South Wales Court of Appeal considered a claim arising from an injury to a young child when she was struck by a car whilst crossing a road in a dangerous location.

Nicole Edson was a 13 year old girl who was injured when she ran onto the F5 freeway near Campbelltown, between the suburbs of Raby and St Andrews. She was struck by two motor vehicles travelling at about 100 kilometres per hour. Where the accident occurred, the freeway ran from north to south. Two lanes of traffic travelled in each direction. The speed limit was 110 kilometres per hour. There were strips of reserve land on each side of the freeway and a reserve strip dividing the lanes of traffic. The RTA was the owner of the freeway and the reserves. At the time that the plaintiff was injured there were two overpasses between the suburbs but the layout of the roads was such that use of the overpass required a significant detour. It was known to the RTA that pedestrians would walk from one side of the freeway to the other and the numbers of pedestrians doing so was estimated at 25,000 per year. There was fencing on either side of the freeway but at the time of the accident on both sides the fencing had either been pushed over or cut through.

Edson commenced proceedings against both the RTA and Campbelltown City Council. The trial judge dismissed the claim against the Council and the RTA.

Edson appealed but only insofar as the claim was brought against the RTA.

The appeal was successful. The Court of Appeal found that the RTA had known for several years that large amounts of people would cross the freeway. In Raby there was a tavern and shops which were an allurement to children and young people in St Andrews. It did not matter that the risk of crossing the highway was obvious. This would go to contributory negligence (Edson's damages were reduced by 40% for contributory negligence).

This decision will have a significant impact on the RTA. The RTA will need to implement a risk management system to ensure that dangerous locations are properly identified and, where appropriate, fencing is erected to ensure that access cannot be gained to the roadway in dangerous locations.

The decision is likely to result in an increase in the erection of barriers along median strips and along the edges of roadways, particularly in high traffic areas which are dangerous to persons who cross roads at dangerous locations.

In this case the tender years of the injured person no doubt influenced the outcome. An adult crossing the road in the same circumstances may not have been as lucky with a claim. Nevertheless, the warning bells for the RTA are still ringing.

## Police Service Liable for Post traumatic stress disorder

A police officer has successfully sued the State of New South Wales for negligence resulting in post traumatic stress disorder.

Gemma Fahy was a police officer at Green Valley. In the course of her duties she attended the aftermath of an armed robbery at a video store. The video store manager was seriously injured during the robbery but after the robbery was able to take himself to a doctor's surgery nearby. It was there that he was attended on by Fahy assisting the doctor.

Subsequent to the incident Fahy developed post traumatic stress disorder. This injury was not disputed.

Fahy alleged that there were five specific actions which constituted unsupportive behaviour on behalf of senior officers. These included her partner Senior Constable Evans leaving her with the doctor and victim. The other four actions involved alleged insensitivity on the part of Inspector Whitten, who did not give evidence at the trial. These actions included not inquiring as to how Fahy was coping when she was with the victim, telling Fahy to put her hat on because there were media present, telling Fahy to return to the crime scene and then not allowing Fahy to remain at the crime scene.

The second element of Fahy's case was that by 1999 the police service had recognised that some support should be provided following incidents such as these but this support had not been provided in this case.

An important question for the Court to consider was whether Fahy's colleague's behaviour had contributed to her condition and in fact whether the breach of duty by the police service had caused her injury, particularly in circumstances where Fahy had seen a chaplain of her own volition. It was also important to attempt to define injury caused by negligence as opposed to injury that would have occurred anyway (as a consequence of Fahy attending the scene.) It did not matter that Fahy had experienced such traumatic scenes before.

Ultimately the police service did not establish that Fahy's injury would have occurred had her colleague's treatment of her been appropriate.

The duty on employers is high, particularly in vocations such as the police service where in this case the Court held that affirmative action was required. Interestingly though, the Court did reduce Fahy's damages as a consequence of her failing to mitigate her damages by

refusing to take anti-depressant medication prescribed to her.

The decision seems a tough one for the police service and it will be interesting to see whether the case goes further.

## What is a motor accident?

What is a motor accident? This seemingly simple question has troubled Courts throughout Australia for a number of years. The High Court has recently considered this issue again in the recent judgment of Nominal Defendant v GLG Australia Pty Limited. The decision demonstrates what a complex area of the law this really is.

On 24 August 1999 Salim Tleyji was an employee of Ready Workforce Pty Ltd, a labour hire company. Ready Workforce supplied Tleyji's services to GLG Australia. GLG were the operator of a warehouse where containers of goods were unloaded. A system had been devised whereby a container to be unloaded would be placed in the yard of the warehouse. Boxes unloaded from the container would be put on a pallet placed on a landing in front of the open container. A forklift truck would then go up a ramp to the landing, pick up a pallet and reverse down the ramp. As the forklift went up the ramp it would cause a vibration which could be felt through the ramp, landing and container. Tleyji was injured when the vibration caused by the forklift truck caused boxes stacked in the container to fall and strike Tleyji as he stood about a metre inside the container.

At the time of the accident the forklift was insured with CIC Insurance Ltd. By the time of the trial, CIC was in liquidation and CIC's liability under the CTP policy was being dealt with by the Nominal Defendant. The Nominal Defendant argued that the accident was not a motor vehicle accident.

The Motor Accidents Act 1988 (the "Act"), the applicable law to this case, defined a motor accident to be an accident caused by the fault of an owner or driver of a motor vehicle in the use or operation of the motor vehicle which causes injury.

It is therefore necessary for an injury to occur and "injury" is defined as follows:
"Injury:

(a) means personal or bodily injury caused by the fault of the owner or driver of a motor vehicle in the use and operation of the vehicle if, and only if, the injury is a result of and is caused during:

(i) the driving of the vehicle;

(ii) a collision, or action taken to avoid a collision, with the vehicle, or

(iii) the vehicle's running out of control; or

(iv) such use or operation by a defect in the vehicle."

The trial judge found that the incident was not a motor vehicle accident. The Court of Appeal disagreed and found that the incident was a motor vehicle accident.

The majority of the High Court agreed with the trial judge and found that the incident was not a motor vehicle accident. The majority, comprised of Gleeson CJ, Gummow, Hayne and Heydon JJ found:

"It is true that the occupier was at fault. The fault, however, lay not in the use or operation of the forklift truck, namely, the driving of it. The occupier itself was not driving, nor was the driver it employed driving in a negligent way. The occupier's fault lay in designing and implementing a system of work that involved driving the vehicle in the manner in which it was driven, rather than devising and providing a reasonably safe system of unloading the containers which would not cause vibrations likely to destabilise the boxes being unloaded."

Justice Kirby disagreed. In his judgment he stated:

> "There was nothing stationary about the forklift truck in the present facts. An essential part of the complaint about the owner's system of work related to the locomotion of the vehicle as its parts struck the ramp. The fault of the owner, relevant to the cause of the plaintiff's injury, was in instituting and persisting with the use or operation of the forklift truck without precautions to prevent adverse and foreseeable consequences of the impact of the tines of the vehicle on the ramp.
>
> A safe system of work in this case might have involved stabilising the ramp leading to the container so that the forklift truck could use or operate on the ramp, even striking it, without the risk of vibration. It might have involved disjoining the ramp and landing from the container so that the use and operation of the forklift truck would not transmit vibrations into the container. Or it might have involved using some other means of unloading the container in the circumstances of the danger presented by the use or operation of the forklift truck. All of these ingredients in the defect of the owner's system of work involved the use or operation of the insured vehicle."

Five Judges heard the appeal with four reaching the conclusion on a proper analysis of the facts and a proper characterisation of the acts and omissions, the negligence arose in respect to a system of work rather than use of a motor vehicle. The absence of a unanimous decision highlights the difficulties which are faced by insurers when they are called on to determine the proper characterisation of negligence.

A work injury or a motor accident? The debate continues. As discussed in our special edition last month changes to the Motor Accidents regime will shortly be implemented which will hopefully make things less confusing for plaintiff and defendants alike.

It appears that the easiest issue in claims such as these is the identification of negligence.

The different statutory regimes regulating the award of damages in work injury damage claims, motor accident claims and civil liability claims results in disputes between insurers where insurers seek to establish that a proper characterisation of the negligence causes the claim to fall into the different regimes. This can result in the insurer declining to indemnify an insured in relation to a claim whilst it is argued that the claim does not fall within the characterisation of negligence to which the insurer's policy will respond. There is no doubt that these disputes will continue as insurers continue to grapple with the proper characterisation of negligence which will determine whether or not the claim is a Motor Accident claim, a Civil Liability Claim or a Work Injury Claim.

## OH&S Snapshot

### Site Specific Safe Work Method Statements Of Paramount Importance

An apprentice Electrical subcontractor sustained a hypoxic brain injury resulting in a cardiac arrest while carrying out unsupervised work on a live electrical circuit at an East Gosford residence. Darren Smith of MacMasters Beach Electrical, was charged under section 9 of the *Occupational Health and Safety Act* 2000 for failing to provide a site specific Safe Work Method Statement, failing to isolate the supply of electricity of the work site, failing to regularly check the work area was de-energised, and failing to be present at the work site at all times to supervise an unlicensed subcontractor. Smith had engaged a contractor that employed the apprentice.

Smith pleaded guilty to the charge at first instance. In reaching its conclusion the Industrial Court of New South Wales noted Smith had no prior convictions under Act and thus the maximum fine Smith was facing was a $55,000 fine. The Court considered Smith's behaviour in leaving an unlicensed, unqualified subcontractor at a work site to carry out work as being irresponsible and reckless and an act that ultimately increased the risk of an accident occurring. The Court noted, as a result of the lack of supervision, Smith was also open to prosecution under section 14(2) of the *Home Building Act* 1989, however it was fortunate for Smith the Prosecutor was not pressing further charges under the *Home Building Act*.

Evidence was led by the Prosecution indicating Smith had prepared site specific Safe Work Method Statements in the past for previous work sites. The Court inferred from this evidence that Smith knew of the importance of Safe Work Method Statements and that if one had have been prepared for this work site the risk of injury would have been significantly reduced, and the accident may not have happened at all.

The Court took into consideration the business and personal circumstances of Smith and MacMasters Beach Electrical, noting Smith was a married man with three children under six years of age and had a family home with a $300,000 mortgage. The Court weighed these personal circumstances up against the business viability of MacMasters Beach Electrical, which it considered was a relatively small business, one which only provided Smith with a yearly income of $20,000. Taking these factors into consideration the Court ultimately imposed a fine of $6,000.

### Heights And Mobile Phones Result In Severe Injury

A roofing and guttering subcontractor while talking on his mobile phone on a rooftop at a residential building, site fell some 6-7 meters and sustained serious head injuries as well as multiple injuries and fractures to the rest of his body. As a result of the fall the subcontractor was unconscious for a number of weeks and subsequently required rehabilitation at the brain injury rehab unit at Westmead Hospital. Following the subcontractors release from Hospital he continued to undergo rehabilitation treatment, including psychological counselling and psychiatric treatment. In or about late August 2004 the subcontractor tragically took his own life.

As a result of the accident WorkCover charged ABC Seamless Pty Limited under section 8(2) of the *Occupational Health and Safety Act* 2000. The charges essentially related to ABC Seamless' failure to ensure the ladder used for access to and from the roof at the building site was safe and was properly secured in such a manner as would have ensured its stability, the failure to enforce the carrying out of a site specific risk assessment for the performance of the work at the site, a failure to identify, assess and control the site specific risks, and finally a failure to provide sufficient supervision and instruction to the subcontractor to ensure that he did not expose himself to risks to his safety at the building site by using a mobile phone whilst working on a ladder. After contracted negotiations, ABC Seamless pleaded guilty.

In establishing the charges against ABC Seamless, WorkCover sought to put before the Court medical evidence to establish the subcontractor's death resulted from his injuries and was thereby caused by the fall. The defendant objected. After heated debate and detailed written submissions, the Court ultimately concluded that although the subcontractor "*took his own life following the fall on 1 August 2002, it was a terrible tragedy, [and was] not a factor the Court could or should take into account in determining penalty".*

In further evidence before the Court, ABC Seamless' solicitors established the subcontractor had entered into an agreement with ABC Seamless on 14 November 2000, which specifically stated, amongst others things that "*Site safety is the absolute responsibility of the sub-contractor. No work is to be commenced until the sub-contractor is satisfied that safe working conditions exist".* The Court however put little weight on specific wording of the contract. The contract could not relieve the contractor from their liability.

ABC Seamless had a detailed OHS safety policy in relation to the training of its regular subcontractors and the injured subcontractor had undergone a height training course with Total Height Safety Pty Limited at the expense of ABC Seamless prior to the accident. The injured subcontractor had also obtained a Certificate of Attainment in Safe Work Practice for Access and Working at Heights on 10 May 2002.

Following the accident ABC Seamless made considerable changes and improvements to its OHS policy relating to working at heights which included additional training for all employees and contractors, changes to risk assessment procedures, spot checks on site by supervisors and a requirement that contractors have all mobile phones diverted or left in a motor vehicle while work is in progress. ABC Seamless outlaid a total of $40,000 in its post accident OHS upgrade.

In reaching a conclusion, the Court took into consideration the early plea of guilty, ABC Seamless' unblemished OHS record, the fact ABC Seamless was unlikely to re-offend and the remorse shown for the offence. The Court ultimately imposed a fine of $90,000.

**Secure the worksite!**

Two 7 year old boys were playing at a residential work site operated by Kingstone Constructions Pty Limited on the Mid North Cost of NSW. While the two boys were playing one of them was involved in a fall of some 2.73 meters, striking a sandstone boulder protruding from the ground. As a result of the incident, the 7 year old sustained a laceration to his right little finger as well as a fractured foot and required the use of a wheelchair for approximately 8 weeks following the fall.

As a result of the fall the WorkCover charged Kingstone and its sole director Brian Willis under section 8(2) and section 26(1) of the *Occupational Health and Safety Act* 2000. The charges brought against Kingstone were based on a failure to ensure individuals not in the employment of Kingstone remained free from risk or harm. Willis was charged with failing to adequately secure the work site from non-authorized entry, as well as failing to provide an adequate system of risk assessment of the work site and failing to provide employees with training to adequately identify, assess and prevent risks to public safety at the site.

As a result of the WorkCover prosecution, both Kingstone and Willis pleaded guilty to the charges. The facts tendered before the Court indicated that at the time of the accident a supervisor at the building site was in charge of the occupational health and safety and general management of the site. The evidence indicated that at the time of the accident no fencing was erected around the building site and that prior to the accident taking place, Kingstone and Willis were aware of individuals under the age of 18 entering the site unauthorised. Further, following the accident, Willis undertook steps to ensure a similar accident would not take place. He issued a site fencing policy which required fences to be erected around the perimeter of each Kingstone building site one week prior to any building works commencing and engaged an OHS consultancy firm to carry out an audit of Kingstone.

A glowing reference letter from Mr Masterton, the Managing Director of Masterton Homes Pty Limited was provided to the court. In his letter, Masterton detailed Willis' career history with Masterton Homes, Willis' previous employer. Masterton also attested to Willis' good character and rectifying actions taken by Willis since the incident.

In reaching a conclusion, the Court noted Kingstone and Willis had no prior convictions and took into consideration the early guilty pleas entered by Kingstone and Willis as well as the OHS policies adopted by Kingstone following the accident. The Court also took into account Willis' actions towards the injured seven year old boy.

Ultimately the Court did *"not consider the circumstances of the offences involving the defendants [Kingstone and Willis] to evidence an irresponsible or indifferent approach to occupational health and safety. The evidence points more to the circumstances of the offence being a lapse in an otherwise responsible approach to workplace safety."*

The Court fined Kingstone $35,000 and Willis $5,200.

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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 agencies.

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'.

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