GD News

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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 a NSW Court of Appeal decision dealing with dangerous recreational activities and obvious risks. We can be contacted at any time for more information on any of our articles.

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Dangerous Recreational Activities and Obvious Risks

In NSW the Civil Liability Act provides that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff. Recreational activities include any sport (whether or not the sport is an organised activity), and any pursuit or activity engaged in for enjoyment, relaxation or leisure, and any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure. A dangerous recreational activity is a recreational activity that involves a significant risk of physical harm.

The NSW Court of Appeal has recently considered these issues in a shooting incident when a gun accidentally discharged on a kangaroo shoot.

Con Fallas accidentally shot his friend Con Mourlas in the leg while hunting kangaroos. At the time of the accident four men were participating in an activity referred to as “spotlighting” or shooting kangaroos at night with the aid of a spotlight.

The men drove into the bush at night in search of kangaroos. Fallas was driving the vehicle and Mourlas sat in the front passenger seat. After about 5 to 10 minutes of driving, two of the men got out of the vehicle and began walking in front while the vehicle followed them. At some stage the vehicle stopped and Fallas climbed out of the vehicle with a handgun to join the other men.

Fallas returned to the vehicle still holding the handgun. Mourlas asked him not to come in to the vehicle with a loaded gun. Fallas gave repeated assurances that the gun was not loaded and that it was safe for him to enter the vehicle. Once Fallas was inside the vehicle, Mourlas once again asked him not to bring the gun inside the vehicle and to point the gun outside. Fallas began “clocking [the gun] back and forward” in an effort to un-jam it. As Fallas was doing this he pointed the gun towards Mourlas’ direction. There was then an accidental discharge of the gun resulting in Mourlas being shot in the leg. Mourlas sued his friend alleging negligence. He succeeded in his claim in the District Court as the judge did not find the activity was a dangerous recreational activity. An appeal followed.

The NSW Court of Appeal judges were divided on the application of the law to these facts.

The Judges of the Court of Appeal agreed that an objective test is required in determining whether, in terms of s 5K of the Civil Liability Act 2002 (NSW), a recreational activity is “dangerous”.

Ipp J and Tobias JA concluded the activity was a dangerous recreational activity. Nevertheless these judges disagreed on a different issue with Ipp J concluding the risk was not obvious whilst Tobias concluded it was. Nevertheless the third judge Basten J who held the activity was not a dangerous recreational activity held that the risk was obvious.

The net effect of the judgements was that the appeal was dismissed and Fallas keeps his award of damages. But what were the different views?

Justice Ipp concluded "in these circumstances, there was a significant risk that one or other of the men, while leaving or entering or being in the vehicle as Mr Mourlas was operating the spotlight, might handle a loaded firearm in a negligent manner and cause someone in the vehicle to be shot. In other words, I am of the opinion that the recreational activity in which Mr Mourlas was engaged carried with it a significant risk of physical harm and, therefore, was a dangerous recreational activity".

Tobias JA agreed and found ‘the totality of the circumstances surrounding the activity in which the respondent (Mourlas) was engaged constituted a recipe for disaster in which the risk of a firearm at some

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point being accidentally or negligently discharged and one of the participants being shot as a consequence had a clearly significant chance of materialising." Tobias JA stated " I am accordingly led inevitably to the conclusion that the subject activity was one which involved a significant risk of physical harm and was thus a "dangerous recreational activity".

Basten JA disagreed and did not see the activity as falling in the definition of a dangerous recreational activity.

The majority of the court advocated that in determining whether the relevant recreational activity involves a significant risk of physical harm, the court will identify that activity at a relatively detailed level of abstraction by including not only the particular conduct actually engaged in but also the circumstances which provide the context in which any conduct occurs. In this case on a 2 to 1 majority the activity was held to be a dangerous recreational activity.

Once an activity is found to be a dangerous recreational activity it is necessary to determine whether any harm resulted from the materialisation of an obvious risk. If it did then a person will have no liability for the damage caused.

The Court of Appeal Judges once again had different views of the facts with the majority view coming from a different combination of the judges. Ipp J and Basten JA concluded the risk was not an obvious risk whereas Tobias JA concluded the risk was obvious.

Ipp J in his judgement noted "It goes without saying that in certain circumstances the risk of a person being negligent (and causing harm) might be obvious, but in the same circumstances the risk of a person being grossly negligent (and causing harm) might not be obvious. I think it also goes without saying that while a person might accept the risk of harm caused by another's negligent conduct, that person is less likely to accept the risk of a person being grossly negligent.
In my view, when considering whether there has been a materialisation of an obvious risk, a distinction may have to be drawn between a risk of negligent conduct on the part of another and conduct that is grossly negligent. In some circumstances, it may not be sufficient merely to ask whether the risk of harm caused by a person being negligent was obvious. If the conduct that caused the risk amounted to gross negligence, it would be necessary, in my opinion, to determine whether the risk of harm caused by gross negligence of the kind in question was obvious." The judge concluded the risk was not obvious.

Tobias JA did not agree and stated "To determine whether the harm suffered by Mr Mourlas was the result of the materialisation of an "obvious risk" requires regard to be had to the particular circumstances in which the harm was suffered and a determination whether the risk which resulted in the harm would have been obvious to a reasonable person in Mr Mourlas' position…. It may well be that in some cases a risk which materialises as a consequence of the gross negligence of a defendant may not be obvious in the relevant sense as Ipp JA recognises in his judgment. However, in the particular circumstances of the present case, and accepting that the appellant's (Mourlas) conduct was grossly negligent, the risk of harm materialising from that conduct would have been apparent to and recognised by a reasonable person in the position of the respondent as likely to result in the pistol being discharged."

The final say was left to Basten JA who concluded the risk was not obvious but the Judge did not adopt the concept of Ipp J that the gross negligence of a person may result in the risk not being obvious.

The divided opinions expressed in the judgements will give plaintiffs injured in dangerous recreational activities some hope that the Civil Liability Act may not defeat their claims. The concepts expressed by Ipp J concerning obvious risk and the potential to argue gross negligence may take a risk outside those considered obvious will be jumped on by plaintiff's lawyers who will seek to minimize the impact of the provisions in the Civil Liability Act that provide that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity.

Trouble for the Bulldogs Rugby League Club? Not this time

Samer Haris was injured by fireworks while attending a football match as a spectator at the Bulldog's stadium. A flare was set off at about 7pm, before the game commenced, another flare was set off at about 8.18pm, and a firework was set off at about 8.32pm. At about 9.10pm, about ten minutes before the game ended, Haris was struck in the left eye by a firework and has now lost the sight in his left eye. The source of the firework was never ascertained.

Haris sued the Bulldogs arguing that they failed to take additional measures, such as increasing the number of security guards, reducing the density of the crowd, stopping the game or using bomb detection dogs, and this constituted a breach of a duty of care. The trial judge rejected this argument and found the steps actually taken were sufficient. Haris appealed.

In 2002, the Bulldogs had a contract with WorkForce International ("WorkForce") to provide security officers. On the day of the incident there were between 80 and 90 WorkForce staff in attendance at the stadium. There were also 37 police present inside the stadium, two mounted police on the exterior and eight transit police also on the exterior (primarily at the railway station). The Bulldogs met regularly with WorkForce, the police and the Royal Agricultural Society, from whom it leased the venue, specifically in the week leading up to a game. They also met at the end of every game to discuss any events which had occurred on the night. Bag searches were carried out by security on the day.

Flares and fireworks had gone off at previous games, though no-one had been injured. There were three or four buckets of sand below Bulldog Hill for extinguishing flares and fireworks.

The trial judge was satisfied that not only was the risk of injury foreseeable in that it was a risk within the Bulldog's knowledge, but also that such risk was not insignificant.

The trial judge found that, although the risk was both foreseeable and significant, the Bulldogs had taken reasonable precautions, in terms of the security measures taken, to minimise the possibility that the risk would be realised. The Court of Appeal agreed and found that it was open to the trial judge to conclude there was no breach of the duty of care as the Bulldogs had acted in a reasonable way to the apparent risk.

Carefully planned security arrangements in this case saved the Bulldogs from an expensive potential claim.

Trips on the roadway-Liability when the road was repaired?

Is a Council liable in negligence if it repairs a road but leaves a depression in the road which someone trips on? Not in all cases.

Mrs Eutick who was 45 years of age was injured when she tripped on the lip of a gully or depression in the roadway whilst crossing Great North Road at Five Dock in a pedestrian crossing. She fell and injured her back. Canada Bay Council had the care and control of the roadway and had carried out works on the roadway. At the time of the fall the works had left a depression with a lip or edge. Mrs Eutick frequently used the pedestrian crossing and she had been aware of the existence of the gully or depression and the lip for some months prior to her fall.

Mrs Eutick sued the Council but lost her case in the District Court. She appealed however she failed in the appeal.

Tripping cases will always turn on the facts of a particular scenario. In this case 19mm was the difference in height. A 19mm difference has frequently been considered by the courts to be obvious and the failure to repair of which has not been held to be a breach of a duty of care. But what happens when the repair caused the difference in height?

Justice Campbell concluded "The obviousness of the lip to pedestrians generally was clearly established by the evidence, quite apart from the fact of knowledge by the appellant (Mrs Eutick). It was open to the Judge to conclude that the presence of potential traffic was not a matter which should reasonably be considered to cause a pedestrian, taking care for his or her safety, to fall on the lip."

Justice Campbell also noted "Crossing over pedestrian crossings is a normal incident of life, particularly in cities and, as with footpaths, they are by no means uniformly smooth and often contain defects, cracks, repaired patches misplaced tiles and other obstacles. Many are raised and some have gutters". He did not consider that Mrs Eutick had shown that the Council should have taken action in relation of the lip in the roadway. He concluded the Council "was entitled, having regard to the obviousness of the lip and the limited nature of the hazard posed by it… to expect that the exercise of reasonable care .. by pedestrians would obviate the need for any further response."

Justice Campbell also noted that if he was to decide this case at trial he would have regard, amongst other things, to the requirement of s 5B(1)(b) of the Civil Liability Act.

> Section 5B relevantly provides:
> "5B General Principles
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
> (a) the risk was foreseeable (. . . . .), and
> (b) the risk was not insignificant, and
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

Justice Campbell found that Mrs Eutick carried the onus of establishing that the lip was a "not insignificant risk" and having regard to her description of it she did not discharge that onus.

A win for the Council but could the litigation have been avoided with better repairs. Legal costs for the Council will be significant and despite a cost order in favour of the Council there is one thing certain the Council will be left substantially out of pocket if Mrs Eutick cannot meet those costs.

Solicitor Certificates- Reasonable Prospects of Success

In NSW, legal practitioners are required to certify that an action for damages has reasonable prospects of success and must file a certificate to that effect when proceedings are commenced. Sometimes proceedings are commenced without the relevant certificate. Does this invalidate the action? The Court of Appeal has confirmed that the failure to provide the certificate at the start is not fatal and the omission can be cured.

Section 198L of the *Legal Profession Act* 1987, which has now been replaced by s347 of the *Legal Profession Act* 2004, provides that a solicitor or barrister cannot file an originating process or defence for damages unless he or she certifies that there are grounds for believing the claim or defence, as the case may be, has reasonable prospects of success.

In the District Court after an initial failure to provide a certificate in a claim of Cheryl Groth v Louise Audet, the defendant sought to have the claim dismissed. The trial judge held that the initial breach of s198L was cured when the solicitor subsequently filed the required certificate. The defendant appealed.

The Court of Appeal noted the clear intention of ss 198L and 198M, when read together, is to restrict the commencement or defence of proceedings by a barrister or solicitor where there are not reasonable prospects of success and the consequences of a breach are clearly intended to fall on the responsible legal practitioner, rather than their client. The relevant section was inserted to regulate the legal profession, and not for the benefit or detriment of parties to litigation.

A breach of s198L(2) will not invalidate proceedings or render them a nullity although proceedings may be struck out if default continues after it has been brought to the attention of the defaulter. A plaintiff's or defendant's solicitor can easily remedy the omission to file the certificate at the commencement of proceedings by filing one later.

Motor Vehicle Safety Inspections-Can they give rise to liability?

The proprietors of an automotive repair and maintenance business recently escaped liability for a negligence action that was brought against them based on an alleged failure to detect that tyres fitted to a vehicle were not in accordance with the manufacturer's specifications. The tyres had a significantly lower load carrying capacity than the type recommended and the vehicle which was a light commercial van rolled over after the driver lost control when the tread separated from the rear nearside tyre. The load carried by the vehicle at the time of the accident exceeded the load carrying capacity of the tyres, but not that of the vehicle. Damages were also sought from the proprietor for alleged misleading conduct in breach of the Fair Trading Act for issuing an inspection certificate that the vehicle was roadworthy only a month before the accident

Mr Zhang was a passenger in the vehicle and sued the driver and the employer of the driver and was successful in his claims. He also sued the Proprietor but in the District Court that part of the claim failed. Mr Zhang suffered catastrophic injuries and the original trial judge awarded an amount in excess of $1.5m. An appeal to the Court of Appeal challenged the judgement in favour of the Proprietor nevertheless that part of the appeal was unsuccessful.

The Court of Appeal found it was open to the trial judge on the evidence to conclude that the defect was not apparent at the inspection and that the inspector did not exercise a lack of reasonable care in failing to identify a defect. The Court also concluded the duty of care imposed on the inspector did not extend to checking whether the tyres complied with the manufacturer's specifications and the Proprietor was not negligent in failing to do so.

It was also found that the undertaking of a safety inspection and the signing of a report, in the standard form required from an authorised inspection station, would give rise to a representation to the owner that 'on the date of the inspection, those aspects of the vehicle and equipment required to be inspected pursuant to the rules for authorised inspection stations, demonstrated no apparent defects. This was a representation made directly to the owner of the vehicle only and since the authorised inspection, which was required to be carried out in accordance with the Rules and safety check standards, did not extend to ensuring that the tyres accorded with the manufacturer's specifications, the implied representation was not relevantly misleading or deceptive for the purposes of the Fair Trading Act.

A lucky escape from a potentially expensive claim. The appeal was brought by Mr Zhang as success against the Proprietor might have allowed him to recover additional damages, unconstrained by the Motor Accidents Compensation Act. That attempt to cast responsibility on the Proprietor having been shown to be in error resulted in an additional cost order against Mr Zhang who is liable to pay the Proprietor's legal costs from the original trial as well as the Proprietor's legal costs of the Appeal as well.

Liability for Someone Else's Criminal Activity

Solicitors for persons injured continue to find ways to blame others for the misfortunes of their clients. In some situations criminal perpetrators inflict injury during the course of a criminal activity. Employees may be assaulted at their place of employment either in connection with their activities or simply as a result of a random criminal act. The Courts are faced with claims which seek to blame employers for the criminal activities of person that are unrelated to the employer. As an example a person assaulted in a carpark by a criminal made a claim against the occupier of premises alleging that the occupier failed to provide adequate lighting and security and therefore were in part to blame for the assault. This claim was considered by the High Court in as *Modbury Triangle Shopping Centre Pty Ltd v Anzil* where the High Court determined that the owner of a shopping centre was not under a duty to prevent physical injury to employees of tenants as a consequence of criminal behaviour of third parties on its land.

The NSW Court of Appeal has had an opportunity to consider a similar type of claim. This time a contractor to Coca Cola was injured whilst performing services for Coca Cola. The contractor was shot whilst delivering products to vending machines and collecting money from the vending machines.

Craig Pareezer was a driver who, through himself or his company Pareezer Transport Pty Ltd was a contractor to Coca Cola and delivered Coca Cola products to vending machines. The contract involved the refilling of machines dispensing soft drinks distributed by Coca Cola in addition to emptying the coin container in the vending machine. Pareezer would collect the money from the machines and place the money

in a safe in his truck. The safe was constructed so that once money was placed in the safe the money could only be removed at the Coca Cola depot. The truck was a large red Coca Cola truck.

On 17 February 1997 Pareezer attended Werrington TAFE to carry out his duties. During the course of collecting some more soft drinks from the back of the truck he was accosted by a man with a pistol. The man with the pistol asked Pareezer for money. Pareezer told the man he could not open the safe. The man then demanded his keys and as Pareezer reached into his pocket for the keys the man shot him in the chest and neck five times. Pareezer was seriously injured.

Significantly, Pareeezer had previously been mugged and seriously injured at the Werrington TAFE in 1995. As a consequence of this mugging his run was altered. However, circumstances dictated that on the date of the incident it was necessary for him to return to Werrington TAFE.

The trial was heard before Justice Hulme in the Supreme Court. It was alleged that Coca Cola was negligent in that it failed to take reasonable care for Pareezer's safety in not providing him with a safe system in which to carry out his duties.

At trial Justice Hulme found that Pareezer was not an employee of Coca Cola and so there was no non-delegable duty of care. However, His Honour found that the relationship between Coca Cola and Pareezer was such as to create a duty of care. His Honour considered that the work that Pareezer was engaged in was for the benefit of Coca Cola and Coca Cola exercised a large degree of control over Pareezer. His Honour found Coca Cola negligent in that Coca Cola required Pareezer to collect money from a site when it knew or ought to have known there was an unreasonable risk of the plaintiff being assaulted and robbed. Damages at trial were assessed at $2.893 million. Coca Cola appealed.

The leading judgment in the Court of Appeal was delivered by Young CJ in Eq. His Honour noted that:

- In this case Coca Cola owed Pareezer a duty of care as Pareezer, although not strictly speaking an employee, was so under the control of Coca Cola that the relationship was extremely close to that of employer and employee.
- After the earlier mugging Coca Cola had taken advice on security. However, according to His Honour this may be insufficient to minimize materially the risk to the fillers.

Pareezer however failed on causation. The Court noted Pareezer had done everything a properly trained person would have done but was still shot. No additional security would have prevented the irrational actions of the shooter.

The case again demonstrates how difficult it is to succeed in a claim that seeks to blame someone for the results of a criminal action of another person. The Courts will always examine the relationships between the plaintiff and the defendant and it will not be uncommon for the Courts to find that there is a duty of care which exists as a consequence of a relationship. The real question will be whether or not there was a breach of the duty of care and whether that breach has caused the loss. In the Coca Cola case it was concluded that the cause of the shooting was not attributable to any action or omission by Coca Cola.

Is Oztag a Dangerous Recreational Activity

In NSW the Civil Liability Act provides that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff. Recreational activities include any sport (whether or not the sport is an organised activity), and any pursuit or activity engaged in for enjoyment, relaxation or leisure, and any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure. A dangerous recreational activity is a recreational activity that involves a significant risk of physical harm.

The NSW Court of Appeal has recently considered these issues in a claim involving a fall during a game of Oztag. On 18 January 2000 Thomas Falvo seriously injured his right knee whilst playing Oztag (a form of touch rugby) at Millers Reserve which was under the care of Warringah Council. The game had been organised by the Australian Oztag Sports Association ("the Association"). The playing field was grassed but there were a number of areas on the field where the grass had disappeared due to wear and tear. The Council had topped these areas up with sand. As Falvo was running towards the opposing team's tryline with the ball in his hand, he moved from a grassy area to one of the sandy patches. His knee gave way and he collapsed to the ground. Falvo fell because his foot sank in the sand.

Falvo sued the Association and the Council. At the initial trial his claim failed. The Association and the Council argued in their defence of the claim that:

- The playing field was in a suitable condition;
- Oztag was a "dangerous recreational activity" within the meaning of ss 5K and 5L of the *Civil Liability Act 2002* (NSW) which provided a defence to the claim;
- The condition of the field was not the cause of Falvo's injuries.

The trial judge found that all three defences were made out. Falvo appealed.

The Court of Appeal made a number of important findings including the following:

- Slightly different levels on playing fields are to be expected (it should be noted that no argument was run that the Association and

the Council were negligent in failing to compact or compress the sand used to fill in the dry patches). On this basis alone Falvo's claim should fail.

- Oztag is not a dangerous recreational activity. There is not a "significant risk of physical harm" and according to the Court "it is difficult to see how a recreational activity could fairly be regarded as dangerous where there is no more than a significant risk of an insignificant injury."

According to Justice Ipp who delivered the leading judgment it is important to clarify whether there is a risk of significant harm. Justice Ipp concluded "In substance, it seems to me, that the expression constitutes one concept with the risk and the harm mutually informing each other. On this basis the "risk of physical harm may be "significant" if the risk is low but the potential harm is catastrophic. The "risk of physical harm" may also be "significant" if the likelihood of the occurrence and the harm is more than trivial. On the other hand, the "risk of physical harm" may not be significant if, despite the potentially catastrophic nature of the harm the risk is very slight. It will be a matter of judgment in each individual case whether a particular recreational activity is dangerous."

In this case the Court of Appeal held there was not a risk of significant harm and therefore Oztag was not a dangerous recreational activity.

So what then is a "dangerous recreational activity"? In this judgment, handed down prior to the judgment in *Fallas v Mourlas* discussed in this newsletter, the Court has provided some further guidance. It is necessary to look at the circumstances of each individual case and consider both the nature of the activity and also the nature of the physical harm that may result as a consequence of the activity.

A common sense approach needs to be adopted in the assessment of an activity as the Court of Appeal has demonstrated that the Courts will be reluctant to classify normal sporting activities as dangerous recreational activities and even if an activity falls within that categorization a negligent person will only escape liability where the harm is a result of the materialisation of an obvious risk.

The recent decisions of the Court of Appeal appear to go some way towards minimising the impact of the provisions in the Civil Liability Act that provide that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity.

NSW OH&S Snapshot

Explosion at Airport- Qantas fined $150,000

A prosecution under the OH&S legislation against Qantas and Caltex Petroleum arose as a result of a sub-contractor sustaining an injury whilst removing lead replacement petrol and diesel fuel from an underground storage facility operated by Qantas at Sydney International Airport. The fuel was being removed from the underground storage facility which was being decommissioned. The injury occurred as a result of an explosion due to a build up of static electricity and the ignition of highly flammable fumes, whilst the sub-contractor was pumping fuel from the underground holding tank into a mobile tanker. The ignition caused a flame to shoot out of the holding tank on the tanker causing burns to the sub-contractor's face and chest.

Qantas was prosecuted for failing to transfer fuel by the process known as *bottom loading*, as well as failing to ensure mobile tankers were properly purged of fuel prior to the transfer of fuel taking place, It was also contended that the transfer of fuel failed to comply with the *Dangerous Goods (General) Regulations 1999 New South Wales.* Qantas initially intended to defend the charge, however, after detailed discussion between Qantas and WorkCover, Qantas agreed to plead Guilty once WorkCover amended the charge to essentially down grade the allegations to a failure to nominate a suitably trained supervisor to supervise the decommissioning of the underground storage facility and failing to ensure that the sub-contractors provided them written method of work and safety procedures outlining the risks and procedures by which the fuel would be removed from the underground facility and transported off the airport grounds.

Qantas relied on the evidence of their senior Fuel Technical Officer that they had carried out extensive review of their expertise and concluded they did not possess the necessary expertise to carry out the decommissioning and that they should engage specialist contractors to carry out the work. Subsequently Caltex Petroleum was engaged to remove the fuel. Caltex Petroleum in turn contracted Kel Campbell for the provision of tankers and drivers required for the removal of the fuel from the site.

Qantas argued they had carried out an extensive examination of Caltex Petroleum 's qualifications and safety procedures and safety record prior to engaging them. Qantas indicated they were satisfied that Caltex Petroleum had the relevant expertise to carry out the required work, and Caltex Petroleum had indicated to them they would engage expert staff with the relevant training and qualifications which would allow the operation to be carried out in a safe and expedient manner.

Prior to the decommissioning Caltex Petroleum staff had attended the site for inspection and had been shown around the site by Qantas technical officers. On the day of the accident, Qantas staff had escorted the Caltex Petroleum and KEL staff onto the site to carry out the work. Evidence lead by WorkCover indicated the pumping of the fuel from the underground storage facility into the mobile tankers had been carried out in the manner stipulated in the agreement between Qantas and Caltex Petroleum, which was via the *bottom pumping* method.

The accident occurred as a result of the ad hoc decision by one of the KEL staff to cease bottom pumping the fuel into the tankers and to load the fuel into the top of the tankers to expedite the process. This change the method was implemented without the knowledge of

Qantas, and was done against the recommendations of the Caltex Australia Drivers Handbook, which all Kel and Caltex Petroleum staff were aware of. The handbook provided a specific warning about the risk of explosion associated with top loading tankers.

In reaching its decision, the Court was faced with was a classic example of an employer relying on a specialist contractor to carry out work that the employer itself did not have the expertise to undertake. The Court indicated whilst contracting out such work was an everyday part of contracting and sub-contracting within New South Wales, an employer must not and can not under any circumstances contract out the responsibility for occupational health and safety, regardless of any contractual arrangement for arranging work between the employer and the sub-contractor.

The court concluded that the culpability of Caltex Petroleum was considerably greater than that of Qantas. Caltex Petroleum held itself out to be a capable and competent contractor that had direct control of the operation. That was not the case with Qantas who whilst it failed to provide and maintain a safe system of work, was not in the position of directly supervising and controlling the fuel transfer operation. Caltex Petroleum had been fined $240,000 for their offence which was dealt with by a different judge.

Ultimately the Court was of the opinion that the risk of an explosion in the decommission process was a reasonably foreseeable one and Qantas should have been aware of it. Furthermore, the Court noted Qantas had five pervious convictions under the OH& S Act, however given the contrition shown by Qantas, its guilty plea, the safety and training procedures set in place following the accident and Qantas' record as a good corporate citizen, the Court imposed a fine of $150,000 out of the possible maximum penalty of $825,000.

Hazardous and Dangerous Substances

The Industrial Court of New South Wales recently dealt with a prosecution by the WorkCover against Northern Sydney and Central Coast Area Health Service in relation to an incident which occurred on 10 and 13 August 2001 when 10 employees of the Health Service became ill after being exposed to fumes from chemicals supplied to the Defendant for the use in the operation of X-ray film and processing machines.

WorkCover brought charges pursuant to Section 15(1) of the *Occupational Health and Safety Act* on the basis the Defendant failed to remove, isolate and clearly label the dangerous and hazardous nature of chemicals used in its X-ray development machines. The Health Service pleaded guilty to the charge at first instance.

At the plea, evidence was led by the Prosecution that the chemicals supplied to the defendant by the chemical supply company did not contain the correct Material Safety Data Sheet ("MSDS") and they did not identify Australian Standards. The MSDS supplied had been prepared in Singapore and did not reflect Australian Codes of practice or the correct chemical classification, and as such were deficient.

Further the Health Service had failed to conduct an adequate assessment of the risks relating to the health and safety of its employees posed by the chemical products, and did not adequately inform them of the associated dangers of the products. There was also inadequate ventilation in the Medical Imaging Department where the chemicals were stored and used, which was a contributing factor which caused the sickness. The Health Service did not provide adequate information, instructions, training and supervision in relation to the use and operation of the chemicals during their use in the X-rays development machines.

The Health Service was facing a maximum penalty of $550,000 and was fined $100,000. In a related prosecution Fujifilm Australia was also fined $100,000 for its role in supplying the chemicals to the Health Service.

Bank Robbery Results in Mid Range Penalty

On 21 September 2004, three male offenders entered the Avalon Westpac Bank Branch on Sydney's Northern Beaches. One offender jumped the anti-jump barrier and bulkhead to the employee side of the Bank and demanded money. Once he had jumped the anti-jump barriers he demanded access to the cash handling area and ordered one of the employees to allow the other two offenders to enter the cash handling area via the locked staff entrance. Once all three offenders were in the secure area of the Bank, they ordered the Manager of Westpac Bank to open the safe and till within the bank. The three offenders left the Bank with approximately $25,000. To date they have not been apprehended or caught by the Police.

As a result of the robbery, Geoff Derrick, secretary of the Finance Sector Union of Australia, New South Wales Branch, brought proceedings pursuant to Section 106 of the *Occupational Health and Safety Act (NSW)* against Westpac claiming, Westpac had failed to provide and maintain an adequate work environment to ensure the safety of employees and specifically to install anti-jump barriers that extended the full height from the bank teller desk to the roof of the Bank. Westpac pleaded guilty to the charges at the first possible instance.

At the plea, it became apparent that the Perspex anti-jump barriers that were in place to prohibit offenders entering the secure section of the Bank had a 2499 mm gap from the top of the bulkhead to the ceiling.

The Prosecution supplied and led evidence in the form of letters and reports dating from 2 February 1995 through to 10 December 2003 which outlined concerns and methodology for improving the security as a result of robberies in and around the area as a result of offenders jumping anti-jump barriers.

Evidence was led by Westpac that on 10 December 2003 an investigation was carried out by a member of the Westpac Physical Security Team to determine the safety of the Avalon Westpac Branch in relation to its employees and specifically the risk associated with the gap between the anti-jump barriers and the bank ceiling. The assessment concluded that there was little or no risk of anyone entering the secure area of the bank by climbing through the gap between the top of the bulkhead and the ceiling.

It was noted at the hearing that during the robbery the four Westpac employees who were present, complied with each of the demands of the offenders, which was in accordance with the Westpac Bank training concerning robberies. As a result of the robbery no employee was physically injured and three of the four employees returned to work the following day.

Following the robbery, Westpac engaged a full-time security guard for the Avalon Branch. Also, a security grille was installed in the gap between the Perspex bulkhead and the roof. Further to this, extra training was given to all Westpac employees addressing actions to be taken by employees during robberies.

The Court imposed a penalty of $145,000 and ordered half the fine to be paid to the prosecutor, effectively providing funds to the union.

Developer Fined $150,000.00

In a recent decision in the Industrial Relations Commission Justice Schmidt delivered a fine of $150,000.00 to a company and fines of $15,000.00 to the two directors of the company following a fatal accident on a construction site. The company was the owner and developer of the site and was erecting a unit complex.

The development company engaged sub-contractors to manage the construction process. The developers engaged a company to supply a site supervisor. The site supervisor was the sole director and employee of that company. He had performed the same role as site supervisor on about five previous blocks of units.

The developer also engaged a bricklaying contractor to carry out the construction of brick walls including a stud wall for a kitchen area which was an internal wall approximately 1 metre wide. The wall was constructed over a number of days by the bricklayers. There was no bracing of the wall during the construction as the wall would have been braced by the top floor once the floor was poured.

The wall collapsed on one of the bricklayer's employees resulting in his death.

Interestingly the Court noted that had there not been a supervisor engaged by the developer the offence would have been more serious. The Court noted that whilst it appeared that there was a managerial mind directed to ensuring safety of the site inadequate attention was paid by the developer.

The Court accepted that the supervisor and the bricklayer failed to take steps in relation to the bracing of the wall. The Court concluded that the developer's culpability for the risk in question was less than the culpability of the bricklayer and the supervisor. The ultimate penalty imposed on the development company was $150,000.00 and each director was fined $15,000.00.

Charges against the bricklayer are pending and in light of the comments of the Court the bricklayer can expect a more significant penalty. The case clearly demonstrates that developers cannot escape responsibility for safety on development sites by contracting companies to carry out those building works relying on those companies to ensure adequate safety measures are in place.

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