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.

Sub-contracting the Transportation of Your Goods. What Is Your Risk?

You manufacture and distribute goods and you need to get your goods to your customers. You engage a contractor to provide a prime mover trailer and driver for the purposes of transporting and delivering your goods. The driver is injured whilst unloading the goods. Do you have any liability to the driver?

The New South Wales Court of Appeal in *J Blackwood & Sons ("Blackwood") -v- Jon Leslie Nichols ("Nichols") & Anors* has recently considered this issue. Blackwood entered into a contract with D & R Boyle Enterprise Pty Limited where that company was to provide a prime mover, trailer and driver for the purpose of transporting and delivering Blackwood's products to its customers between its yard in Newcastle and its Wetherill Park yard in Sydney. Nichols was employed by D & R Boyle Enterprises Pty Ltd. Whilst he was loading the trailer he was required to stand on top of the load to tighten the chains used for securing the load and in tightening the chains he slipped and fell causing him to suffer injury.

So what responsibility did Blackwood have to Nichols? Did Blackwood have some form of supervisory responsibility? Was there some confusion as to whose responsibility it was to secure the load?

Blackwood argued that in carrying out the particular task of securing the load Nichols was not subject to Blackwood's supervision or direction.

The Court noted that it was important to examine the control over the conduct that gives rise to a risk, the knowledge of a risk and the relevant inability of a claimant to protect themselves in determining whether a duty of care arises.

The question in this case was whether Blackwood had control over the conduct of Nichols which gave rise to the risk of the load moving so that he lost balance.

In this case the Court noted that the High Court has previously found that a contractor engaged to deliver bread to Woolworths Supermarket who injured his back whilst attempting to move heavy industrial waste bins obstructing the access to a supermarket delivery bay was owed a duty of care by Woolworths as it was the task of the supermarket staff to move the bins ("Thompson"). The High Court had found that Woolworths were liable as they required the driver to conform to a delivery system. Woolworths had an obligation to exercise reasonable care for the safety of those delivering goods to its delivery bay who for that purpose came into the premises and the duty extended to ensuring that that system did not expose those who made such deliveries to an unreasonable risk of physical injury. As the driver was required to unload at a designated place and as Woolworths had established the system to which he was required to conform, its duty of care covered not only the static condition of the premises but also the system of delivery.

Nevertheless in Blackwood's case the facts were distinguishable from those considered by the High Court in *Thompson*.

There was no system of work provided by Blackwood that Nichols had to follow for the purposes of carrying out the task of securing the load. Blackwood had not provided defective equipment or

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facilities. The task of securing the load was one over which Blackwood had no control. Blackwood in this case did not owe any duty of care to Nichols.

In this case the relationship between Nichols and Blackwood was not such as to give rise to any duty given that Blackwood had no control over the manner in which Nichols being an employee of another party would carry out a task which he was at all times experienced in performing.

The issue to determine is the extent of control you have over the activities of the persons you have subcontracted or the persons employed by those you have subcontracted.

So why did the claimant sue Blackwood? The damages recoverable from Blackwood would have been greater than the damages recoverable from the employer due to the different damages regimes regulating awards for different categories of claims in NSW.

An expensive exercise for Nichols as he is now liable to pay Blackwood's costs of the original trial and the Court of Appeal and he receives no damages from Blackwood.

Trade Practices, Negligence or Both - The Unpredictability of the Judiciary

Is there an upswing in the number of personal injury claims where both negligence and breaches of the Trade Practice Act ("TPA") are alleged? Perhaps so, and what has been the effect on defendants?

In the recent NSW Court of Appeal decision of *Gharibian -v- Propix Pty Limited trading as Jamberoo Recreational Park*, 3 Justices of the Court of Appeal all reached different conclusions regarding the liability of the defendant following a personal injury suffered by the plaintiff where both negligence and breaches of the TPA were alleged.

Gharibian was injured when using a stainless steel toboggan at Jamberoo Recreational Park. The injury occurred following a brief period of rain which made the track more slippery and the plaintiff was unable to stop the toboggan. Gharibian commenced an action in the District Court for damages relying upon Section 74 of the Trade Practices Act, namely the services were not reasonably fit for the purpose for which they were supplied. Gharibian also brought a claim in negligence alleging Jamberoo Recreational Park failed in its duty of care in not stopping the ride until the possibility of rain had passed. Gharibian failed on both counts in the District Court and appealed the decision to the Court of Appeal.

Justice Ipp believed the trial judge erred in dismissing the claim that the defendant breached Section 74 of the Trade Practices Act. Although the trial judge had been satisfied that the services were reasonably fit for the purpose for which they were supplied, the trial judge had provided inadequate reasons as for the basis of those findings. Justice Ipp noted when considering a Section 74 cause of action, the first question to be determined was whether there was a contract between the plaintiff and the defendant. The second was whether materials were supplied in connection with those services and finally whether the materials were reasonably fit for the purpose for which they were intended. There was no dispute as to the satisfaction of first and second limbs of the test. In relation to the third limb, although the defendant had led evidence that there had been no other previous accidents, this was not relevant as to the fitness of the toboggans and the track. Justice Ipp noted in this situation recreational equipment intended for general use by the public should not depend on the ability of members of the public to react as soon as they detect rain by operating a brake within a few seconds in order to avoid an accident. It was noted regard must be had to the fact that a number of potential users would be inexperienced, react slowly and/or panic. The appeal was therefore upheld due to a breach of Section 74. However, Justice Ipp believed there was no negligence on the part of the defendant.

His Honour Justice Tobias also agreed that there was a Section 74 breach but disagreed as to the finding that there was negligence on the part of the defendant. It should be noted that in the initial proceedings in the District Court, expert evidence had been led by the plaintiff that the incident could have been avoided by the extension of the toboggan run to allow out of control toboggans to slow down without the use of the toboggan brake. The defendant had argued this expert evidence should be disregarded as it was not the responsibility of the recreational park to design and modify the toboggan run. This responsibility should rest with the manufacturer of the toboggan run. Justice Tobias stated there was no plausible reason which would tell against extending the end of the run in the manner suggested. It could have been achieved quite easily with minimal testing and cost. The defendant had been negligent in allowing the plaintiff to use the toboggan when it knew rain would cause a failure of the toboggan brakes. The only reasonable response to that risk was stopping the ride until the possibility of rain had passed.

Finally, Justice Mason agreed with Justice Ipp with regards to the Section 74 breach but remained unconvinced there was any negligence on the part of the defendant.

This decision highlights a number of important considerations. Traditionally the primary focus of plaintiffs in personal injury actions was to bring claims on the grounds of negligence. This decision makes it clear that potential claimants should also look closely at breaches of the Trade Practices Act when assessing the liability of a potential defendant in a contractual situation. Whilst this would have little bearing on situations where there was no contractual relationship between the plaintiff and the defendant, it certainly highlights the availability of the Trade Practices Act to bring actions for injuries in amusement parks, child care centres and the hired sporting facilities where there is a contractual relationship.

Despite the plaintiff ultimately failing on the negligence action, the split decision highlights a similar factual scenario may not be determined so favourably to the Defendant in the future. It should be noted despite extensive monitoring of the weather, vigorous communication procedures between the employees to stop the ride when rain was imminent and an excellent safety record, this may not be enough to discharge the duty of care of the defendant. Justice Tobias commented the mere possibility of rain and the reasonable foreseeability of an accident if the track became wet, meant the ride should be stopped until that possibility had passed.

Finally, the decision reinforces the unpredictability of the judicial process. Whilst the plaintiff was completely unsuccessful in the District Court, the plaintiff was successful in a majority verdict in relation to Section 74 of the Trade Practices Act in the Court of Appeal with some minority support in relation to the negligence claim. One wonders if the Defendant is successful in having the matter appealed to the High Court, whether another range of variable reasons will be handed down.

Damages for Gratuitous Care

When a person is injured needs are created by their injuries and disabilities. These needs often include a need for domestic assistance which is provided gratuitously by family members.

The statutory damages regimes imposed in various jurisdictions in Australia limit the entitlement to bring claims for gratuitous domestic assistance provided by family members. Thresholds are imposed which provide that no compensation is to be awarded for gratuitous domestic assistance if the assistance is below a specified level. Caps are also imposed.

For example in New South Wales pursuant to the Motor Accidents Compensation Act 1999, no compensation is awarded if the services are provided, or are to be provided for less than 6 hours per week and for less than 6 months.

Interesting claims do arise. What happens where a family has family pets and the injured person used to care for the family pets? Is the injured person entitled to recover damages for the cost of provision of gratuitous services to care for those family pets?

The Courts have previously held that a claim based upon services provided in caring for pets was not maintainable. But isn't the question really whether there are reasonable needs created by the injuries and disabilities. Caring for pets was not seen as a necessary need that was created by the injury.

The New South Wales Court of Appeal in *Teuma -v- C P & P K Judd Pty Limited*, recently considered the method of assessment of the need for domestic assistance created by an injury.

Justice Ipp in this judgment noted:

> *"The concept of need involves more than a mere desire. Compensation for need does not encompass compensation for services that are not reasonably necessary for the plaintiff's well being."*

Justice Ipp concluded that:

> *"The fact that domestic services were provided before the injuries as part of the ordinary give and take of domestic arrangements is relevant to the determination of damages for gratuitous care."*

Justice Ipp noted that:

> *"Where negligently caused injuries bring about a need for domestic care, compensation will be awarded for the need even if it is not proved that the need is, or may be, productive of financial loss … damages for domestic care should not be reduced by notions of mutual obligations that are part of marital or family life or by services as part of the mutual give and*

take of marriage that would have been performed in the same way to the same extent in any event. In other words damages should not be limited to additional services."

When determining claims for gratuitous domestic assistance it is not open to argue that the services would have been provided in any event as a consequence of the domestic relationship between the parties. Where the need is created by the injuries compensation is payable for the services provided even if those services were provided prior to the accident that led to the injury.

The issue to determine is what needs are created by the injuries and disabilities. If there is a need created compensation will be payable for gratuitous domestic services subject to any threshold or caps imposed by the various statutory damages regimes which regulate personal injury claims.

Identity of Contracting Parties

In a recent decision of the NSW Court of Appeal, the Court looked at how to identify the parties to a contract where the owner of a business name was different to the owner of the business.

A company is a legal entity and can be sued in its name in the same way that an individual can be sued. But what happens when a company or an individual operate under a business name?

A business name is usually owned by an individual, a group of individuals or a company. The business name does not create a different legal status as it merely reflects the name under which the owners commonly trade. If you have a problem with the business you need to take the issue up with the individuals or the companies that are the owners of the business.

However when an individual owns a business name and a related company runs the business and uses the business name there can be problems identifying the person responsible for a problem particularly when a contract only identifies the business name.

Care is not always taken when the names of contracting parties are written in contracts. This is particularly the case in the building industry when trading names rather than details of individuals or corporations are noted on contracts. This can lead to a problem when there is a breach of the terms of the contract and a party suffers a loss and must seek to recoup that loss. Who do you sue?

This problem was examined by the Court in Dennis *Pethybridge v Stedikas Holdings Pty Ltd* ("Pethybridge") where it was necessary to determine whether a building contract was made with a company or with the man who stood behind the company.

Why did it matter? Because where there is a breach of contract, only the contracting party is liable to compensate the other for loss. In addition, enforcing contractual rights against another is only as good as the assets of the other party.

As happens commonly in the building or manufacturing industry, there is often no separate contract document governing the relationship between the parties to an agreement. There will be a quote given and acceptance of the quote by work order. These documents form the terms of the agreement.

This is what happened in Pethybridge's case.

The business name "C & D Asphalt Service" was registered to an individual, Dennis Pethybridge. The asphalt business was carried on by a company, Torpoint Investments Pty Ltd of which Dennis Pethybridge was a director.

An invitation to tender and work order was addressed to the business name. The quote was submitted by C & D Asphalt Service however on the bottom of the quote, the ACN of Torpoint Investments Pty Ltd was printed. Torpoint Investments Pty Ltd was the entity which carried on the relevant business.

Under the now repealed *Business Names Act 1962 (NSW)* and the current *Business Names Act 2002 (NSW)*, a person must not carry on a business in New South Wales under any business name unless the business name is registered in the name of that person.

Does registration of a business name legally bind the registered owner to a contract? The Court noted:

- Without other evidence, there is a presumption that the owner of a registered business name is the relevant contracting party;
- Where the owner of the registered business name adduces evidence that the subject business is carried on by someone else, the persons who own the actual business will be the contracting party;
- However, if the other party searches the business name, finds out the identity of the owner of the registered business name and relies on the business name search to identify the person or corporation that they are dealing with then the registered owner is estopped from denying that they were the contracting party;
- There are also circumstances where a person or company discloses they are contracting as agent for a principal. In those circumstances, the principal will be the party to the contract.

But what if a party intends to contract with the business name owner? The test is not what the relevant person actually believed but what the reasonable business man would have done:

> *"The intention for which the Court looks is an objective intention of both parties, based on what two reasonable businessmen making a contract of that nature, in those terms and in those surrounding circumstances, must be taken to have intended."*

In C & D Asphalt Service, the ACN stated on the quote indicated that Torpoint Investments Pty Ltd was the contracting party. In addition evidence adduced at hearing showed that the company was the entity carrying on the relevant business.

The Court did not consider that invoices or other dealings after entering into the contract were relevant to identification of the parties to the contract and they only went to establishing the terms of the contract itself.

The inclusion of the ACN of the company on the quote was an important fact.

The action against the director who owned the business name failed and the plaintiff was ordered to pay the costs of the director.

So what are the lessons learnt? If you need work performed:

- Find out who you are contracting with and identify them in the contract. Do not rely solely on a business name search. Persons in business incorporate companies to remove themselves and their assets from liability to creditors. That is essentially the purpose of a company as a separate legal entity. Where there is a business name, enquiries should be made to identify the owner of the business name as well as the owner of the business that operates the under the business name, just in case they are not the same. An assessment of the commercial risk of contracting with the person that will actually carry out the work and contract with you is essential. A business name identifying a party is not sufficient to record on a contract without exposing you to possible uncertainty.
- To avoid uncertainty, the contract terms and the parties should be properly identified in a written document signed by both parties. This might take the form of a credit application or a heads of agreement which relies on a standard form contract for its terms. Make sure the correct names of the contracting parties are included in the contract and preferably the ABN of the business and ACN of any contracting corporation.
- Finally, once you know who you are contracting with and have assessed the commercial risk, it might be appropriate to obtain security for performance of the contract, such as personal guarantees from directors, charges over assets, bank guarantees or retention.

Hotelier Not Liable for Injuries during Fracas

The New South Wales Court of Appeal has recently found there was no liability on the part of a hotel, hotel licensee or and security firm when a patron was injured during a fracas.

Vanessa O'Reilly was a patron at the Collingwood Hotel in Liverpool on 30 April-1 May 2002. During the course of the evening, a fight broke out between two men, as a consequence of which one of the men was knocked to the floor, bleeding from the head. O'Reilly had nursing training and so began attending to the injured man. As the assailant was being escorted out of the hotel, a second fight broke out and one or more patrons fell on O'Reilly, who suffered injury to her back.

O'Reilly commenced proceedings in the District Court alleging negligence on the part of the Collingwood Hotel, the licensee of the hotel and the company that provided security guards at the time of her injury, Night Knowledge Security Pty Ltd. At trial,

O'Reilly was successful in her claim against all three. The hotel, hotel licensee and security company appealed.

This appeal was successful.

There was no issue in the appeal that someone in the position of a hotel manager or licensee may be liable for injury to a patron caused by the deliberate and unlawful act of another patron. In our March newsletter we discussed the New South Wales Court of Appeal decisions of *Wagstaff v Haslam & Anor and Spedding v Nobles; Spedding v McNally* which confirmed that this is the case.

The issues in this case included whether or not the hotel, hotel licensee and security guards ought to have done something to prevent the fights and whether or not the hotel ought to have informed Security that it had stopped serving alcohol to some patrons.

The Court of Appeal in a judgment that is somewhat critical of the trial judge concluded that there was no liability as no breach of duty on the part of the defendants had been identified nor had O'Reilly been able to prove that if there was any breach that the breach of duty had caused her injuries.

The evidence given in O'Reilly's case was simply insufficient to find any liability on the part of the defendants.

The Court of Appeal concluded:

> *"In my view, the factual findings made by the trial judge did not warrant an ultimate finding of liability on the part of any of the defendants. That is not merely because her Honour failed to make a relevant finding as to causation in relation to the respective breaches of duty: it is because her Honour failed to identify with adequate precision the manner in which the relevant duties had been breached.*
>
> *That conclusion leads to a question whether this Court can make any relevant findings, or whether there should be a retrial, or whether the Appellants are entitled to judgments in their favour. "*

The Court of Appeal carefully examined the evidence in the trial. It was noted that O'Reilly understandably, did not observe all of the actions of the hotel staff or the security guards. Nor did she give evidence of any relevant behaviour before the first fight which might lead to the inference that steps should reasonably have been taken, which were not, for the safety of patrons. Nor did she gain sufficient assistance from other witness to the events of the evening, sufficient to demonstrate that there was any breach of duty. The Court of appeal also concluded:

> *"Although the plaintiff argued, on the appeal, that if there were errors in her Honour's judgment, the only proper order was a retrial, such an order would not be appropriate if the evidence called at trial was insufficient to establish a relevant breach of duty on the part of either the Hotel or Security. In my view, for the reasons given, the evidence failed to demonstrate relevant breaches which might have a causal connection with the injury suffered. The plaintiff is not entitled to a second trial to attempt to make good the lack of such evidence."*

A loss for O'Reilly who does not get a second chance to try and prove her case. The case serves as a reminder to injured persons that it is not enough that they have been injured; they must prove there has been a breach of duty and this breach has caused their injuries.

As can be seen hoteliers continue to face claims from patrons who are injured as a consequence of fracases on their premises particularly where the fracas involves persons who are intoxicated.

It is clear that there is a duty of care imposed on hoteliers to protect patrons from action of other patrons however the true question is whether there is a foreseeable risk and what should be done about that risk. Evidence of intoxication of patrons will not be sufficient in itself for liability to attach to a hotelier. Nor will the simple event of a fracas between intoxicated patrons. Something more is needed. The hotelier needs to be aware of the propensity for something to go wrong and that the patron may become aggressive. The hotelier must then act reasonably to eliminate that risk otherwise they may be liable to compensate patrons who suffer injuries in a fracas at the hotel.

However the obligation to prove the case will still rest with the person injured. What could have been done? What was a reasonable response in the circumstances? Was there a breach of duty and did that breach of duty cause the injuries? These are the issues that must be addressed by an injured person and there must be evidence available to an injured person to establish the facts necessary to ground the claim otherwise the case will be lost, as Ms O'Reilly has found out the hard way.

Calculating Future Economic Loss in Personal Injury Claims

Persons injured are entitled to claim damages for the losses they suffer as a consequence of their injuries. The damages recoverable include damages for past and future economic loss.

Usually, past economic loss can be calculated by reference to an arithmetic calculation based upon the time off work and the probable earnings that the injured person would have received but for the accident.

The question of future economic loss will generally be more difficult. The calculation of future economic loss is more problematic particularly where there is no clear way to arithmetically calculate the loss. Can you use a crystal ball and pluck a figure. Can a gut feel of a Judge help decide the issue?

The NSW Court of Appeal has recently provided further guidance on the preferred approach. In *Ranger -V- Turner* the Court considered a claim by Turner who was injured in a motor vehicle accident. Turner claimed damages and his damages were assessed in the District Court by Acting Judge McGrowdie. Past economic loss was assessed at $45,590.00 and future economic loss was assessed at $100,374.00. The calculation of future economic loss was based upon a finding that in the future Turner would suffer one day's loss of work per week at an average rate of $138.00. Actuarial tables were applied to calculate the loss for 33 years being the balance of Turner's working life until the age of 65 years.

The insurers for Ranger believed the calculation of future economic loss was flawed and appealed.

It was argued that it would have been more appropriate to allow an award for future economic loss by a modest buffer without any arithmetic calculation.

Justice Basten in his judgment noted that:

> *"His Honour assessed diminution of the plaintiff's earning capacity carefully by reference to relevant considerations, and by reference to the evidence. The appellant contends that this exercise involved undue precision, and to provide a small cushion could have been the appropriate course. A cushion is usually appropriate only where there is no basis for making a calculation. That may be an unavoidable approach in some cases, but it is an invitation to the taking of shortcuts with possibly unfair results to contend that it is the correct approach where an evidence based calculation is justifiable.*

Basten J concluded that the evidence was sufficient to support the calculation applied by the District Court Judge. Acting Justice Tobias agreed. Acting Justice Tobias noted that the claimant was a painter and carried out work within the building industry generally and the evidence demonstrated that he had an injury that would impact upon his earnings in the future and he would not be able to earn as much carrying out light work generally in the building maintenance industry.

Acting Justice Tobias noted that Ranger submitted that there was no evidence in the proceedings that the labour market for painting work or general maintenance work of a manual kind, was any less for an injured person compared to a person that had not been injured.

Acting Justice Tobias noted that the District Court Judge came to the conclusion that there was a smaller labour market available in respect to light work where a person was injured. Acting Justice Tobias concluded it was not necessary for some form of evidence, expert or otherwise to have been called to support that finding. Common knowledge could prevail. As a matter of commonsense it followed that in relation to the type of work the claimant was capable of undertaking any constraint on the worker where he would be required to avoid any form of heavy work would result in less opportunities to obtain that work.

Acting Justice Tobias noted that:

> *"It would inappropriate in cases such as the present case for this Court to in anyway encourage parties to undertake the expense of calling such evidence about an everyday experience which, as I have had said, seems to me to involve a matter of commonsense. This is particularly so given one's common knowledge that labour markets change over a period of time and are sometimes more buoyant and at other times extremely tight. If an unskilled worker is confined only to light work, or light duties, it must follow as a matter of commonsense that the pool of work available to such a person will be less than which would be available to a person who suffers no such constraint."*

Acting Justice Tobias supported the District Court judge's approach in coming to an arithmetic calculation of the claim for economic loss rather than approaching the assessment by allowing some notional buffer for the potential loss of earnings.

Clearly, Courts do not want to become bogged down with detailed evidence concerning the state of the labour market where findings can be drawn based on a commonsense approach to the understanding of the labour.

Where future economic loss claims are capable of arithmetic calculation the Courts are likely to prefer that approach rather than the approach of allowing a lump sum without any calculable basis to provide compensation for future economic loss.

Nevertheless buffers will continue to play a role where a claim for economic loss cannot be calculated by reference to an arithmetic analysis.

Will there be an increase in the arithmetic calculation of future economic loss awards and if so is it possible that arithmetic calculations will lead to larger awards? Time will tell.

Recovery of Workers Compensation Benefits - New Developments

In New South Wales where an employer makes payments to an injured worker those payments can be recovered from an entity other than the employer who has negligently caused the injury to the worker. Section 151Z of the Workers Compensation Act 1987 (NSW) effectively provides that an employer who makes workers compensation payments to its worker is entitled to be indemnified by the negligent party who has caused the injury and is entitled to recoup the payments made.

Nevertheless there is a limitation on the recoupment of payments. The repayments which can be recouped will be capped to the amount which represents a notional assessment of the damages that would be payable by the negligent party to the worker if the worker had sued the negligent party.

Generally where an employer seeks to recover workers compensation payments pursuant to Section 151Z of the Workers Compensation Act 1987 proceedings are commenced against the negligent party and the Court must then notionally assess the damages that would be awarded to the worker if he or she had brought the claim against the negligent party.

There are a number of important issues to note in such a claim:

- The Limitation Act 1969 in New South Wales provides a limitation period for bringing a claim in respect to each payment made by the employer. The employer must commence proceedings under Section 151Z within 6 years of making a payment. If they fail to do so the claim in respect to that payment will be statute barred. Each time a payment is made a cause of action accrues to the employer. In certain situations some payments made by the employer will be statute barred if payments were made more than 6 years before the commencement of proceedings whilst other payments will not be statute barred. The employer will only be entitled to recover the non-statute barred payments from the negligent party.
- When proceedings are commenced pursuant to section 151Z the only payments which can be recovered pursuant to the indemnity are payments actually made. The liability for future payments remains an issue for a later time. Therefore a judgment is usually entered in favour of the employer in respect to actual payments made provided the payments made are below the notional assessment of damages. Then, as further workers compensation payments are made after the judgment the further payments can be recovered up to an amount that reflects the notional assessment of damages without another trial to assess the notional damages.
- When a judgment is entered under section 151Z the employer will be entitled to interest on the award. The interest is a separate entitlement which is not effected or modified by the notional assessment of damages.

But what happens where the workers compensation payments made exceed the notional assessment of damages? The employer will only be entitled to recover payments up to the notional assessment of damages.

There are further complications. What happens if some of the payments made cannot be recovered as they are statute barred, and the obligation to pay workers compensation payments is ongoing and the notional assessment of damages is not reached yet? Will the statute barred payments be counted against the notional assessment of damages?

In the recent decision in the NSW Court of Appeal in *Teuma -v- P & C K Judd* the Court of Appeal considered this unusual issue.

The Court determined that the worker's notional assessment of damages was $577,334.00. Workers compensation payments had been made totalling $331,188.06. Of those payments $95,892.78 had been made more than 6 years before the

commencement of proceedings, and this amount was timed barred by virtue of the Limitation Act. Accordingly only $246,145.94 had been paid at the time of trial which could be recovered. The obligation to pay workers compensation payments was ongoing.

The majority of the Court of Appeal determined that the statute barred amount did not constitute part of the capped damages sum which would restrict the employer's entitlement to indemnity. The Court determined that the employer was entitled to recover the full amount of $577,334.00 where the employer had a viable cause of action which was not statue barred for payments made pursuant to the Workers Compensation Act 1987. In this case if the employer continues to make workers compensation payments it will receive reimbursement up to the notional assessment of damages of $577,334.00 and this entitlement is not reduced by the statute barred payments.

When the compensation paid exceeds the aggregate of the statute barred payments and the notional assessment of damages the entitlement to reimbursement will cease.

The result in the case is that the employer recovered a judgment for the payments made (excluding statute barred payments) together with interest and will now continue to make payments and recoup those payments provided the payments made (excluding the statute barred payments) and all future payments do not exceed the notional assessment of damages.

In this case the worker may well be better off receiving workers compensation payments which will exceed the damages that would have been recovered from the negligent party. An interesting outcome.

Clearly scheme agents need to be mindful of the Limitation Act and its effect on claims under section 151Z. However, statute barred payments do not reduce the amount that will ultimately be recoverable if workers compensation payments made substantially exceed the notional assessment of damages.

Can You Request Particulars In Recovery Claims?

As discussed above, in New South Wales section 151Z of the Worker's Compensation Act 1987 allows for recovery of compensation payments made by a worker's compensation insurer to, for or on behalf of a worker from a third party if there is negligence by the third party. The workers compensation insurer can recover payments made to, for or on behalf of the worker up to a notional assessment of damages had the worker commenced proceedings against the negligent third party (the defendant) in his or her own right. What this means is that in order to combat the claim the defendant must attempt to ascertain information including the extent of the worker's injuries, medical expenses, employment status and any requirement for domestic assistance.

The difficulty that often arises is that as the worker is not actually a party to the proceedings, the defendant to the claim does not have the right to have the worker medically examined. Obtaining information about issues such as economic loss and domestic assistance can also be difficult. So what options, apart from the expense of issuing subpoenas, does a defendant have? In a personal injury claim brought by the injured person the injured person is obliged under the Court rules to provide information to the defendant in relation to their claim. Does a worker's compensation insurer in a section 151Z claim have the same obligation?

The New South Wales Court of Appeal has recently considered this issue in *Allianz Australia Insurance Ltd v Newcastle Formwork Constructions Pty Ltd*. The facts of the case were simple. A worker employed by Newcastle Formwork was injured in a motor vehicle accident on his way to work. Allianz were the CTP insurer of the other driver. Newcastle Formwork sued Allianz in the District Court seeking recovery of compensation payments made to, for, or on behalf of the worker. Allianz requested detailed particulars of the claim which Newcastle Formwork refused to provide. A District Court judge was asked to rule on the issue and agreed with Newcastle Formwork that the particulars did not have to be provided. Allianz appealed.

The Court of Appeal dismissed the appeal but made a number of interesting comments along the way. Justice Giles stated:

> *"The purpose of particulars is to assist in defining the issues at the trial, whereby the opposite party knows the case it has to meet and will not be taken by surprise, so that the evidence to be led can be appropriately confined and costs can be limited by avoiding the expense of preparing to meet issues which will not arise. Giving particulars of the case to be made out has been distinguished from disclosing the evidence by which the case is to be proved, but the distinction is not a clear one and the touchstone must be what is reasonably necessary to achieve the purposes last-mentioned."*

In this case according to the Court of Appeal the request for particulars by Allianz went far beyond what it was necessary for Allianz to know to allow Allianz to meet the claim. The appeal by Allianz therefore failed but the Court did comment that there was an obligation to provide particulars although issues such as whether or not the worker was co-operative would need to be taken into account in determining the extent of particulars that should be provided.

The end result is that Allianz must defend the claim without further elaboration from the workers compensation insurer. This will effectively impede the investigation of issues that are only ascertained whilst the hearing proceeds, a bit like a trial by ambush. But there may be light at the end of the tunnel.

Justice Giles noted the difference between personal injury claims and 151Z claims and commented:

> *"The objectives of r 15.12 [of the Uniform Civil Procedure Rules 2005 which govern proceedings in the District Court] would seem to apply to establishing the damages which would have been recoverable had the worker sued the wrongdoer. Consideration should be given to rules which prescribe particulars and documents in relation to damages in claims for indemnity under s 151Z(1)(d), in similar manner to r 15.12 but with such modification as is thought appropriate because the plaintiff is not the worker and may require the worker's co-operation. WorkCover and interested insurers can no doubt be invited to participate in formulating rules."*

It will be interesting to see the Court's response. With so many section 151Z claims before the Court today such rules seem necessary and it is probably only a matter of time before more minds are turned to this issue.

OH & S ROUNDUP

Maintenance Team Leads to the Demise of the Directors

Salamander Shores Hotel Pty Ltd was a company that operated a hotel/motel employing approximately 50 staff including 6 full-time maintenance personnel. The hotel/motel was located on 3 acres of land and a swimming pool was attached to the motel. Child proof gates secured access to the pool.

A 13 year old was swimming with a friend in the pool. He was not a hotel guest. He lived locally and had not obtained permission from hotel staff to use the pool. The motel's general manager was not aware that the boy occasional swam in the pool or that the boy had been swimming on that day. Some of the motel's maintenance staff were aware that he had occasionally used the pool and on occasions had been asked to leave the pool.

The young boy was fatally injured when he was electrocuted. He had gained access to a semi-enclosed area which contained a conduit pipe. He had gone to the area to retrieve a tennis ball. Whilst attempting to return to the pool he was climbing on the retaining wall and the pool fence and stood on the pipe and sustained an electric shock.

An RCD had not been fitted to the main switchboard which would have isolated supply to protected circuits, sockets and outlets or equipment in the event of a current flow to earth which exceeded a pre-determined value. At the coronial inquest it was noted that the collapse of the pipe that the boy stood on exposed an active wire which came into contact with the metal pipe and when the boy stood on the pipe and touched the fence this effectively grounded the circuit.

The company pleaded guilty to an offence under the Occupational Health & Safety Act however the three directors were also prosecuted and pleaded not guilty. The thrust of the prosecution was that the company had failed to ensure that the electrical cable was installed and maintained so as to ensure it could not come into contact with the live electrical current and that an RCD was not fitted.

The Court noted there was a very serious risk to safety posed by the electrical cabling housed inside the corroded pipe which was a direct result of the company's failures to ensure maintenance of the cabling, to have fitted an RCD and to ensure that an adequate risk assessment was conducted of the cabling.

By virtue of the company's conviction the directors were deemed to have committed the same offence. However there are defences available to directors if they can establish that they were not in a position to influence the conduct of the corporation in relation to its contravention or being in such a position they used all due diligence to prevent the contravention by the corporation.

The Court noted that the fact that a person is a director is enough subject to the defences to establish liability for a corporate defendant's contravention. This conclusion is based on the responsibilities and duties of the director of a corporation and the

clear words of the Occupational Health & Safety Act. The other category of persons who may also attract liability under these deeming provisions are persons concerned in the management of the corporation. A manager of a mine has been held to fall within this category because of the position that a mine manager carried.

A director by reason of his or her position with the corporate structure sits at the top of the corporate hierarchy with the authority of making decisions on matters of operations, policy and management.

The Court noted that directors must exercise "due diligence" and not "supine indifference".

The directors argued because they lacked experience and expertise in specific areas of electrical cabling they were not in a position to influence the conduct of the corporation. The Court held this argument was flawed. The directors were entitled to rely on others who possess relevant experience and expertise but only if they satisfy themselves that those persons to whom the vital functions of detecting and obviating the risks to safety had been delegated, could discharge and were discharging the functions. An occasional site inspection and otherwise passive role adopted by the directors in relation to safety issues did not amount to reliance on others for the purposes of successfully establishing a defence to prosecution.

The directors in the case conceded they had authority to make decisions about all matters of safety which affected the corporation. They argued that they had exercised all due diligence.

The Court highlighted that “all due diligence” requires the taking of appropriate precautions aimed at preventing the conduct of the corporation which led to a contravention. Although “all due diligence” depends on the circumstances of the case it “contemplates a mind concentrated on the likely risks”

The Court held that all due diligence requires as a minimum or threshold requirement that directors have played a significant and hands on role in the corporate defendants operations or that they have responsibility for day to day decision making. Liability will be attracted where directors play a limited direct role in the operation of the business, preferring to leave the decision making, relevantly in relation to safety matters, to the management team but without at the same time making consistent and ongoing enquiries aimed at ensuring that management was both capable and competent of discharging the corporations obligations as to safety.

The end result, three directors have been convicted and will face sentencing some time in the near future.

Australand Holdings Limited Fined $178,500 Over Fatality

Last month our articles on OH&S included a review of fines for breaches of the OH&S Act imposed on J B Metal Roofing Pty Limited James Densen and Garry Densen following a work accident on an Australand Holdings Limited site where a fatality occurred as a consequence of a fall through meshing which was inadequately secured. Mesh was inadequately overlapped and there had been inadequate training and instructions in the appropriate method for installing safety mess.

J P Metal Roofing was fined $200,000 and the two directors received fines totalling $57,500.

Australand has now received a penalty of $178,500 for a breach of the OH&S Act for its role in the circumstances leading up to the fatality.

Australand had received a job safety analysis from the contractor and required amendments to the document specifically addressing the inadequacy of the plan to install meshing. The Australian standard and the Building Code relating to working at heights was brought to the contractor’s attention by Australand. The worker who was fatally injured had been inducted by Australand and the worker had read the site safety plan. The skills competency assessment register maintained by Australand noted the workers relevant experience. The contractor was asked to ensure that all safety equipment was provided to the worker. An Australand employee took all sub-contractors and employees through the job safety analysis. Daily safety site inspections were carried out. The contractor had received three improvement notices from Australand prior to the incident. Safe work method statements had been reviewed by Australand.

Tragically for the worker the original changes to the job safety analysis requested by Australand dealing with the installation of safety mesh were subsequently shown to be the cause of the accident and resulted in the worker’s death. The safety mesh was not appropriately fastened to the purlins or properly lapped. Australand’s failure was seen as a failure to actually check that the safety mesh was properly installed.

Once again a significant penalty imposed on a head contractor for an incident that led to the fatal injury of a contractor’s employee.

You Just Can't Delegate Your Risk

Infinity Constructions Pty Limited engaged M & H Bricklaying Services to perform masonry work at a building site where a single storey community centre was being constructed. A masonry wall collapsed at the building site injuring a number of sub-contractors working for M & H . M & H were prosecuted for a breach of the OH&S Act however the company was placed in liquidation and deregistered before any judgment had been handed down and the prosecutor withdrew the proceedings against M & H. A prosecution was then pursued against Infinity and the two directors of Infinity.

The directors were prosecuted under Section 26 of the OH&S Act which deems directors and persons concerned in the management of the Corporation to have committed the same offence as the corporation.

Infinity and the directors argued they had relied on the competence and experience of its sub-contractors.

The evidence revealed that there were numerous factors contributing to the walls instability including the speed with which it was built, the height to which it was taken, heavy lintels were placed on the brickwork and the lintels and walls were not braced. The day the wall collapsed it was not windy and the wall was 16 to 17 courses high when it fell. The wall that collapsed had not been tied or braced when it collapsed. The two walls comprised a cavity wall were built together rather than separately which also contributed to the incident. The risk of collapse of an unstable brick wall was seen by the Court as an obvious one.

Infinity had a proforma safety plan, it had two foremen and a safety officer and they each had responsibility for safety but none of the employees of Infinity identified the problem with the erection method. Ultimately Infinity relied on the expertise of M & H and M & H did not pay proper attention to its safety obligations. While Infinity could not have not known this before hand the OH&S Act does not permit a company to delegate its safety obligations in relation to bricklaying work. While the documented safety system of Infinity recognised this the practical operation of the system did not.

The employees and directors of Infinity in their evidence noted "we rely on the competence and experience of the sub-contractors undertaking the works. We rely on the safe work method statements provided by the sub-contractors and the company safety manual." These statements in the Court's opinion put the inadequacy of Infinity's approach beyond question. The end result was a conviction under the OH&S Act for Infinity and the two directors with the penalty to be determined sometime in the near future.

Compensation Not Payable for an Injury at a Social Function

As you may recall from our February 2007 newsletter, the NSW Workers Compensation Commission determined in *J P Morgan -v- Haider* a social club function outside normal work hours would not be in the course of employment. The facts of that decision involved a cruise which had been organised by the J P Morgan Social Club and been advertised within the organisation as an end of financial year function. J P Morgan had allowed the company email system to be used in advertising the event to the staff and the social club fees had been deducted using the company payroll system. However, there was no direct financial sponsorship of the event, no clients of J P Morgan were in attendance and the function was held outside normal work hours. Tragically, a worker fell overboard near the end of the cruise and drowned.

Whilst the worker's estate was initially successful in bringing a death claim pursuant to the Workers Compensation Act 1987, Deputy President Bill Roach of the Workers Compensation Commission overturned the decision on the grounds that the death was not an injury arising in or out of the course of employment (Section 4) and the deceased's employment was not a substantial contributing factor to the injury (Section 9A).

In recent weeks, the Court of Appeal has unanimously dismissed the appeal brought by the worker's estate against the Deputy President's decision. The Court of Appeal confirmed that the Deputy President had applied the correct test in determining the nexus between the injury and the worker's employment. Despite the fact the employer may have achieved a benefit of increasing the morale and interaction of its staff through the social club function, the benefit to the employer was too vague and tenuous to link an injury at a purely social function to an employment relationship. The social club function was not inextricably linked to the operations of the employer and mere authorisation of the employer for the event to go ahead (including allowing the staff to wear "mufti" on the day of the harbour cruise) would not be sufficient for its participants to be given the protection by the Workers Compensation Act 1987. Furthermore the event would not satisfy the various criteria contained in Section 9A(2) for employment to be considered a substantial contributing factor to the injury. In particular it was noted the injury was well outside working hours, the place of injury was well away from the deceased's place of employment, the injury could have happened at the same time of deceased's life whether or not he was employed with J P Morgan and finally the fact the worker had been drinking heavily on the night of the cruise.

The affirmation by the Court of Appeal of the Commission's reasoning in *Haider* further clarifies the lack of an employment nexus to social club events. It is simply not enough for employers to authorise or provide some basic support to activities outside normal working hours in order to trigger workers compensation liability. It confirms a sensible approach in that an employer must receive a benefit more than simply the improved morale of its employees in order for the employer's workers compensation policy to be invoked.

Workers Compensation - Applicants Do Not Always Get Paid.

When a worker is injured and they consult a solicitor who then brings a claim for compensation on behalf of the worker, provided the worker succeeds in the compensation claim the workers solicitor will receive payment of their costs from the workers compensation scheme agent. The solicitor is not allowed to recover costs from the worker. If the compensation claim fails the workers solicitors will not be paid. Hard, but fair. Lawyers for workers do take some risks.

Nevertheless, there are additional circumstances where a workers' solicitor will be out of pocket and will not recover costs when a compensation claim is successful. This is a rare occurrence but can happen when a worker does not act reasonably in pursuing a claim when a reasonable offer of settlement has been made by the scheme agent and the end result of the claim is payment of compensation which is less than or equal to the offer that was made.

In the recent decision of *William Psarakis - v - Tabco Pty Limited*, the workers lawyers were not awarded any costs for work performed after the date a reasonable offer of settlement was rejected.

By way of background in June 2005 QBE made an offer to the worker in the sum of $1,250.00, based on a 1% whole person impairment. At the same time QBE advised the worker they had difficulties accepting the method of assessment employed by their medical expert in assessing whole person impairment. Their medical expert had assessed an 11% whole person impairment. QBE again conveyed the same offer on 20 December 2005 and at this stage the worker requested an extension of the offer. Ultimately, the offer was rejected on 29 March 2006. On 9 October 2006 an Application to Resolve a Dispute was filed in the Workers Compensation Commission.

The matter came on for teleconference where the same offer was put and again it was rejected. Following the conference a formal offer was conveyed pursuant to Section 115 of the Workplace Injury Management Act, 1998.

The worker was referred to an Approved Medical Specialist ("AMS') who assessed a 1% whole person impairment.

Section 342 of the Workplace Injury Management Act, 1998 permits the Commission not to award costs if they have unreasonably been incurred.

What is considered unreasonable? As a general rule the final decision of a Court or Commission is a guide to the reasonableness of an offer. The arbitrator found a reasonable offer had been made by QBE and reiterated. The workers' solicitors did not fully appraise themselves of the reasonableness of the offer in light of the issues raised by QBE. The arbitrator determined any costs incurred in respect to the claim for permanent impairment after the date of rejection of the offer (29 March 2006) were unreasonably incurred and costs should not be paid after this date.

What lessons are learnt? Even if an offer appears deficient at face value, reasonable offers based on well supported grounds can limit the costs payable to workers' solicitors. Medical experts may have the requisite training to assess impairment although there may be flaws in the application of the appropriate methodology used to assess whole person impairment. Any such concerns should be raised by the scheme agent when they make an offer. If QBE's concerns, when it made then offer were addressed by the workers solicitors or commented on by the workers' medical expert, then the arbitrator would have been less inclined to make an adverse costs order as the rejection of the offer may have been seen as reasonable in light of an additional inquiry.

There are rewards for scheme agents that make reasonable offers which are conveyed pursuant to Section 342. Costs payable to the workers solicitors can be restricted. The end result in this case - the workers lawyers miss out rather than their client who still walks away with compensation albeit with much less than had been hoped for.

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