GD News

Gillis Delaney Lawyers

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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 employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Landmark Decisions On Council's Liability - Or Are They?

The New South Wales Court of Appeal has recently handed down concurrent decisions dealing with the liability of Councils. In *Angel v Hawkesbury City Council* and *Blacktown City Council v Hocking* 5 judges of the Court of Appeal considered the effect of s. 45 of the Civil Liability Act and the impact that it has on Council's liability.

Section 45 of the Civil Liability Act provides that a roads authority is not liable in proceedings for civil liability for harm arising from a failure of the authority to carry out road work or consider carrying out road work unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

In a previous issue of GD News we discussed the NSW Court of Appeal decision of *Roman v North Sydney Council*. In *Roman* the Court also considered the operation of section 45 of the CLA 2002 and the majority found that the actual knowledge of the risk must be found in the mind of an officer who had either delegated or statutory authority to consider carrying out the relevant roadwork. In that case the Court accepted that whilst street sweepers had knowledge of the actual risk (a pothole) an officer at decision making level did not and so the Council was entitled to rely on the defence. The decision resulted from the views of two of the three judges whilst Justice McColl did not agree and was of the opinion that the knowledge of the street sweeper was sufficient and the Council were not entitled to rely on s 45 as a defence. Roman appealed and was granted special leave however the case resolved prior to the High Court hearing. The question of interpretation of section 45 therefore remained.

So in light of these two cases was *Roman*'s case decided correctly?

The cases of *Angel* and *Hocking*, which both involved the s 45 defence, allowed 5 judges of the Court of Appeal to consider the section's interpretation. Usually 3 judges will hear a matter however in cases of considerable importance or where a previous decision of the Court of Appeal is being challenged 5 judges will hear the appeal.

Joan Angel was walking along a concrete slab footpath on the eastern side of George St, South Windsor, when she tripped on the raised lip of one such concrete slab which was about 4 to 5 centimetres higher than the adjoining slab. The slab had displaced due to tree roots and, importantly, the location was overshadowed by the adjoining trees. The Council argued that it was not liable to Angel and was entitled to rely on the defence of s 45 and also argued that the raised slab was an obvious risk. At trial the Council was successful in its defence and Angel appealed.

The leading judgment was handed down by Justices Beazley and Tobias who found in favour of Angel. The Judges did not have to consider which judgment in *Roman* should stand.

In their consideration of s 45, the Court stated that it was significant that on the day following the accident Angel and her son visited the Council and had a conversation with a Ms Flanagan who at the time and when she gave evidence was an assistant insurance officer in the Risk Management Department of the Council. Angel and her son (although their wording was slightly

Inside

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different) gave evidence that Flanagan had said words to the effect of: "we knew about this… you got there before we did." Flanagan denied the conversation but the trial judge preferred the evidence of Angel and her son and found that the Council had actual knowledge of the risk. As a consequence of this finding Justices Beazley and Tobias stated:

> *"In the foregoing circumstances, even on the basis of the majority judgment in Roman, a relevant officer of the Council had actual knowledge of the particular risk the materialisation of which resulted in the appellant's injury, thus engaging the exception to the Council's statutory non-liability for the failure to carry out the repairs so earmarked for action. It is for these reasons that in our opinion it is unnecessary to consider whether to confirm the majority decision in Roman or to reject that decision and adopt the view of the dissenting judge. On either view, the exception referred to in s 45(1) was engaged."*

Nor could the Council argue that the risk was an obvious one as the shading from the branches above made the raised slab difficult to see.

In *Blacktown City Council v Hocking* Sherrie Hocking was walking along a footpath in Hebersham. The footpath was of concrete construction with a grass verge between the footpath and a layback kerb to the roadway. Set partly within the footpath and partly within the grass verge was a Telstra communication pit. Hocking observed the pit but saw nothing to suggest that the pit was defective. Hocking placed her foot in the middle of the lid which then rotated causing her left leg to fall into the pit and her right leg to splay in front of her. Hocking was seriously injured as a consequence.

Hocking sued both the Council and Telstra for damages. The trial judge found negligence on the part of the Council but not Telstra. Cross-claims between the Council and Telstra were dismissed. The Council appealed against the trial judge's decision finding that it was negligent or was liable for any negligence on the part of the contractor who constructed the relevant section of the footpath. The Council also argued that Telstra should have also been liable and that damages assessed were excessive. Hocking argued that Telstra should have also been liable.

The Court of Appeal found in favour of the Council.

Justice Giles in his judgment commented:

> *"I do not think that it was established that inspection should have alerted the Council that the pit was defective. The trial judge referred to the damaged state of the lid, but beyond the damage and chipping away at the edges and associated cement filling at the time the footpath was constructed there was no evidence that its damaged state compromised its integrity or gave notice that the lid was not properly supported."*

Justice Giles commented that issues in relation to actual knowledge of the Council were not relevant.

Justice Tobias (who was in the minority) noted that the trial judge found that the work of laying the footpath in 1994 or 1995 had been carried out by NCI under contract with the Council and had been inspected by Council employees after it was completed. The trial judge found that any proper inspection would have found the lip was obliterated and found that the Council was liable as a consequence of a failure to properly inspect the footpath when constructed and a failure to properly inspect the footpaths.

His Honour Justice Tobias stated:

> *"In these circumstances, the central proposition of the Council was that in the absence of expert evidence it was not open to the primary judge to rely merely upon her interpretation of the photographs in coming to her conclusion that at the time the footpath was laid in 1995, not only was the condition of pit the same as that depicted in the photographs taken in 2002 so far as those photographs depicted the lip upon which the pit's lid was to be supported, but also that that part of the pit was negligently reconstructed at that time.*
>
> *As I have indicated, it is apparent that her Honour did not rely upon Mr Garofali's evidence in terms of his interpretation of the photographs but on her own which, in my view, she was not entitled to do.*
>
> *Accordingly, in my opinion the Council's submission that there was no basis for a primary finding by her Honour of inadequate construction of the path and, therefore, no basis for the allied finding that a proper inspection would have revealed that the pit was defective, should be accepted. I therefore now turn to the decided cases which, in my view, support that conclusion."*

Justice Tobias then went on to consider s.45 and noted that the trial judge did not address the issue of whether Mr Shackleton an officer of the Council had knowledge of the risk and went on to reconsider the issue. Justice Tobias concluded the plaintiff was successful in establishing Mr Shackleton had actual knowledge of the risk. Shackleton did not however have authority to carry out repairs. In Justice Tobias' opinion the decision in Roman should be reconsidered and the minority judgment in that case preferred.

Justice Tobias stated:

> *"As Mr Shackleton was part of the Council's organisation in inspecting its roads for the purpose of ascertaining hazards which required repair by the Council's maintenance department, it follows s 45(1) does not protect the Council from its failure to carry out repairs to, or otherwise erect a barrier around, the hazard constituted by the unstable lid to the pit. The Council's defence based on s 45 therefore fails."*

In relation to the section 45 argument, Chief Justice Spigelman found that the trial judge did not find the Council had "actual knowledge" Justice Beazley and Justice Campbell agreed with Chief Justice Spigelman.

So what was the end result? The Council's appeal was successful despite the majority judges not considering the s 45 defence.

And what about s 45? It looks like despite consideration by 5 judges of the Court of Appeal in two separate decisions questions still remain unanswered. In Angel the actual knowledge was that of a relevant officer of the Council and so consideration of *Roman* was not necessary. In Hocking's case the decision in *Roman* was only considered by one judge. The mystery of s 45 therefore remains unsolved. Will knowledge of any council officer ultimately be enough to bring a s45 defence unstuck. Only time and more cases will tell.

Does The Duty Of Care Extend To Those Who Are Sent To Repair The Damage?

An accident happens and damage is caused. Someone is sent to fix the damage and encounters a dangerous situation which leads to an injury to the repair person. Is the person who caused the original damage responsible?

The recent Court of Appeal decision of *Country Energy & Ors - v - Gregory Cook* examined the extent of a duty of care owed by both an aircraft operator and an employer to an experienced power line worker who was sent to repair damage caused by the accident. The facts of the case were that Mr Stubbs was flying a crop dusting aircraft when whilst flying low the tail fin of the aircraft brought down a high voltage power line into a cotton field. Mr Cook was called to the site by his employer, Northpower to affect repairs on the power line. Unfortunately the field in which the power line came down was particularly wet and difficult to traverse. As Mr Cook walked towards the downed power line he tripped and came within an unsafe distance to the downed power line. The subsequent electric shock caused serious injury to Mr Cook.

Initially Mr Cook was successful in his action for damages against Northpower and the owner/operator of the aircraft, Mr Stubbs. However the Court of Appeal reversed these decisions. In relation to Mr Stubbs the Court of Appeal discussed the extent of the duty of care he owed others when operating the aircraft.

Ignoring the statutory provisions covered under the *Damage by Aircraft Act 1999* Justice Campbell (with Giles and Beazley in agreement) explored the common law duty of Mr Stubbs. Whilst it was noted Mr Stubbs may well have owed a duty to people on the ground who might be injured if the plane or anything dropped from it struck them or caused them to injure themselves whilst taking evasive action, there was a limit to the duty. When Mr Stubbs knew he was flying in close proximity to high voltage electricity cables, he may well have owed a duty to people on the ground who might be struck or come in the immediate vicinity of the wire. This would include inexperienced people who approached too close to the fallen wire or people who might come near a fallen wire without realising it was there. However, this did not necessarily mean that Mr Stubbs owed a duty of care to anyone else.

The Court of Appeal noted it could be expected that a power worker sent to repair a damaged power pole would be properly trained and experienced. The power worker would be able to take care of himself so far as avoiding electric shock. Justice Campbell commented it would be a realistic possibility that a power authority would send a person who was properly trained, experienced and capable of protecting himself. In that circumstance the taking of reasonable care for the interests of the hypothetical power worker did not result in the imposition of a duty of care to that power worker on Mr Stubbs.

With respect to the duty of care that the employer owed the power worker, Justice Campbell confirmed there was no doubt that there was a duty owed by Northpower to Mr Cook. The question that needed further examination was had there been a breach of that duty? In particular, it was examined whether the failure to isolate and turn off the power to the live downed wire was a breach of that duty.

Mr Cook himself accepted in cross-examination it would be ridiculous that every time there was a call about a fault in a line for the whole line would be switched off. All workers carried out a risk assessment when they arrived at a site and found if it created a danger, it was then open to them to use their radio to contact base to ask them for the line to be switched off remotely. Indeed, the failure to isolate the line might have been a breach of the employer's duty to farm workers in the field but it did not necessarily mean it was a breach of duty to Mr Cook given the special training and experience he had. Northpower had reason to believe that if Mr Cook was properly trained and experienced he was well able to assess for himself how to deal with any danger posed by the live power line.

So did Mr Cook have the requisite training and experience in order to make the assessment? It was noted Mr Cook had never been given any specific instructions by his employer how to deal with muddy or wet conditions which were a factor in Mr Cook's accident. Nevertheless it had been rigorously drilled into Mr Cook that he should always maintain a minimum 1 metre distance from a conductor of this type. Indeed Mr Cook would have maintained a clearance of 1 metre from the line if he had not fallen.

Justice Campbell determined that Mr Cook had received adequate training and this training had been reinforced. The clearance was always expressed in terms of a minimum distance that should be maintained from the line. The danger of the clearance distance being breached if a power worker tripped and fell whether because of the mud was an obvious one. Although conditions Mr Cook encountered were most unusually arduous it was reasonable for an employer to leave the power worker in the field to assess the risk of such conditions. It was also up to the power worker to determine what the appropriate response should be to ensure that he stayed at least 1 metre from the line. Consequently the employer did not breach its duty of care through providing him with inadequate training.

This decision is a reminder of the limits of the duty of care owed to particular persons and whether that duty has been breached. It is particularly noteworthy to observe the Court of Appeal is not seeking to impose a strict liability on employers for any accidents that may befall their employees. Providing the training, procedures and the enforcement of those procedures is maintained by an employer, there will not necessarily be a breach of the duty for an employer to take reasonable care of its employees. It is refreshing to observe that the judiciary will not punish an employer when an employee is injured when they carry out tasks in line with the responsibility entrusted to the employee provided they have been adequately trained and reminded of safety requirements.

Personal responsibility is alive and well and continues to present a real defence to personal injury claims.

Witnesses Recollection May Be Crucial

In many personal injury cases whether or not the claimant succeeds in their claim can come down to one witness being preferred over another. A witness' recollection and evidence can also be important when a judge is apportioning liability between a number of parties. The evidence can be the difference between the majority of liability or little if no liability at all. An example of such a case is the recent Court of Appeal decision of *Eastside Scaffolding v Kazic*.

Mesud Kazic was injured during the course of his employment on 23 February 2002 when he was struck on the head by a piece of scaffolding at a construction site. Kazic commenced proceedings against his employer's worker's compensation insurer (the employer was in liquidation), the head contractor John Holland Pty Ltd, Waco Kwikform Limited who subcontracted to provide scaffolding on site and Eastside Scaffolding and Rigging Pty Ltd who subcontracted to provide labour to Waco Kwikform for the erection and dismantling of scaffolding on site.

The central issue in the case was who employed the scaffolder whose negligent act had resulted in the scaffolding striking Kazic?

At trial the judge found that Eastside was the employer of the negligent scaffolder and found Eastside liable for moving and stacking components of the scaffolding inside the building when it was unsafe and vicariously liable for the action of its employee. As a consequence Eastside was found to have the lion's share of liability which was apportioned at 75%.

Eastside appealed arguing that it was possible that the employer of the negligent scaffolder was R & K Donnelly. R & K Donnelly had also subcontracted with Waco Kwikform and the subcontract was in the same terms as that of Eastside's subcontract. In those circumstances either firm may have been responsible for dismantling the scaffolding on level 10. Eastside also argued that the negligent scaffolder was not wearing clothing that was worn by employees of Eastside.

Evidence was given by Robert Damiani who at the time of the accident was employed by Waco Kwikform and was the contract supervisor. Damiani's evidence was that Eastside were responsible for dismantling and erecting the scaffold and could recall giving instructions in relation to the work to David Tai an employee of Eastside. Damiani also gave evidence that R & K Donnelly was responsible for jetmesh.

The Court of Appeal agreed with the trial judge that the negligent scaffolder was employed by Eastside and dismissed the appeal. There was no basis to challenge the trial judge's findings which were based on Damiani's evidence. Eastside's apportionment of 75% of liability to Kazic remained.

One witnesses recollection of arrangements can be enough for a Court to determine the factual matrix surrounding the incident. In most claims a hearing will take place many years after an incident and it may be difficult to track down potential witnesses. A persons recollection of events may also fade over time. When an accident occurs on a construction site and a person is injured there is likely to be a claim for workers compensation made and also a claim for damages against any business or person involved in the cause of the incident. A detailed investigation report following the incident identifying witnesses and recording statements in many cases will minimise issues in dispute in a claim and in particular what person and business was responsible for any act or omission.

Damages Recoverable Can Be Reduced for the Employers Negligence

In New South Wales there are different damages awarded for injuries depending on the classification of the injury. The damages awarded for a motor accident claim are governed by the *Motor Accidents Compensation Act*, work injury damages are regulated by the *Workers Compensation Act* and for civil liability other than for employers the damages awarded are regulated by the *Civil Liability Act*.

The regimes are different and contain a variation of the following:

- thresholds that must be satisfied before a claim may be brought;
- thresholds that must be satisfied before a particular type of damage can be compensated;
- caps and limits on some types of damage that can be awarded.

So the classification of a type of accident is important. The classification of an accident will dictate the damages regime that will apply and the ultimate damages that will be received.

There are thresholds in the *Motor Accidents Compensation Act* and these limit the damages rather than limit the right to bring a claim and the damages that can be recovered include compensation for pain and suffering, economic loss, medical costs, and care needed to be provided.

However in work injury damages claims the threshold to ground an entitlement to bring a damages claim against an employer is significant and the only damages that can be recovered relate to economic loss suffered. Not surprising, workers will look to some other party to blame for their injury and seek to bring a claim under the *Civil Liability Act* against another negligent party or bring a motor accident claim if a motor vehicle is involved as generally the damages regimes will result in substantially more compensation. The difference in the regimes is the very reason an injured worker will look to persons other than his employer to claim damages.

Sometimes an accident at work can involve a motor vehicle and give rise to a motor accident claim under the *Motor Accident Compensation Act*. Issues arise when the employer is the owner of the vehicle and there is an argument that the driver of the vehicle was negligent as well as the system of work. If the accident occurred in circumstances which fall within the provisions of the Motor Accident Compensation Act then the damages will be assessed pursuant to that Act and both the workers compensation insurer and the CTP insurer can be liable to meet the claim against the employer who is also the owner of the vehicle.

However the involvement of the employer in an accident can still have a significant impact on the damages awarded even

where a claim is brought under the *Civil Liability Act* or the *Motor Accident Compensation Act* as the damages awarded must be reduced by an amount equivalent to the damages the injured person would have received from the employer multiplied by the employers percentage of liability. If the liability of the employer is substantial the reduction will be significant.

In an incident involving multiple parties the identity of the employer can be a significant issue particularly in labour hire type situation or situations where the structure of a business utilises more than one entity to own assets, employ workers and carry on the business.

An example of this was seen in the recent NSW Court of Appeal decision of *Benton v Scott's Refrigerated Roadways.*

Kenneth Benton commenced proceedings against Scott's Refrigerated Roadways as a consequence of injury sustained in October 2003 when his foot slipped whilst alighting from the cabin of a vehicle. Benton argued that the step was defective in that it was worn and had insufficient slip-resistant properties at the time of the accident. The trial judge found that the step was not defective and therefore found that Benton's claim must fail. However, the trial judge assessed damages in case the decision was overturned. Damages were assessed pursuant to the Motor Accidents Compensation Act 1999.

Apart from losing the case, another difficulty for Benton was that if Restaco (who had made worker's compensation payments to Benton) was found to be the employer rather than Scott's Refrigerated Roadways then Benton's damages would be reduced by the proportion of Restaco's liability as a consequence of section 151Z(2) of the Worker's Compensation Act 1987. This was in fact done by the trial judge who assessed Restaco's liability at 25% and Scott's Refrigerated Roadways' liability at 75%.

A reduction in the notional assessment of damages would result from the employers contribution for its share of liability however, if the injuries of Benton were such that the threshold to bring a damages claim against the employer was not met then there would be no deduction from the damages that are awarded as there would be no liability for the employer to pay damages.

The trial judge found that, although Benton's whole person impairment had not been assessed, his injuries were such that his whole person impairment would have satisfied the threshold for a work injury damages claim.

Benton appealed. What Benton disputed, along with the primary finding on liability, was the trial judge's finding that Benton was employed by Restaco Pty Ltd and not by Scott's Refrigerated Roadways. Benton also challenged the trial judge's reduction of damages for Restaco's negligence arguing that Restaco was not the employer.

So what was the end result? Benton's primary appeal on liability failed. There was no clear evidence before the trial judge that the step was worn or otherwise required maintenance or replacement. In these circumstances the question of who was the employer was not relevant - and there could be no apportionment of damages as neither company was liable.

Campbell JA noted when considering the reduction of damages for an employers contribution to an accident it is important for the following issues are considered:

> *"The material facts that would need to be established for a claim under section 151Z(2)(c) would include identification of the person alleged to be the employer, the material facts by virtue of which that relationship of employment was alleged to exist, the material facts which showed that the worker had taken or was entitled to take proceedings independently of the Act to recover damages from the employer, and any material facts that entered into the quantification of the reduction that was sought in section 151Z(2)(c). "*

Who is - and who is not - the employer - turned out to be irrelevant in this case but the fact remains that a finding of an employment relationship between an injured person and a entity partly responsible for an accident can result in a reduction of the damages that a person can recover form someone other than the employer.

Employee Unlawfully Dismissed After Making Complaint Against His Manager

The Australian Industrial Relations Commission recently held that an employee who was allegedly made redundant by the employer had been dismissed for a prohibited reason. The AIRC found the employee was dismissed after making a complaint against his manager.

Section 659 of the Workplace Relations Act, 1996 prohibits employers from dismissing an employee for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

- Temporary absence from work because of illness or injury.

- Trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours.
- Non-membership of a trade union.
- Seeking office as, or acting or having acted in the capacity of, an employee representative.
- The filing of a complaint, or the participation in proceedings, against the employer.
- Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- Refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA.
- Absence from work during parental leave, and
- Temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all circumstances.

An employee alleging unlawful termination under Section 659 of the Act does not need to prove that the termination was one of the above proscribed reasons. As soon as an employee alleges the termination was for a proscribed reason, the onus of proof shifts to the employer to demonstrate that the termination was not for such a reason.

An employer will be unlikely to succeed in proving the termination was not for a proscribed reason unless it can provide evidence of some other reason for the dismissal such as unsatisfactory performance, misconduct or redundancy.

In the matter of *Brown - v - Macedon Ranges Shire Council (2008) AIRC 117*, Brown had been employed by the Shire Council for nearly 10 years. In March 2007 the Council terminated Brown's employment allegedly as a result of a restructuring proposal which did not have an ongoing position for Brown.

Brown had been employed as the Council's IT manager for 10 years. Brown had frequently complained to the Council about the increased responsibilities and shortage of staff within the IT department. Whilst new staff were periodically added to the IT department, Brown complained the shortage of qualified staff remained.

Brown was absent from work on sick leave caused by his stress at work in March 2006. When he returned to his duties he stood down from the position of IT manager. He took up the position as a programmer analyst. Newman was appointed to the position of IT manager. Newman and Brown's relationship deteriorated once she had been appointed to Brown's old position.

Brown alleged Newman had bullied him. An inquiry by the Council to the complaint by Brown found that some of the allegations against Newman by Brown were proven. Newman was given a warning and counselled.

Brown's employment was terminated by the Council in March 2007. He commenced proceedings claiming that his termination had been harsh, unjust or unreasonable and in breach of Section 659 of the Act. Brown alleged that shortly after the allegations against Newman had been proven, Newman devised a restructuring proposal that contemplated no ongoing position for Brown. This "redundancy" from the IT department was accepted by the Council as a cost saving measure notwithstanding the continued complaints by Brown and others of staff shortages within the IT department.

Commission Lewin of the AIRC found that Brown's employment would not have been terminated in the absence of the specific restructuring recommendations made by Newman. The Commissioner found:

- Newman did have influence in the decision making process with Council in respect of the restructuring plan, and
- Newman had been the "prime moving force" in the decision to terminate Brown's employment.

The Commissioner considered this was in extremely inappropriate given the deterioration in the relationship between Brown and Newman.

The Commissioner found the Council did not have a valid reason to terminate Brown's employment. Brown had been an employee of the Council for 10 years and was found to have performed his duties over that period with competence and diligence.
Commission Lewin determined Brown's dismissal had been "especially harsh in the circumstances". The matter will continue on the issue of penalty.

Employers should be aware when making decisions regarding termination of employees, that managers or other employees

who may have influence or participate in the decision as to whether or not to terminate employees should not have been involved in any complaints by the employee that is proposed to be terminated.

Termination Unfair As Employer Failed To Warn Employment In Jeopardy

Employers should be aware that if they employ 100 or more employees, they should ensure the termination process for the employee was fair. In a recent decision of the AIRC in the matter of *Clark - v- Hydac Pty Ltd*, Commissioner Smith determined that whilst the employer had a valid reason to terminate the employee, the method of termination was unfair. The employer, whilst counselling and disciplining the employee prior to the termination, had not warned the employee that his employment was in jeopardy. Consequently, the failure to warn the employee that their employment was in jeopardy and subsequently terminating the employee meant the termination was unfair, entitling the employee to bring an application under Section 643(1) of the *Workplace Relations Act, 1996* (the "Act").

Clark had been employed by Hydac from March 2007 until termination of his employment on 12 December 2007. In the letter terminating Clark's employment, Hydac stated they had decided to terminate his employment " . . . as a result of the significant and ongoing dissatisfaction of our customers and other company employees".

Clark was paid four weeks in lieu of notice.

Clark commenced proceedings in the Commission claiming the termination of his employment had been harsh, unjust and unreasonable.

Clark conceded he had been given cautions by various Hydac managers in the past. However, he contended none of the cautions amounted to a formal warning. Clark also conceded he had been "out of order" on a few occasions although he had done nothing that justified his dismissal. Evidence was produced at the hearing that his sales records revealed he had been performing well at his job.

There was evidence produced by Hydac that Clark had been counselled by managers on three or four occasions. The counselling followed complaints that Clark screamed at fellow employees, forgot to return telephone calls and failed to attend a client on one occasion. Also there had been feedback from customers they were not happy to deal with Clark.

The Commissioner reviewed the requirements of Section 652(3) of the Act which outlines those matters which the Commission must have regard to when arbitrating a matter.

> *"652(3) In determining, for the purposes of the arbitration, whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:*
> *(a) whether there was a valid reason for the termination related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees); and*
> *(b) whether the employee was notified of that reason; and*
> *(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and*
> *(d) if the termination related to unsatisfactory performance by the employee - whether the employee had been warned about that unsatisfactory performance before the termination; and*
> *(e) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and*
> *(f) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and*
> *(g) any other matters that the Commission considers relevant."*

Ultimately Commissioner Smith formed the view that as a result of Clark's difficult relationship with fellow employees and some of Hydac's clients and the fact he had failed to be attentive to his duties, Hydac had a valid reason to terminate his employment. However, the Commissioner considered the termination was procedurally unfair as:

- the evidence did not establish Clark had been aware that his employment was in jeopardy if he failed to address Hydac's concerns; and
- Clark had not been given the opportunity to respond to allegations prior to a decision being made to terminate his employment.

Clark had only been employed by Hydac for nine months. He was provided with four weeks notice when he was terminated. The Commissioner took this into account, together with attempts by Clark to obtain alternate employment. The Commissioner ordered Hydac to pay Clark an additional 12 weeks wages.

Employers should be aware that where they employ more than 100 employees and a decision is made to terminate an employee's services for unsatisfactory performance, the employee, prior to the termination, must be:

- Given the opportunity to respond to the allegations of unsatisfactory performance; and
- Cautioned and/or warned that a failure to address the employer's concerns may lead to termination of his/her employment.

OH&S Roundup

$160,000 Fine For Headcontractor

Baseline Constructions Pty Ltd ("Baseline") entered into a contract as head contractor for the construction of a number of multi-storey buildings located in Marque Street Rhodes. Baseline entered into a number of sub-contract agreements for the provision of a variety of works and services at this site, including the supply and manufacture of Hollowcore floor planks by and the provision of tower cranage services. Baseline also entered into a sub-contract agreement with Girotto Precast Pty Ltd ("Girotto Precast") requiring that company to supply precast wall panels, co-ordinate the delivery of precast wall panels, take delivery of the floor planks and erect the wall panels and floor planks. Girotto Precast sub-contracted the erection of the wall panels and the floor planks to Hi-Rise Erections Pty Ltd ("Hi-Rise").

Hi-Rise were working with two erection crews and Brendan Brown was in charge of an erection crew working on levels two and three. Four planks were being laid prior to the erection taking place and employees had installed temporary support to the pre-cast walls, being supports supplied by Girotto Pre-Cast, using Z-brackets and timbers. During the course of this work Mr Brown and another employee saw the eastern Z-bracket was askew and steps were taken to obtain a prop to provide support to the bracket.

Prior to this occurring, a floor plank had not been able to be fitted and while arrangements were being made to cut it to size it had been placed over one or more of the already installed floor panels, as was normal with this type of construction. Whilst Mr Brown was under the installed floor panels, those panels came away and fell. As a result Mr Brown was fatally injured and three other workers received injuries through falling whilst working on the floor panels that fell.

Prosecutions under the OH&S Act were brought against Girotto Pre-Cast who were fined $215,000. Baseline was also prosecuted as was a director and a person who was alleged to be concerned in the management of the company. Baseline indicated the prosecution would be defended a hearing date of 5 days was set. It appears that a form of plea bargaining was entered into with WorkCover and Baseline changed its plea to a guilty plea and WorkCover dropped the prosecution against the director and the person concerned in the management of the company.

The Court noted the seriousness of the offence was indicated by the particulars of the breach accepted by Baseline: that there was a failure to have in place a safe system of temporary support of planks while the Hollowcore planks were being erected; there was a failure to check that the planks were the correct size prior to being lifted into place; there was a failure to ensure that the load bearing capacity of the structure where the planks were being installed or erected or where they might be stored was sufficient to permit the temporary storage of planks during the erection process; there was a failure to have in operation a safe work method statement dealing with all aspects of the erection of floor planks especially where the planks were found to be too big when ready for installation; there was a failure to prohibit work being carried out from below the planks or in the bay during the process of the erection of the planks; there was a failure to undertake adequate and proper calculations in relation to the load bearing capacity of all parts of the structure that might be affected during the erection process; there was a failure to make sure that all people working at heights wore harnesses or were otherwise protected by some other appropriate system of fall arrest such as the use of safety net scaffolding; there was a failure to have an adequate system of checks and safety audits so as to make sure that all the matters referred to above were addressed; and there was a failure to adequately train, instruct and supervise sub-contractors and the employees of sub-contractors working on the site.

The Court noted that the substance of the offences committed by Girotto Precast and Baseline were similar and that the culpability of each defendant was much the same. The Court however also noted in this particular case there was a significant difference in that Baseline, with a clear record and as a significant employer in a dangerous industry, is entitled to the leniency

reserved for a first offender and its penalty is properly to be set against a significantly lower maximum penalty than applied to Girotto Precast. A penalty of $160,000 was imposed.

$90,000 Fine for Supplier

The WorkCover Authority has recently prosecuted Lanza Management Pty Limited "(Lanza") a supplier of plant and equipment to Dupond Industries Pty Limited for a breach of section 18 of the OH&S Act. A director was also prosecuted under the provision in the Act that deems directors to have committed the same offence as the corporation.

Dupond carried on the business of storage, repair and distribution of 'Chep' pallets, engaged the corporate defendant to design, manufacture and supply a Pallet Paint Line that included a De-stacker

Gavin Garland, a 37-year-old employee of Dupond, commenced operating the plant one morning and was alone. He was found in an unconscious state trapped between a stack of 20 pallets, which had moved along the conveyor to enter the de-stacker, and the front entry side guide plate of the de-stacker. Garland died. It was unclear whether the incident occurred when the employee was clearing a blockage or removing a steel bar from under the bottom pallet so the pallet would release and continue.

Dupond was prosecuted for a breach of the OH&S Act prosecuted and fined $200,000.00 in relation to the incident and two directors and a manager of the Dupond Industries were each fined $25,000.00.

A person who designs, manufactures or supplies any plant or substance for use by persons at work must ensure that the plant or substance is safe and without risks to health when properly used. Essentially, the prosecution against Lanza related to a failure to properly guard machinery.

At no time did either of the defendants provide to Dupond an operation manual in respect of the plant, and at no time did either of the defendants provide to Dupond or any of its employees, any training or instruction in the safe use of the plant.

The Court determined that 'supply' does not include 'install' so the issue was what was actually supplied. There were certainly changes made by Dupond to the plant after it was supplied and installed by the contractors for the defendants. There was a factual dispute as to what was supplied by Lanza but in the end the Court noted even if the equipment claimed to have been supplied was supplied the plant was still unsafe. That dispute was raised more from the point of view of the severity of the offence as there had been a guilty plea.

The Court characterised the defendants as being of modest means and found that some care needed to be taken to ensure any fines imposed were not oppressive. A fine of $90,000 was imposed on the company and $9,000 on the director.

Workers Compensation -Reduction of Weekly Payments

An entitlement to and liability for Section 40 weekly payments of compensation for partial incapacity under the *Workers Compensation Act 1987 (NSW)* ("the Act") is always difficult to assess. Section 40 of the Act requires insurers to compensate injured workers for a loss of earning capacity as a result of a workplace injury. So what does loss of earning capacity mean? How is it assessed? What factors need to be considered? When can these Section 40 payments be reduced or terminated? The NSW Court of Appeal in *Ric Developments trading as Lane Cove Poolmart v Muir* has handed down a decision that answers some of these questions. The decision demonstrates the difficulty insurers face in reducing or terminating an injured worker's entitlement to Section 40 weekly payments.

Jeremy Muir was employed by Lane Cove Poolmart ("Poolmart") as a sales assistant and pool cleaner. In May 2001 Muir injured his right arm at work whist unloading pool chemicals. In the months following the accident, Muir's arm did not respond to treatment and he remained unfit to carry out the full range of duties required by his employment.

In September 2002 Poolmart subsequently terminated Muir's employment. During the period December 2002 to February 2006 Muir obtained part-time employment in a supermarket. This employment did not pay as much in comparison to Muir's employment with Poolmart, therefore Poolmart's insurer made Section 40 weekly payments to Muir.

In December 2004 Muir underwent a series of tests at the Vocational Capacity Centre ("VCC") in order to test his capacity to work. In September 2005, on the basis of the reports produced by the VCC, the insurer terminated Muir's weekly payments

from 28 October 2005. This termination was based on the fact that according to the vocational reports, there was an ability by Muir to earn in some alternative employment a higher wage than his average pre-injury wage.

Muir registered an Application to Resolve a Dispute in the Workers Compensation Commission ("WCC") seeking weekly payments from 28 October 2005 to date.

On 16 February 2007 the arbitrator determined Muir was capable of full-time employment in suitable duties in a wide range of positions. This decision was based on the VCC reports relied upon by the insurer. Muir appealed against this decision.

On 19 July 2007 Deputy President of the WCC Bill Roche (the "DP") revoked the original decision by the arbitrator. The DP awarded the worker Section 40 payments from 28 October 2005 to date and continuing. The following are some of the reasons the DP relied upon in making his decision:

- The DP was of the opinion there was an inconsistency in some of the VCC reports. For example, the physiotherapist noted there were no physical signs of restriction preventing Muir from returning to his pre-injury occupation, however he may need to avoid lifting weights above 13.5 kilograms.
- The DP argued the arbitrator failed to take into account the fact Muir had an agreed permanent loss of his right arm of 15%.
- The arbitrator did not consider the availability of work for a person with Muir's disability and lack of tertiary qualifications.
- The DP referred to the decision in *Mangion v Visy Board Pty Ltd* in the Compensation Court of NSW in 1992. In this case Judge Burke stated "it is not sufficient to merely identify a particular avenue of employment…allowance must be made for the availability of work."
- The DP concluded the VCC reports provided no guidance as to the availability of the jobs identified as being suitable for Muir. He went to suggest there was a real probability, based on Muir's previous unsuccessful attempts at obtaining work, he would suffer long periods of unemployment.

The NSW Court of Appeal agreed with the decision of the DP and stated:

> *"The VCC reports did not address the worker's practical prospects in the labour market. Rather, they assessed his physical and mental capacities, and matched them to the tasks required to be performed in various jobs. That the worker had the physical and mental capacity to carry out tasks involved in some particular job is not sufficient to establish that there was a realistic prospect that anyone would actually give him such a job, or that he would be able to keep it."*

The Court upheld the decision of the DP and the appeal was dismissed with costs.

This decision highlights the increased difficulty insurers face when seeking to reduce or terminate Section 40 weekly payments. Care must be taken when obtaining Section 40 Assessment Reports to ensure these reports address not just the worker's capacity to perform various roles in a particular labour market, but also whether these roles are readily accessible to the worker. Another question is whether the worker can reasonably expect to obtain such a role and keep it taking into account his injury and other factors outlined in Section 43A of the Act.

In the end, when assessing whether Section 40 Payments can be reduced or terminated, it is a question of **reality** not just **capacity**.

Are Workers Compensation Benefits Payable For An Injury Sustained Overseas?

The Workers Compensation Commission has recently delivered a decision which reaffirms the interpretation of Section 9A of the Workers Compensation Act, 1987 (the "Act"). In short, Section 9A of the Act requires a claimant's employment to be a substantial contributing factor to the injury sustained to be entitled to compensation.

In Qantas Airways Limited - v - Watson [2008] NSW WCC PD65, the Workers Compensation Commission found the claimant, Watson, was not entitled to compensation when he was seriously injured in a motor vehicle accident while in Los Angeles. Watson was employed as a pilot with Qantas. On the night in question he travelled to a friend's house whilst on overnight "slip port" leave from a long haul flight. On the way back to his hotel he was severely injured in a motor vehicle accident. As a result of his injuries, he was unable to return to work as a pilot, therefore sustaining significant economic loss.

Under the Act in order to determine whether an injury arose out of, or in the course of employment, it is necessary to consider the time and place of injury. It is also necessary to consider the circumstances of the injury. The time, place and nature of Watson's injuries were not disputed however the issue in dispute was whether or not Watson suffered a work injury arising out of or in the course of his employment and whether his injury was compensable. Was his employment a substantial contributing factor to his injury?

The 'course of employment' may extend beyond the strict hours of duties into certain breaks in work activity although it does not involve a time during which the worker is at a place or doing something otherwise than in, or that is reasonably incidental to, the performance of their duties.

The critical factor in determining whether Watson's injury arose out of or in the course of his employment was whether Qantas expressly or impliedly induced or encouraged him to spend an interval at a particular place or in a particular way.

Watson submitted it was necessary for pilots and such persons as air stewards, to have breaks at various overseas destinations before they travelled onto the next destination, especially for safety reasons. After arriving at Los Angeles Watson hired a car and travelled to his friends house. Both Watson and his friends had an interest in horses. Watson embarked upon the social visit without any input from Qantas.

Did Watson interrupt the course of his employment such that the injury sustained did not arise in the course of his employment? The Commission found this was the case.

Watson consciously embarked upon a personal and social activity which was beyond and unrelated to his employment in a period of time in which he was not required to work and knowing he was not required to work.

Qantas could not be said to have expressly or impliedly induced or encouraged Watson to embark upon this particular social activity at the time he did and it was not incidental to or part of his employment. He took himself out of the sphere of his employment in an interlude of personal leisure time. Irrespective of the fact he was in Los Angeles because of work, it was not sufficient to bring him within the course of his duties at the place and time and in the circumstances of his unfortunate accident.

Accordingly, the Deputy President overturned the Arbitrator's findings in favour of Watson and found Watson's injuries were not compensable under the Act on the basis that the requirements of Section 9A were not satisfied.

A detailed analysis of the circumstances of each case is required when determining whether a worker's employment is a substantial contributing factor to the injury. It is therefore crucial that each case is analysed on its own facts and circumstances to determine whether Section 9A applies.

Standard Form Construction Contracts in Australia

Building and Construction in Australia is dominated by the use of standard form contracts produced by various entities including Standards Australia, the Master Builders Association (MBA), the Housing Industry Association (HIA), The Property Council of Australia, Government departments and the Department of Fair Trading.

Common examples of standard form contracts include:

- AS2124–1992 and AS4000-1997 (Standards Australia);
- BC4 Residential Works, CPC (costs plus residential), ABIC.BW-1 Residential (Architect Administered), Standard Trade Contract, etc (MBA);
- GC21 (Public Sector); and
- New Dwelling Residential Contract and Residential Costs Plus Contract (HIA);

just to name a few.
There are a multitude of other standard form contracts and sub-contracts available in addition to those above, each of which vary widely in terms of form, content and risk allocation. It is virtually impossible for the layman (and even experienced contractors) to ascertain which of these standard forms is the most appropriate for the particular project they are involved in or how these contracts should be properly amended to fairly allocate risk and exposure.

For example, if you are a Principal using the BC4, you would want significant amendments and special conditions inserted in

order to ameliorate the weighting given to the builder in the BC4. Conversely, if you were a Builder utilising AS4000 or a HIA contract, you would require substantial amendment to the standard form in order to reduce the risk exposure to the contractor.

The construction industry is rife with the use of both inappropriate forms of contract and insufficient or ineffective attempts amend or add special conditions to the same. The result is often unnecessary disputes and avoidable costs, including legal expenses. Unfortunately, these problems are usually only identified when disputes arise.

Both sophisticated Principals and Contractors utilise amended standard forms in order to improve their contractual position. Unless legal advice is obtained in relation to those amended standard forms, it is highly likely that either the unsophisticated Owner/Principal or Contractor will find themselves in a precarious contractual position, giving rise to additional costs and/or non-payment.

Typically, one or other of the parties get themselves into a situation where several hundreds of thousands of dollars may be on the line, in circumstances where had these issues been addressed and proper advice sought at the commencement of the contract, no such exposure would exist.

The old saying 'prevention is better than cure' applies most relevantly to standard form construction contracts. A small amount spent in up front initial review and legal advice on standard form contracts can prevent hundreds of thousands of dollars in additional cost when a dispute arises. In most cases, fairly simple and straight forward amendments or additions can address most problems that arise in construction contracts from the outset.

Attendances at the front end of the contract can avoid significant costs at the back end. It is our experience that most contractors and principals studiously avoid front end legal advice and only seek assistance at the back end when the contractual noose is already tied. This often arises out of a fear or mistrust of lawyers and/or a lack of funds.

However, a small allocation to ongoing front end legal advice is not only a prudent business strategy, there is no reason why it cannot be factored in to overhead component cost for recovery in cost plus contracts and/or variation valuations, etc

Typically, clients do not seek either enough advice when formulating amendments to a standard form contract or alternatively, seek legal advice from practitioners that do not specialise in construction law (even though they might purport to do so).

In addition to the rights and remedies that arise out of the drafting of construction contracts, it is imperative that your lawyer understand the interplay between construction contracts, the Common Law and Statute. Examples include interpretation rules, misrepresentation, implied terms, prevention principles, Security of Payments Act, Trade Practices Act, Contracts Review Act, Occupational Health and Safety Act, Insurance Contracts Act, etc. Relatively few practitioners have a broad grasp of this interplay and therefore give limited or incomplete advice.

The focus of contract administrators and parties often restricted to the terms of the contract itself and there is little understanding or thought given to the role of extra contractual remedies and construction principles. Such a focus leads to either a false confidence (or false fear) in relation to a parties rights and remedies at law, and often to a dogged commitment to a perceived contractual outcome. The Courts have proven ready, willing and able to restrict contract provisions without very specific drafting.

Over the past several hundred years, contract law has developed as being paramount and untouchable. In the last 20 years there have been several developments in terms of extra contractual remedies that override the terms and provisions of the contract. Examples include the Security of Payment Act, Home Building Act, Contracts Review Act, Trade Practices Insurance Contracts Act, etc. Courts are moving away from the former contractual primacy and far more willing in the modern context to imply terms into a contract or sever (cut out) ambiguous provisions.

Rules of interpretation are often applied to restrict the wording of contract where any ambiguity exists in the contract terms. Hence the need for clear and concise drafting by experts has never been more valuable and yet still so under utilised by the construction industry itself.

Only construction specialists with a broad range of experience have a firm understanding and knowledge of standard form contracts and the specific requirements for amendment of the same, in light of the ever increasing complexity of construction law. There are in fact very few firms that specialise in construction law and even fewer that have a broad experience at the front end with standard form construction contracts. Gillis Delaney is one such specialist with a dedicated construction team

centred in its Newcastle office.

It is imperative that a party to any construction contract seek proper legal advice prior to entering into or using standard form contracts. It is also a commercially imperative that good legal advice be sought at material time during the administration of a contract. Prudent Contractors and Principals alike understand the need to allocate a budget for legal advice as part of the overhead in property development, residential building and commercial construction. Those that seek to save a couple of thousand dollars by "going it alone" expose themselves to substantial and unnecessary risk. Construction is expensive enough in the current climate without limiting your liability for additional costs.

There is no reason why ongoing legal costs to a contractor cannot be factored into overhead that is recoverable in contract sums. It is not suggested that legal advice alone is a panacea for all forms of exposure – prudent and timely contract administration is as important as proper and timely legal advice.

However the prudent (and most successful) Contractors and Principal are those that allocate a small budget for ongoing legal advice in their business operations.

Typically, the total amount spent for proper legal advice at the front end is less than 1% of the contract sum. This is a small price to pay to protect yourself from disputes that can result in substantial costs and damages.

Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.

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

Our clients tell us that we provide practical commercial advice. For them, prevention is better than cure, and we strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service. The changing needs of our clients are met through creative and innovative solutions - all delivered cost effectively. We make it easier for our clients to face challenges and to ensure they are 'fit for business'.

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

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

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

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

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

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