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

Security for Hotels, Restaurants and Nightclubs- Ejection of Patrons

Companies that provide security services for hotels, nightclubs and venues where patrons consume alcohol will always face the risk that employees overstep the mark when dealing with intoxicated patrons.

If a security employee oversteps the mark and injures a patron whilst removing a patron from the premises, the security company can be held liable for injury, loss and damage suffered by the patron.

The NSW Court of Appeal has recently delivered two judgments that have considered issues that arise when patrons at establishments that serve alcohol are injured as a consequence of their ejection from the premises by an employee of a security company.

In the first case of *Salmon -v- Elite Protective Services Pty Ltd* the NSW Court of Appeal was called on to determine whether or not an intoxicated patron could be found guilty of contributing to his injuries by reason of his actions that preceded his ejection from a nightclub.

Thomas Salmon sued Elite Protective Personnel Pty Limited for damages in respect of injuries that he suffered at 5am whilst being removed from a nightclub. The District Court Judge who heard the case awarded Salmon $418,790.00. At the trial the security company argued that the damages should be reduced for contributory negligence on the grounds that Salmon had drunk alcohol to an extent likely to impair his senses and judgment, had failed to act in an appropriate manner, had behaved in a provocative and aggressive manner, had engaged in a fight or altercation when he knew it was likely he would be involved in a confrontation which could result in physical harm to himself and had failed to take care for his safety. The District Court Judge rejected those arguments. The security company appealed.

The NSW Court of Appeal was then called on to consider whether or not the damages awarded were excessive and whether or not there should have been a finding of contributory negligence.

Salmon was getting married. He was celebrating with a group of friends. The celebration started at 5pm with a barbeque and progressed to the nightclub at about 9.30pm. By 5am Salmon said he was "merry/pretty sociable/not totally off his head". At about that time a bouncer approached him and said it was time to go. Salmon pleaded his case to stay on several occasions. Ultimately the bouncer grabbed Salmon's arm and forced it behind his back in a thrusting motion with such force that the elbow was fractured.

The District Court Judge thought the force applied was excessive and the bouncer was liable for an intentional assault.

The Court of Appeal ultimately agreed with the District Court Judge's findings. The Court of Appeal confirmed that the onus of proving that a person has contributed to their damages rests with those who have caused the damage. The question of whether a person is guilty of contributory negligence must be determined objectively. The Court of Appeal supported the Judge's findings on contributory negligence as it accepted that it was available on the evidence to find that Salmon in this case was not adversely affected by alcohol and that he was trying to

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persuade the bouncer to permit his party to stay rather than resisting an order to leave.

Justice McColl noted:

> *"in my view a reasonable person would not expect even a sober pub or nightclub patron to foresee that failing to leave could lead to a bouncer using excessive force to remove the patron".*

Interestingly, the Court also considered a number of cases which have determined that a finding of contributory negligence is not available where there has been an intentional tort.

The Court considered a previous judgment of the NSW Court of Appeal in *Reilly v State of New South Wales* which was handed down in 2003 and had previously determined that "a defence of contributory negligence is not available at common law to a claim for damages for an intentionally inflicted injury". On the other hand in that case it was also noted that: "where there are indirect and unintended consequences of a trespass a defence of contributory negligence is available in respect of those unintended consequences".

In Reilly's case the defence of contributory negligence was available because Reilly's wrist injury was a result of negligence in applying handcuffs or in the manner of driving a paddy wagon during a period of false imprisonment rather than the trespass.

In Salmon's case the Court of Appeal did not seek to prescribe a hard and fast rule that where there is an intentional assault by a bouncer, there can be no finding of contributory negligence. Rather, the Court considered it was necessary to examine the facts of each case and no doubt in some circumstances there will be wriggle room for a finding of contributory negligence. But in Salmon's case there was no contributory negligence.

Once again, this decision confirms that security personnel need to take care when dealing with patrons as actions taken whilst ejecting patrons can result in substantial damages claims.

The Court of Appeal reduced Salmon's damages award to $278,881.00 as the Court determined that the allowances for the pain and suffering and economic loss were excessive, but there was no reduction for contributory negligence.

So the question is can the security company be held liable for actions during an assault by security personnel on patrons? The NSW Court of Appeal has recently confirmed that an employer of a security guard can be vicariously liable for the actions of employees even where the employee appears to overstep the mark.

The NSW Court of Appeal delivered its decision in *Sprod -v- Public Relations Orientated Security Pty Limited* which overturned a decision in the District Court that had found that employees of a security company that assaulted a person whilst ejecting them from a pizza shop were not acting in the course of their employment at the time of the assaults and that the assaults were independent of the employment with the result that the security company was not liable for the actions of the security guards.

The assaults occurred at a pizza shop known as Dave's Midnight Pizza. Sprod had been making a pest of himself in the pizza shop by drunken aggressive, insulting and generally objectionable behaviour. The security guards had been called to help and remove Sprod from the shop, and this was part of the chain of events that led to the assault. The pizza shop had a history of violent events, thus the need to have a security company provide services.

Sprod was dragged from the shop by the security guards, who pushed and shoved him.

Interestingly, Sprod had been a boxer who had won a trophy which he described as an "Australian versus New Zealand like title fight".

Sprod at the original trial argued the security company had failed to properly train and supervise its employees and take reasonable steps to prevent them from assaulting other persons. The District Court Judge held that the security guards were appropriately trained and the Judge ultimately found that "the brutal and vicious assault was not for the purpose of subduing Sprod, it was so severe and unnecessary that it was motivated by the blood lust of security officers involved". The District Court Judge held that the security guards were engaged in an independent frolic of their own, and were not in the course of their employment when they assaulted Sprod. Sprod appealed.

Justice Ipp in the Court of Appeal noted

> *"there are circumstances under which an employer may become vicariously liable for unauthorised acts of an employee, even when those acts are criminal and even when the employer has expressly instructed the employee not to perform acts of that kind".*

Justice Ipp noted that it is not possible to discern a generally accepted theory which has been proposed by the Courts in the past to underline the imposition of liability on an employer in this situation. As Justice Ipp noted

> *"liability without fault is an unusual phenomenon when its source is not legislated".*

The *Employee Liability Act* in New South Wales imposes vicarious liability on employers for the actions of their employees whilst acting in the course of their employment. An employer can be held liable for the actions of his employees where they are acting within the ostensible authority provided by the employer.

Justice Ipp noted liability can be imposed even where the employer has not been negligent. As Justice Ipp noted "the explanation that liability is incurred when acts are done in the intended pursuit of the employer's interests or in the ostensible pursuit of the employer's business means that the employer may be entirely at the mercy of the employee. On this basis, no matter what instructions the employer may give the employee, the employer may be liable if the employee disobeys those instructions and commits a criminal act in the subjective belief that by doing so the employer's interests will be advanced".

The Court of Appeal noted that it will always be necessary to pay close attention to the facts of a particular case.

The Court of Appeal accepted that it was open to the District Court Judge to infer from the evidence that there was personal animosity on the part of the security guards and perhaps personal vindictiveness but the Court of Appeal did not believe these matters were the dominate cause of the assault. The Court of Appeal concluded that the dominant cause of the assault was a desire on the part of the guards to do their duty by ensuring Sprod would not make himself a pest in the pizza shop and would not molest customers.

Justice Ipp concluded that the assault was incidental to the employment of the guards in the sense that the assault was not a gratuitous unprovoked act. It had a great deal to do with the performance of the guards' duties, and it was an act "performed as on behalf of the employer" and "in the supposed furtherance of the interests of the employer".

The Court of Appeal concluded the guards were not acting "as strangers in relation to their employers with respect to the assault".

Justice Ipp supported a conclusion that the guards were acting in the course of their employment as:

- After Sprod was removed from the pizza shop the guards spent several minutes near the laneway during which time Sprod was behaving aggressively and insultingly to the guards but they did not demonstrate any unusual anger and merely yelled at him to go away.
- There was evidence that the guards when they returned to the pizza shop, having assaulted Sprod, had said "he will not be causing any trouble that night as he just got his head kicked in".
- The evidence was that the guards assaulted Sprod to prevent him from causing any further trouble and to prevent him from returning to the pizza shop. The guards acted in concert which was indicative of a deliberate course of conduct and not a spontaneous act triggered by personal animosity or pure personal vindictiveness.

Justice Ipp concluded this was enough to demonstrate a connection with the interests of the employer.

The connection between the unauthorised acts of the guards and the acts which their employer had authorised was sufficiently close to extend vicarious liability to the security company for the intentional wrongdoing of its employees.

The end result is that the security company now has a liability to pay damages to Sprod and no doubt the damages will be paid by an insurer.

Sprod originally won his case in the District Court but only against individuals and any recovery of the damages from the

individuals would have been problematic as individuals generally have limited financial resources and no insurance for this type of claim. This no doubt was the motivation behind the appeal and Sprod was fortunate in this case as he now has a judgment against a company with insurance.

Hotels, restaurants and nightclubs will continue to outsource security services in an attempt to minimise theirs risks. Security services present a significant risk as security guards will be called on to deal with intoxicated, aggressive and misbehaving persons as part of their employment duties and it is not uncommon for there to be an escalation of aggression during a confrontation. If the confrontation leads to an injury there may be a damages claim and the security company must remain wary as it may be liable if an employee disobeys instructions and commits a criminal act in the subjective belief that by doing so the security company's interests will be advanced.

Death Claims-Estimating Loss of Fatherly Services

In New South Wales if negligence results in a person's death, then close relatives of the deceased can bring a claim against the negligent party. If the relative was dependant upon the deceased then a claim can be brought pursuant to the Compensation to Relatives Act 1897. The claim entitles dependants to be awarded damages for any loss suffered as a consequence of the deceased's death due to loss of income and also for loss of any domestic assistance such as motherly or fatherly services. The estimation of domestic assistance can be difficult to quantify as there is a fine line between what is actual assistance (which is compensable) and tasks that a deceased used to do for enjoyment (which are not) such as watching the kids play soccer. It will also often be difficult to decide at what age children would have ceased to become dependent upon the deceased.

The Court was presented with the difficulty of attempting to quantify loss of fatherly services in the recent decision of Suresh v Jacon Industries Pty Ltd. Kumuda Suresh commenced proceedings against Jacon Industries as a consequence of the death of her husband who was fatally injured in a work accident. One of the issues that the Court had to consider was the number of hours per week that her late husband had provided domestic assistance to the family.

At trial in the District Court, His Honour Judge Armitage allowed a period of 15 or 16 hours per week for this assistance until 2 January 2007. After this time His Honour allowed 8 hours per week for a further 3 years and then 4 hours per week after that. Before calculating the allowance the Judge noted that “As with the succeeding figures to which I shall come, I have found myself between the plaintiff’s and the defendant’s estimates, and I have done the best I can to attend to the plaintiff’s evidence in chief and to her cross-examination, in which she made some but not many concessions, and to formulate a figure which inevitably must contain a degree of guesswork but which is an effort to be fair to both parties.”

Mrs Suresh appealed to the Court of Appeal arguing that the allowance for domestic assistance should be increased as His Honour had not calculated the allowance properly. The complaint that Mrs Suresh made was that the District Court Judge had simply averaged the number of hours of assistance that she had argued she should receive and the number of hours that Jacon Industries had argued she should receive.

The Court of Appeal disagreed. The Court of Appeal was of the opinion that although the allowance for assistance was somewhere between the two figures put forward this did not mean that His Honour had got it wrong.

Justice Basten who delivered the leading judgment in the Court of Appeal stated:

> *"Given that his Honour had already expressed doubts about aspects of the plaintiff’s evidence, the statement in his reasons set out above is a fair description of the process by which the final figures were achieved. It demonstrates the artificiality of requiring some more precise basis of calculation. Nor is it fair to suggest that his Honour failed to give adequate reasons for rejecting those aspects of the plaintiff’s evidence which were effectively undented in cross-examination. Much of the assessment of domestic assistance was based upon the circumstances of the family as they existed prior to the fatal accident. The plaintiff’s evidence was itself an attempt to extrapolate from past conduct and expectations into the future. Because there must have been an element to which the plaintiff herself was making an assessment of things which were speculative, his Honour was quite entitled to accept that in part only, as he did."*

Compensation to Relatives claims can be difficult to quantify and do require some level of speculation. As Justice Mason commented in his judgment in this particular case hypothetical issues were necessarily involved. It is difficult to quantify future assistance when the past assistance has been provided when the children were younger and required greater care.

Justice Mason noted

> *"it must be recognised, that the time that a father spends with his children in their early years does not necessarily reflect the hours spent in later years. ..Children may never cease to need the care of their parents, but that care gets shown in different ways as the children, and indeed the parents, age. The claim for future domestic assistance was based on the assumption that the deceased would have spent six hours per week "tutoring" his son for nine years between 1998 and 2007, and a similar time each week "tutoring" his daughter for eleven years between 1999 and 2010. Having regard to the deceased's skills and his own field of training, and having regard to the propensities of children as they age to resist parental assistance with homework, I confine myself to the observation that I can see no error in his Honour's reasons or in the conclusions on which they were based in this regard".*

A Court can only speculate as to what the future might otherwise have brought and in these circumstances the original trial judge's reasoning was sufficient.

Calculating the extent of care lost will continue to trouble the courts and no doubt will continue to cause speculative determinations of the level of care that dependents may have received in the future but for the loss of a loved one. The analysis will always be subjective. Mathematical precision for the calculation of the loss of fatherly services is not possible and the evidence of the dependents will in general dictate the quantification of the award. However, the Courts will continue to examine the assertions of dependents to determine whether the loss of care claimed actually matches the fair calculation of the compensation to be awarded.

Are The Documents Privileged?

In last months issue of GDNews we discussed the decision of State of NSW v Jackson which involved a dispute between the parties as to whether or not documents that fell within the scope of a subpoena issued by the plaintiff were privileged. This month in the decision of Timothy Sugden v Nicole Sugden the Court of Appeal has again considered the issue of privilege.

Nicole Sugden was involved in a motor vehicle accident on 18 May 2003 in which she sustained devastating injuries. The accident occurred when the vehicle owned by Mr Sugden and driven by Nicole, who was on a learners permit, hit an embankment and rolled. In her claim Nicole in essence alleges that her father failed to supervise her properly.

The question in this case was whether or not documents created by Mr Longhurst, the solicitor for Nicole, were protected from disclosure to the insurer representing Mr Sugden by client legal privilege. The documents the subject of the dispute included three file notes made by Mr Longhurst following discussions with Mr Sugden and a draft statement of Mr Sugden that had been obtained by investigators and annotated by senior counsel for Nicole in conference with Sugden and the solicitor Mr Longhurst. The instructions to the investigator were to investigate the claim on the part of Nicole.

Judge Phegan who heard the argument in the District Court was of the opinion that one of the file notes was created by Mr Longhurst in the course of taking instructions from Nicole through her father (at the time Nicole was under 18 years of age and was also still in hospital). This file note was therefore subject to client legal privilege, the privilege being that of Nicole. At this stage there had not been any particular attention given to the identification of a prospective defendant. Ultimately a Motor Accidents Claim Form was prepared which had to be submitted to the insurer. This Claim Form identified Mr Sugden as a potential defendant. Sugden signed the Claim Form on behalf of his daughter. After this time Mr Longhurst did not take any further instructions from Mr Sugden.

In Judge Phegan's opinion the draft statement (that was being prepared for provision to the police) was also subject to client legal privilege - but that of Mr Sugden.

The Court of Appeal agreed that the file notes were privileged as when the solicitor took the file notes they were notes of a conversation he had with Nicole's agent.

The draft statement was also privileged. The Court of Appeal was of the opinion that in the conference Mr Sugden was not acting as the agent for his daughter. Justice McDougall who delivered the leading judgment stated about senior counsel and the solicitor who obtained the draft statement:

> *"To the extent that they undertook the task of settling the draft statement on Mr Sugden's behalf, so that it could be submitted to the police, they may have placed themselves in a position of some conflict. But it does not follow from this that either the annotated draft statement or the views expressed in conference are thereby rendered non-confidential. If it*

is correct to think that the work was undertaken at the behest of Mr Sugden, he is entitled to insist that it be treated as confidential. If obedience to that insistence places Mr Longhurst and Mr Campbell in a position of conflict with Ms Sugden, that is their problem, not Mr Sugden's. It does not destroy whatever confidentially otherwise attaches to the document and the communications flowing from the circumstances in which they were created and expressed."

A complicated scenario but in the end the documents did not have to be produced. As in Jackson's case no doubt the documents were of some significance given the battle to stop access. Legal privilege continues to cause problems for parties seeking evidence to assist in the defence of a claim.

Proportionate Liability in NSW

If you are only half to blame for an accident why should you be obliged to pay the full amount of a loss that flows from an accident? In personal injury claims in NSW a claimant may recover from a negligent party the full measure of damages even when the negligent party is only 1% to blame. This is especially convenient for claimants where there are multiple parties who have contributed to an accident, some of who are uninsured. The negligent party that pays out is left to recover contribution from the other parties. No insurance will generally mean no contribution. The rationale they say is that the injured should not suffer and insurers have deeper pockets.

The same approach does not apply to property damage claims in NSW. The *Civil Liability Act 2002* has introduced the concept of proportionate liability in property damage claims which results in a defendant only being liable for a proportionate share of damages payable to reflect the percentage blame of the defendant for the accident.

Proportionate liability was introduced into NSW on 1 December 2004 by the Civil Liability Act. Prior to this time, a person who had negligently caused a property loss and was only partially, was liable for the whole of the damages and would be forced to claim contribution from other negligent parties. A claimant could sue only one party and provided that they could demonstrate that there was some negligence, there would be recovery of the total damages.

The *Civil Liability Act 2002* provides that the amendments concerning proportionate liability extended to civil liability arising before the commencement of the amendments but do not apply to or in respect to proceedings commenced in Court before the commencement of the amendments. The amendments commenced on 1 December 2004.

Accordingly, claims which arose as a consequence of accidents after 1 December 2004 are subject to the proportionate liability provisions.

The NSW Government also passed a regulation that provided that claims which arose before 26 July 2004 were excluded from the operation of the *Civil Liability Act*.

The effect of this regulation was recently challenged and the Court of Appeal has delivered a judgment in *Origin Energy LPG - v - Best Care Foods Limited & Ors* confirming that proportionate liability does not apply to claims which arise from accidents which occurred prior to 26 July 2004.

Consequently, proportionate liability in NSW for property damage claims does not apply to any claim arising from an accident which occurred prior to 26 July 2004. Proportionate liability will apply to all claims arising out of accidents subsequent to 1 December 2004.

Proportionate liability will apply to claims arising out of accidents in the period from 26 July 2004 to 1 December 2004 but only where court proceedings in respect to that claim had not been commenced prior to 1 December 2004.

So the way forward has been clarified and proportionate liability will now be a fact of life in most property damage claims for accidents after 1 July 2004.

NSW Workers Compensation Scheme Changes

The NSW WorkCover Scheme has continued to perform strongly and the latest independent valuation estimates recently announced reveals that the Scheme now has a surplus of $812 million.

On releasing the Scheme valuation results, the Government also announced further reforms to the Scheme. The reforms

announced were:

Benefit Improvements

Benefits will be increased. The enhanced benefits and changes will include:

- increase the lump sum death benefit from $331,250 to $425,000
- increase permanent impairment lump sum payments, with the maximum amount rising by more than 38 per cent to $390,000. This increase will apply to claims that have not been paid for injuries that occurred after 1 January 2002. If a death or permanent impairment payment has already been made prior to the date that the changes come into effect - it will not be possible to apply for a top up payment.
- ensure all workers sustaining a compensable permanent impairment also receive an additional amount for the pain and suffering arising from their injuries
- provide for permanent impairment benefits to be indexed annually
- allow more workers (in restricted circumstances) to have their ongoing benefits commuted(paid out and finalized) in a one-off payment.

Premium Reduction

There will be an average five percent reduction in the target collection rate for workers compensation policies commencing or renewed on or after 31 December 2007. The total premiums collected across the Scheme will be reduced by 5 percent for policies commencing or renewed on or after 31 December 2007. The reduction will not apply to policies renewed prior to this date. The new target collection rate paid by employers in NSW will fall to 1.77%, down from 2.57% in 2005.
Not all employers will receive a five percent premium reduction. The reduction will not apply uniformly to all employers, however no employers' basic tariff premium rate will increase.

This is because the basic tariff premium rates for individual industries will be simultaneously adjusted to reflect WorkCover's estimates of the cost of claims within each industry.

Basic tariff premium rates for each industry classification are set to reflect 'risk' in that industry. WorkCover's actuaries calculate each WorkCover Industry Classification (WIC) rate using the historical costs of claims - ie. costs associated with all the workplace injuries in that classification over the past five years, excluding the most recent year (as these costs are not yet fully developed) - and the wages of the industry - in terms of wages paid to workers and declared by employers for premium calculation purposes.

The size of the adjustments to the WIC rate will be capped, to ensure that where industry claims experience has been poor, an employer's basic tariff premium rate will not increase. Where industry claims experience has been good, basic tariff premium rates may be reduced by more than 5 percent.

No Need For Policies if Wages Less Than $7,500

Currently if you employ or hire people to work at your home you should take out a domestic workers compensation insurance policy. Domestic workers compensation covers any domestic workers employed within the home. It does not cover home-based businesses or strata titles.

Generally, people carrying on their own business, or tradespeople, such as plumbers, electricians and builders, have their own insurance. However, many others employed by the householder, such as cleaners, handypersons and gardeners, may not have their own insurance. To ensure that you and the workers are protected, homeowners will take out a domestic workers compensation insurance policy.

In addition homeowners who are building their own homes should take out a workers compensation insurance policy to make sure they are fully covered. Contractors engaged by an owner-builder may be deemed to be a worker of that owner-builder.

However under the proposed changes to the workers compensation legislation, from 30 June 2008 you will no longer be required to obtain a workers compensation insurance policy for your workers if you pay, or expect to pay $7,500 or less in

annual remuneration. If the worker of an employer that is not required to hold a policy is injured, the employer will be required to report the claim and pay a one-off fee of $175.

Up until 30 June 2008 employers whose wages will be less than or equal to the exemption threshold of $7,500 are required to take out or renew their current policy of insurance.

Requirement to Keep Wage Records Reduced

There will be a reduction of the period that wages records must be kept, from seven to five years.

Commission Can Order An Insurer To Pay Future Medical Expenses

Under the changes, the Workers Compensation Commission will be empowered to order the payment by an insurer of an injured worker's proposed future hospital and medical expenses where the necessity of that treatment is under dispute in the Commission. Currently the Commission can only order an insurer to pay hospital and medical expenses incurred.

No Reinstatement Of Injured Workers By The Workers Compensation Commission

A worker suffered an injury on his way to work on 4 October 2005. He became entitled to workers compensation benefits. His employment was terminated by his employer on 10 May 2006 as a result of his unfitness to perform suitable duties for at least another three months after.

The employee filed an Application to Resolve a Work Place Injury Management Dispute in the Workers Compensation Commission. The Application sought orders from the Commission including an order the worker be reinstated.

The Application relied on Section 49 of the Workplace Injury Management and Workers Compensation Act, 1998 (the "1998 Act") which imposes certain duties on the employer liable to pay compensation to a worker in respect of an injury. This includes an obligation the employer "must", at the request of an injured worker, provide suitable employment for the injured worker.

The Arbitrator considered Section 49 of the 1998 Act gave the Commission jurisdiction to order the reinstatement of a terminated worker and made orders to this effect.

The employer sought declarations in the Supreme Court of New South Wales including a declaration the Commission did not have jurisdiction to order the reinstatement of the worker.

Associate Justice Malpass noted Section 49 is not a provision that confers jurisdiction. The sanction for an employer that fails to comply with its obligation under Section 49 is dealt with in Section 56 of the 1998 Act, ie: increased costs from the calculation of the claims experience factor for the employer in determining its premium for an insurance policy by way of a premium surcharge.

Associate Justice Malpass did not consider the Commission had jurisdiction to reinstate the worker. He noted in November 2006, the "Injured Worker Reinstatement Provisions" were removed from the Industrial Relations Act, 1996 and placed into a new Part 8 of the Workers Compensation Act, 1997. Despite the Reinstatement Provisions now being contained in the Workers Compensation Act, 1987, jurisdiction for reinstatement of injured workers continued to remain with the Industrial Relations Commission.

OH&S Roundup

$130,000 fine for ABB Australia Pty Limited

ABB was recently fined $130,000 as a result of a prosecution under the Occupational Health & Safety Act for failing to ensure the safety of persons at a worksite where there was a failure to adequately restrict access to a dangerous area of the premises and there was a failure to provide adequate information and instruction in relation to overhead cranes working at heights and working in the vicinity of live electrical wires.

An employee of Consulting Earth Scientists was required to inspect a roof to ascertain whether or not there was asbestos in

the roof, and to perform this task he obtained access to the roof of the factory and used a stationary overhead crane and in the course of inspecting light fittings at the end of the overhead crane he came into contact with live electrical cables that energised the crane and he was severely injured.

ABB argued that this was not a case where there was an absence of safety systems or where there had been any ongoing or long-standing omission in the system. ABB was a large employer in a sophisticated industry and had a well developed and comprehensive system of safety in operation, and it appeared to be the particular circumstances of the visit of the employee of CES that resulted in the incident. The factory was being decommissioned. The CES employee was inducted after the employee unexpectedly arrived on site. ABB had a plan for the CES employee to be at the site at another time.

There was some debate as to whether ABB in these proceedings could be considered more culpable in relation to this incident than Mr Petrozzi, the principal of CES, who was prosecuted for a breach of s 8(1) of the Act. Mr Petrozzi pleaded guilty and was given a significantly discounted penalty of $9,000 against a possible maximum penalty of $55,000. Mr Petrozzi had been in business for a number of years, but in a small way, and had no prior convictions. The facts in that case, heard well before the ABB's case came before the Court, are somewhat different to the evidence ultimately received by the Court and counsel for the prosecutor also drew attention to the difference in the charges pressed against Mr Petrozzi although in essence the risks identified were the same.
ABB did not plead guilty where Petrozzi did. The court noted as there as no guilty plea in these proceedings ABB was not entitled to a discount on the penalty as was available to Mr Petrozzi but ABB is not to be more heavily penalised because it chose to contest the proceedings.

The Court noted ABB is to be given credit for its extensive system of safety in existence prior to the accident, and the steps apparently taken promptly following the accident, to address the dangers and risks exposed by Mr McCormack's accident. ABB has been in operation since mid-1987, employs a large workforce in both New South Wales and throughout Australia and operates in a heavy industry where there is a risk of serious injury. The Court considered its record is to be considered overall as a good record and the evidence supports a conclusion that it is a corporate citizen performing charitable works in the communities in which it operates.

Having regard to all of the material and given the difference in the particulars of the charges and the maximum penalties faced, the Court was unable to discern any significant difference in the culpability of Mr Petrozzi and ABB. Notwithstanding, the end result was a fine of $130,000 a significant fine for a large employer engaged in a dangerous sector of the construction industry. Clearly large corporations must expect more significant fines as demonstrated in the difference in the fines in this case, although the maximum penalty for Petrozzi was $55,000 and for ABB it was $550,000.

Design and Project Management Business Fined $85,000.00

Glenpar Pty Limited, a small design and project management business which operates nationally was recently prosecuted for a breach of the New South Wales Occupational Health & Safety Act for failing to ensure the safety of persons at a work site. From 1994 Glenpar has worked for Esprit undertaking design and management work at Esprit stores. Glenpar was retained to perform demolition and fit out work at a retail store and engaged several contractors to strip out the store. A joinery business was engaged to control the stripping out phase of the project and oversee contractors in occupational health and safety compliance. During the strip out a bulkhead fell during the course of demolition, seriously injuring one of the workers.

The main complaint by WorkCover was that there was inadequate information about the structure of the premises and the scope of work to be performed and there was not adequate monitoring and supervision of the subcontractors whilst the stripout was being carried out. Glenpar was a Victorian company operating in NSW on this occasion. It had two full-time employees and four contractors. Glenpar had engaged structural engineers to determine the structural work required, however, the failure of the bulkhead was not part of that expert consideration.

The Court noted that Glenpar was a small company but had a significant history in the nature of the business that it was undertaking. The occupational health and safety management system was not adequate or fully documented. Steps were taken by Glenpar to document the system after the event. At the time of the incident Glenpar did not have a formal OHS management system and it managed OH&S primarily through others. Glenpar's practice was to adopt the site safety rules and procedures prepared by others and review that safety documentation. It did not prepare an OH&S management plan for the site and did not provide site specific inductions in relation to the site. It did not ensure that prior to commencement of work contractors had safe work method statements or a job safety analysis. Having regard to these factors the offence was regarded to be a serious one and a fine of $85,000.00 was imposed.

Fatality leads to $120,000.00 fine

Brickmart (NSW) Pty Limited were charged with breaches of the Occupational Health and Safety Act for failing to ensure a safe system of work for employees and persons not in their employ who were engaged in unloading a shipping container that contained scaffolding. Racking frames in the container were stacked with scaffolding and when a forklift was used to lift the racking frame about 100 mm off the floor, the load became unstable and toppled onto a worker who was knocked back and struck by the scaffolding cross braces and the worker was ultimately crushed by the falling cross braces suffering a fatal injury.

Brickmart had experienced problems with the containers before. Fifteen previous containers had to be unpacked carefully and the company was in the process of installing at the China end of operations a specially designed new racking frame to provide better stability.

The company had a system in place where there was an order that no person was to go into the container if possible. The employee that was fatally injured was highly qualified. He was a qualified bricklayer and an excavator and general concreter. He had in fact been integral in the design of the new racking system for the scaffolding.

The Court noted there was no training in place to ensure no employee entered the container while it was being unloaded. The Court noted that although the company could not for a period eliminate the risk, it had to control it. The company failed to ensure the stability and structural integrity of the contents of the containers in circumstances where it was aware of the hazard. It failed to provide adequate information, instruction and training in the unloading of the container. The Court accepted that there had been a risk assessment and a system of work had been designed to meet the recognised risk. However, in the promulgation of that system to control the recognised risk there was a failure. The new system had not been implemented soon enough. The case was originally defended and three days into the trial a plea of guilty was entered. Consequently the Court determined to discount the ultimate penalty by 15% and imposed a fine of $120,000.00.

Company and Director Fined $60,000.00 Over Electrocution

Mission Services Pty Limited were engaged by a principal contractor to carry out electrical subcontract works at a retirement village. Generic safe work method statements were submitted to the head contractor and there was no site specific set of safe work method statements. An employee of the electrical company was running cables for power points and lights in the building when the foreman, whilst working on the main switchboard, was electrocuted.

The Court noted the safe work method statement was inadequate as it did not describe how the work was to be carried out and did not identify the work activities assessed as having safety risks or assess the safety risks. In addition, it did not describe the control measures that would be applied to work activities.

Mission had been issued with electrical design drawings made by the head contractor's engineers. Essentially, an essential services distribution board which connected to the main safety board was not switched off. An employee of Mission failed to adequately check whether the wiring diagrams provided were accurate and failed to recognise that the essential services distribution board was separately fused from the main switchboard and failed to understand the warning label on the main board in circumstances where electrically qualified persons ought to have understood. Mission failed to recognise, as a qualified electrician should, that under the relevant Australian Standard an essential services board always has a separate source of power from the main switchboard. These failures constituted an unsafe system of work and were serious breaches.

The Court noted electrical work is inherently dangerous and given there were two power sources through the switchboards and warning signs on the switchboards, a check of the power source to the essential services distribution board should have been made, especially by a person qualified as an electrician. The incident was foreseeable. The company and its director pleaded guilty to charges under the OH&S Act.

Ultimately a fine of $50,000.00 was imposed on the company and $10,000.00 on the director.

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