GD News

Gillis Delaney Lawyers

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Insurer Pays For The Raw Prawn

The New South Wales Court of Appeal has recently determined that Zurich Australian Insurance Limited was liable pursuant to a Contract of Insurance for damages claims brought by a number of customers who became ill when they consumed prawns served at a restaurant. The restaurant, Regal Pearl Pty Limited, had purchased the prawns from a wholesaler, Tai Kwan Seafoods, which had purchased the prawns from an importer, Great Ocean Products Pty Limited.

Tai Kwan possessed an insurance policy with Zurich. The restaurant sued Tai Kwan for negligence and breach of contract and ultimately succeeded in the claim. The Court held that Tai Kwan was liable for a breach of the implied conditions of merchantable quality and fitness contained in the NSW Sale of Goods Act. Tai Kwan was not able to meet the judgment and Regal Pearl commenced proceedings seeking direct access to Zurich's policy pursuant to the Law Reform Miscellaneous Provisions Act 1946. At trial, the Judge held that the Policy of Insurance responded to Tai Kwan's judgment debt. Tai Kwan appealed.

There were three issues.

Firstly, Zurich argued that the insuring clause did not respond to the liability between Tai Kwan and Regal Pearl as it was a liability in contract rather than negligence. The insuring clause provided cover for "all amounts that the insured person becomes legally liable to pay in compensation for personal injury or property damage from an occurrence that happens in connection with your products".

In addition, Zurich argued that exclusion clauses excluded cover as the policy contained conditions that excluded cover:

> *". . . that is accepted under any contract requiring:*
> *(b) the acceptance of liability, except liability that would have existed even if the contract accepting the liability did not exist, or*
> *(c) the waiving or limitation of the insured person's rights of recovery against another party."*

It was argued that the implied terms of the contract between Tai Kwan and Regal Pearl contained in the Sale of Goods Act constituted an acceptance of liability of a kind contemplated by paragraph (b) of the exclusion.

Tai Kwan had also entered into a contract with Great Ocean which contained a clause excluding any warranty for the goods' fitness and required Tai Kwan to accept all liabilities for any claims arising from the use of the goods and also required Tai Kwan to indemnify Great Ocean for any claims arising out of defects in the goods. It was submitted that this constituted an acceptance of liability within paragraph (b) of the Exclusion and a waiver or limitation of rights against another party within paragraph (c) of the Exclusion.

Relevantly, the claim made on the policy did not relate to a claim between Great Ocean and Tai Kwan.

The Court of Appeal ultimately concluded that the policy did respond to Tai Kwan's liability to

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Regal Pearl. The court considered it was necessary to determine the meaning of the words "for personal injury" in the insuring clause and determined that the words were capable of meaning "in respect of". The Court of Appeal noted that it was correct to emphasise the significance of the commercial purpose of the policy to protect a business enterprise from the risk of liability arising from its products. The Court of Appeal noted the indications in the policies were that the cover was intended to be broad and these indications were reinforced in the present case by insuring the business as a wholesaler. The Court of Appeal noted that if the scope of the cover were restricted as contended by Zurich, the insured would not receive any cover in the most likely circumstances in which it was exposed to risk. The Court concluded that the insuring clause should be given a broad meaning and should be understood to apply to claims "in respect of" personal injury with a breadth sufficient to encompass the claims made against Tai Kwan under the implied contractual terms.

The Court of Appeal also concluded that the implied contractual liability did not fall within Exclusion Clause (b). The Court of Appeal noted:

> *"the commercial purpose of providing cover against risks in a product liability policy should, absent clear words to the contrary, be understood to encompass the range of obligations normally associated with such liability in Australian law, including implied terms of merchantable quality and fitness. No such clear words to the contrary appear in the policy."*

The Court of Appeal ultimately concluded that Tai Kwan's liability constituted a normal and usual basis of liability stemming from run of the mill commercial contracts. It was not the product of some unusual or exceptional risk arising from the specific contractual covenants to which the exclusion clause referred. The Court of Appeal noted that the implied terms of merchantable quality and fitness for purpose with respect to product liability are so common that only clear words will be found to exclude them in a policy purporting to give cover for product liability. It was held that the relevant Exclusion Clause did not provide such clarity.

The Court of Appeal also concluded that the contract between Tai Kwan and Great Ocean did have the requisite character referred to in Exclusion Clauses (b) and (c). Clearly Zurich had lost a valuable right of subrogation by reason of this clause against Great Ocean. Nevertheless, the issue for the Court to determine was whether the claim falls within the Exclusion and in this case it did not. There was no claim for cover under the contract with Great Ocean. There was no relevant claim to which the policy was called upon to respond and to which the Exclusion could attach. It was noted that the Exclusion was not a provision which denies cover whenever an insured entered into an arrangement which adversely affects the subrogation rights of an insurer. In its terms it did not apply to this situation.

A raw prawn for the insurer - perhaps! Nevertheless, the insurer by offering product liability cover to a wholesaler was held liable for claims arising under contract where the claims related to personal injury claims. The Court of Appeal held the true intention of the policy was to provide this cover.

The decision in the Regal Pearl case turned on the facts and the particular policy wording. The wording found in the policy is not unusual. Insurers need to heed that the NSW Court of Appeal has delivered a clear warning that it is the commercial intention of the policy which will significantly influence the determination of the application of insuring clauses and Exclusion Clauses in a contract of Insurance.

Will a Defendant Be Liable For Another Defendant's Costs?

Personal injury claims often involve multiple defendants. An injured person may bring a claim for damages against a number of defendants seeking to blame each of those defendants for their injuries. What happens when a plaintiff only succeeds in the claim against one of the defendants?

The usual approach adopted by the Courts is that costs will follow the event. If a plaintiff is successful against one party he will usually be entitled to recover his legal costs incurred in the action brought against that party. If a defendant is successful and defeats the claim, the defendant will usually secure a costs order in its favour. Multi-defendant proceedings are more complicated.

Courts, when considering cost orders to be made in favour of a successful plaintiff in multi-defendant proceedings, will be called on to determine what is a just and reasonable order. Sometimes an unsuccessful defendant will be ordered to pay the plaintiff's costs including any costs which that plaintiff must pay to another defendant and sometimes the unsuccessful defendant will be ordered to pay a successful defendant's costs.

In considering these situations, the Courts will need to consider whether the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant.

In Dederer - v - Great Lakes Council & Roads and Traffic Authority an injured plaintiff sued both the RTA and the Great Lakes Shire Council and succeeded in the claim against both defendants before a Supreme Court Judge. The Council and the RTA appealed. The RTA did not convince the Court of Appeal that it should escape liability whereas the Council did. The result of the appeal was that Dederer succeeded in his claim against the RTA but not the Council. Subsequently Dederer sought an order that the RTA should pay Dederer's costs of all proceeding as well as the Council's costs of all proceedings.

Dederer originally sued the RTA. The RTA filed a Defence admitting it was the Authority responsible for a bridge from which Dederer jumped resulting in his injury. The trial was listed for hearing in September 2003 and a week prior to the hearing the RTA advised Dederer that it would seek an adjournment to join the Council as a cross-defendant. The RTA's Defence was amended to allege that the pedestrian way and no diving signs on the bridge were under the control of the Council. Nevertheless, the RTA continued to admit that it was the Authority responsible for the bridge. Dederer's solicitors then joined the Council as a defendant.

After the Council was joined as a defendant by Dederer, the RTA filed a further Defence which effectively withdrew the admission that the RTA had previously made that it was the Authority responsible for the bridge. The Trial Judge did not find that the RTA was the Authority responsible for the bridge.

The Court of Appeal concluded it was significant that the admission was not withdrawn until after the Council had been joined by Dederer as a party. The Court of Appeal noted there was no need for Dederer to rely on the RTA to ascertain whether or not the Council was the relevant Authority. The Court of Appeal noted that Dederer had commenced proceedings against the Council at a time when RTA was admitting that it was the relevant Road Authority. The Court of Appeal also noted that the RTA said nothing about the Council that was factually inaccurate nor did it mislead Dederer nor conceal from him anything he could not with reasonable effort have found out himself.

The Court concluded it was reasonable for Dederer to join the Council as defendant but the RTA had not been engaged in conduct such as to make it fair to impose some liability on it for the costs of the Council. Dederer is now liable for the Council's costs incurred.

The result may have been different if the RTA had withdrawn its admission that it was responsible for the bridge before Dederer joined the Council. The RTA was lucky on this occasion.

Defendants need to be aware that actions and conduct which encourages a party to join additional defendants to proceedings may have adverse effects including adverse costs orders being made against them as a consequence of that conduct.

Liability For Illegal Conduct

When will an employer be liable for the criminal acts of others? Should a person who was injured as a consequence of contact with criminals during the course of their employment be entitled to recover damages?

The New South Wales Court of Appeal in TAB Limited - v - Beaman recently considered a claim brought by a person injured during the course of their employment during an armed robbery.

Beaman was working alone in the Woy Woy TAB Agency. The TAB owned the Agency which was operated by Dannik Pty Limited, pursuant to an agency agreement. Dannik employed Beaman. About 5.45 pm whilst working alone in the Agency, Beaman was confronted by two persons, one armed with a gun. Beaman was taken into the back room and she was held down on the floor while one of the criminals removed moneys. The two criminals decamped and have not been seen since. Beaman suffered soft tissue injures to her neck and left shoulder and aggravation of degenerative changes in her neck and also suffered an emotional and psychological reaction.

Beaman sued both the TAB and her employer, Dannik. The TAB was sued as it was alleged that it had failed to ensure the premises were a suitable and safe place for work. At trial Beaman succeeded with the Judge determining the employer was 25% liable for the damages and the TAB was 75% liable. Both defendants appealed.

The Court of Appeal noted that it is trite law that being shot by a criminal, whether at home, at work or at play, is a risk that

each member of the community assumes and that merely because one is shot at work does not mean that the controller of the premises or the employer will be liable. In order for there to be a liability in this situation it is necessary for there to be special relationship.

In this case the Court held the TAB was in a special relationship with Beaman as the TAB had a degree of control over the activities of an organisation so that the person who, as a matter of law, is in charge of the day-to-day functions of the operation, was bound to observe the TAB's directions. Therefore there was a special relationship between TAB and Dannik and its employees.

In this situation the Court of Appeal concluded that one could almost equate the TAB with the employer. The employer was in no position to take measures to protect its employees without the concurrence of the TAB. The Court of Appeal in essence concluded that the TAB owed a duty of care to Beaman and it was of the same nature as the duty owed by the employer.

Nevertheless, in this case, the Court of Appeal concluded that there was no breach of duty. The original Trial judge found three matters constituted a breach of duty, namely:

- Failing to provide a bullet proof screen barrier.
- Failing to provide security guards pending the replacement of a screen/barrier; and
- Failing to provide at least two employees pending such replacement.

The Court of Appeal noted the central point of the appeal related to the capacity to reduce the risk considerably in the building and prevent the incident occurring by the expenditure of little over $22,000.00 and installation of further security equipment, namely, bullet proof screens.

The Court of Appeal concluded that the TAB and the employer were not liable for the damages claim. The TAB and the employer argued that any breach of their duty did not cause the harm as the harm was caused by the actions of the criminals. It was argued that even if the TAB breached its duty to provide a bullet proof screen without holes in it, it was impossible to conclude that the robbery would not have occurred. The Court accepted that the harm was caused by a carefully planned robbery, by committed people who were well familiar with the operating procedures of the TAB agency and that Beaman failed to produce the necessary evidence to show that, but for the lack of the screen, the robbery would not have occurred. There was no evidence that a person behind a supposedly bullet proof screen when threatened by an armed man would do otherwise than to give in to the armed man.

The Court concluded that Beaman had not shown that the lack of the screen was causative of her injury. The end result was that Beaman is now liable to pay the costs of TAB and Dannik for the original trial and the Court of Appeal proceedings. She will be substantially out of pocket and will not have the benefit of any damages. Nevertheless her rights to workers compensation payments remain.

Should the TAB or her employer have done more? Perhaps so! But in this case the failure of the TAB or the employer was not seen to cause the injury. The criminal activity of others inflicted the injury and that was an end to the claim for Beaman.

Illegal Worker Update

In the March 2006 edition of GD News we reported on a Workers Compensation Commission decision which, effectively, denied ongoing weekly payments to an injured worker whose visa did not allow him to work in Australia.

The NSW Court of Appeal has now reversed that decision. In *Singh v v TAJ (Sydney) Pty Limited* it was held that the fact that a worker could only work illegally was irrelevant to a proper determination under section 40 of the Workers Compensation Act 1987.

The facts of the case are very common. The worker commenced employment at a time when his visa allowed him to work. He was then injured, and weekly benefits and lump sum amounts paid to him. His visa status then changed - he was no longer permitted to work in Australia - and payment of weekly compensation was stopped.

In the Court of Appeal it was held that section 40 of the *Workers Compensation Act* requires at least three steps to be taken before an award for incapacity payments may be made:

- a calculation of what the employee would have earned but for the injury assuming the same or comparable

employment;
- an assessment of the employee's post-injury earning capacity; and
- the exercise of a discretion.

The Court said that it was wrong - under element 1 - to find that probable earnings were nil by reason of the worker being precluded from working as a result of his visa restriction. It also said that the worker's visa status was not a relevant consideration in determining suitable employment under element 2.

For those reasons, the Commission had been in error in holding that the worker's entitlement under section 40 was nil.

Why did the Court of Appeal reach this conclusion? Although not altogether clear, it seems that their concern really was to compensate for the reduction caused in weekly earnings by the injury (despite what section 40 says on its face), and to maintain the beneficial nature of the legislation.

The result, of course, makes that although a worker's visa may not allow work in Australia, he or she may still get compensation for being unable to work. A sensible outcome?

Look Out Drivers And Pedestrians!

What happens if you have had a few too many and are struck by a motor vehicle? Is it you or the driver of the vehicle who is to blame?

Until recent times the Court has tended to blame the driver in these circumstances. However, in two recent decisions of the New South Wales Court of Appeal this trend has - to some extent - been reversed.

Stuart Lindsay was walking along the middle of Kangaloon Road in Bowral, having left the Bowral Hotel in the early hours of the morning in an inebriated condition. Whilst walking down the middle of the road Lindsay was struck by a truck that was driven by Keith Evans. Lindsay sustained brain injury that was so severe he was unable to give evidence at the trial. At the time of the motor vehicle accident the conditions were dark and wet but the road was illuminated by street lights in addition to the low beam headlight of the truck. Evans had been driving along the road within the speed limit of 60 km an hour.

There was evidence that demonstrated Lindsay was inebriated at the time of the accident and in fact his blood alcohol level was .235.

In the District Court the Trial Judge found negligence on behalf of the driver, Evans. The Trial Judge was of the opinion that Evans had been travelling at an excessive speed and failed to keep a proper lookout. 15% was deducted for the contributory negligence of Lindsay.

Evans appealed. Evans argued that he had not been travelling at an excessive speed and had been keeping a proper look out. Evans also argued that the percentage deducted for the negligence of Lindsay was insufficient.

The Court of Appeal did not agree with the Trial Judge that Evans was travelling too fast in the circumstances. The Court of Appeal did, however, find that Evans had been failing to keep a proper lookout. Evans admitted that he could probably have avoided the accident if he had seen Lindsay 20 metres away. The Court of Appeal therefore found that Evans could have taken steps to avoid the collision if he had been sufficiently observant.

The Court of Appeal then went on to consider the question of the negligence of Lindsay. The Court of Appeal disagreed with the trial judge's deduction of 15% and considered that without taking into account the question of intoxication (which was not properly dealt with at trial) Lindsay's walking along the roadway without any regard for oncoming traffic demonstrated a failure to take care for his own safety. Lindsay could have walked along the footpath.

Lindsay's damages were reduced by 75%, a substantial deduction, as a consequence of his negligence.

An identical deduction was made in another decision of the Court of Appeal handed down on the same day. Thomas Vale sustained serious injury after being struck on Anzac Parade, Chifley, by a motor vehicle driven by Timothy Eggins. Vale was "stumbling" across Anzac Parade as Eggins was driving at a speed of about 60 kms an hour. Eggins could see about 100 metres in front and first saw Vale on the roadway about 90 metres away. Eggins accepted that Vale was stumbling when he

first saw him. The Court of Appeal found that in these circumstances Eggins should have taken reasonable steps to react to the danger. The Court stated:

> *"the respondent's decision to increase his speed again up to the speed limit when the appellant turned and commenced moving out of lane 3, was not only an error of judgment, it was negligent, as it meant that the respondent was not able to thereafter react to the presence of the appellant on the roadway."*

A 75% deduction for Vale's negligence. Intoxication played a significant role in causing the accident.

A couple of interesting decisions that perhaps provide some comfort to both injured persons and defendants. Apportionment of blame is a real issue. Substantial reductions to damages can result where intoxication of the injured has played a contributing role in the cause of the accident.

NSW OH&S Round Up

What Effect Do Victim Statements Have In OHS Prosecutions?

The Industrial Court of NSW has recently considered the legal impact of a victim impact statement in the determination of a penalty in a prosecution under the *Occupational Health and Safety Act, 2000.*

Two fire extinguishers exploded at the Wakefield Park Raceway whilst they were being tested and recharged. One person was injured in a first explosion and two others were injured in a second. The Confederation of Australian Motor Sport Limited was prosecuted arising out of the incidents. Ultimately a fine of $80,000.00 was imposed on the Confederation.

Significantly, however, during the course of the prosecution, a victim impact statement was tendered by the prosecutor. Statements were tendered by one of the injured and his wife.

The tender of victim impact statements is permitted where an offence results in actual physical bodily harm.

The Industrial Court confirmed that it is entirely appropriate that Trial Judges acknowledge the impact of a crime on victims and their families in a public way and the purpose of the criminal justice system is well served by such public recognition of the grief imposed on families of victims. Clearly the injured in this case were victims and were exposed to serious injury and the Court noted that the injury most regrettably materialised.

The Court, however, noted that the receipt of the statements cannot lead to the imposition of a higher penalty than would have been imposed in the absence of such evidence. The receipt is a proper recognition by the Court in a public way of the explanations given by the injured of what had to be endured as the direct consequences of the offence.

The effect of a victim impact statement is to acknowledge the awful impact which the offence has had rather than to bolster the ultimate penalty that is determined.

The Criminal Activity of Others Can Lead to OH&S Convictions.

The Industrial Court of NSW has recently convicted Gignen Pty Limited and Tempo Services Limited for a breach of the *Occupational Safety Act* arising out of the sexual assault of an employee during the course of her employment. Tempo Services Limited is a contract cleaner with arrangements to provide cleaning services to the Government including many State public schools. People who perform work under these contracts are usually provided by one of Tempo's wholly owned subsidiaries, one being Gignen Pty Limited. Mrs Rodgers, a casual relief cleaner with Gignen was working at Llandilo Public School at about 5.30 am. When she was about to leave a room which she had cleaned she was confronted by a man who pushed her back into a classroom and sexually assaulted her in the walk-in storeroom.

WorkCover argued that Gignen and Tempo failed to provide and maintain a safe system for cleaners working in isolated areas and failed to provide adequate communication systems for the cleaners and failed to properly assess the risks.

Unfortunately for Tempo and Gignen there had been a history of assaults to cleaners in other schools. The Court concluded it was entirely artificial to look at the history of one school in order to characterise the risk or a presence of the risk. The Court concluded that a risk assessment of this school ought to have been carried out before the incident. The Court noted that the

Occupational Health and Safety Act accepts that it might not be possible to eliminate all risks in the workplace and it proceeds on the basis that employers are to take steps to ensure the safety of their workplace. Here the general risks of assaultive behaviour against cleaners working alone was identified by the employer many years previously and could not be described as a risk that was unduly remote, unpredictable or unknown.

The Court concluded that the employer let down Mrs Rodgers by failing to inform her of the risks of working alone and/or working in an isolated area and failed to provide employees with adequate instruction and training in systems of work or procedures.

It was noted there were instructions given to Mrs Rodgers about cleaning work but nothing said to her about her security and the risks to her at work, apart from an instruction to keep the door closed behind her whilst cleaning - an instruction frankly accepted as having more to do with securing the school properly than the safety of a cleaner.

Tempo and Gignen argued to no avail that the offences were due to causes over which they had no control and against the happening of which it was impractical for them to make provision.

A conviction has been recorded and a penalty will be imposed at a later date.

Employers must be aware that they owe duties to their employees to protect against potential criminal activity, particularly where it is known that there is a risk that employees will be exposed to potential criminal behaviour.

Tempo Services Cops It Again.

King, an employee of a subsidiary of Tempo, was employed as a cleaner at Bonnells Bay School and was injured when an unknown male entered the administration block of the school and assaulted her, putting his hands around her throat and dragging her into the principal's office, demanding money. He attempted to assault King and left the premises.

Tempo defended this prosecution. The absence of a risk assessment played a significant impact in the determination that there had been a breach of the *Occupational Health and Safety Act*. Tempo's case focused on the incident rather than focusing on the risk to safety exposed by the incident and the particulars of the charge.

In essence, Tempo argued that the incident could not be avoided. Nevertheless, a number of measures were later adopted such as team cleaning, locking of doors, screening of windows, bringing cleaning services inside and rescheduling the work so that outside work was not performed before teachers or students started to arrive.

The Court suggested that the protection of the cleaning team was not universally applied but was applied in a piecemeal fashion being introduced in areas where employees themselves raised concerns as to the presence of unauthorised persons in the school grounds rather than performing risk assessments on a proper basis. Another conviction for Tempo arising from the criminal actions of others.

$30,000.00 Fine Not Enough

DJ Gleeson Pty Limited, a building company, was fined $30,000.00 for a breach of the *Occupational Health and Safety Act* in an incident in February 2003 when a subcontractor carpenter was injured whilst carrying out work on a single storey cottage. A subcontractor of DJ Gleeson was instructed to take down the fascia and eaves and guttering from the roof of a cottage using a hook and working at ground level. After completing the task he set up a ladder and commenced to push tiles back from the roof edge. He was found lying on the ground, having apparently fallen from the ladder. He died two weeks after the incident.

WorkCover challenged the level of penalty, appealing to the Full Court. It was argued that the penalty was manifestly inadequate. In addition, the Judge had discounted the penalty by 25% for the utilitarian value of an early plea of guilty. WorkCover argued that this discount was excessive as a plea had not been entered at an early stage.

The company had originally elected to defend the prosecution. The plea was only entered after a hearing date was allocated and an adjournment for the hearing date granted to facilitate legal advice being provided to the company.

The Court confirmed that the 25% discount on penalty was too much in the circumstances. A discount for the utilitarian rationale of pleas of guilty involves considerations of the efficiency and expediency of the criminal justice system and places

particular emphasis on the timing of a guilty plea as indicative of the saving of time, money and other resources which are otherwise incurred in running a defended hearing. A plea of guilty after the prosecution has commenced its trial preparations but before the commencement of hearing saves time and money. The earlier the plea of guilty the greater the likelihood that costs will be saved and accordingly the greater the claim will be to a substantial discount.

In this case the Court determined that an appropriate discount for the plea of guilty was 15%.

The Court noted that the offence was a most serious one. The risk to safety was foreseeable and the death was a reflection of the seriousness of the breach in that it was necessary to impose a penalty for both general and specific deterrence. The Court noted that the risks could have been avoided by taking simple remedial measures well known in the industry. The ultimate penalty was increased to $70,000.00 reflecting the 15% discount.

A substantial increase however the penalty was in the bottom end of the range of penalties for fatalities.

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

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

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