GD News

Gillis Delaney Lawyers

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January 2008 Issue

Obvious Risk And Personal Responsibility

The NSW Court of Appeal has recently delivered a reminder to all persons that they must take care for their own safety and cannot simply blame someone else for an accident.

Trips, slips and falls are common occurrences in day-to-day living. Walking in some areas comes with known hazards.

Occupiers who own premises that contain hazards are not under a duty to remove all risks, rather, they are under a duty to act reasonably.

When an accident happens it is quite simple with hindsight to speculate on actions which could have been taken to reduce the risk. The existence of measures which could have reduced the risk does not necessarily result in a finding that a person has breached a duty of care for failing to introduce those measures. It is always necessary to examine the magnitude of the risk and its likelihood of occurrence and what a reasonable person would do in response to that risk. Sometimes the answer may be nothing.

Persons injured in accidents usually receive a sympathetic hearing from the courts. Nevertheless, the courts are still obliged to consider what is a reasonable response to the risk.

The NSW Court of Appeal has recently considered these issues in *Brighton-Le-Sands Amateur Fishermen's Association - v - Kiromvokis* when the Court was called on to consider a claim for damages by Kiromvokis arising out of an injury he suffered when he tripped on some slipway rails which were protruding approximately 150 to 200 mm above the concrete apron upon which three parallel sets of rails were placed.

Kiromvokis was 75 years of age and had been a member of the Association for 10 years and was an avid fisherman. At 5.30 am it was still dark but the area was lit and Kiromvokis had to walk over the slipway rails to gain access to an ice room, he collected some ice and he was returning to his car when he struck one of the slipway rails and fell.

The original District Court Judge found in favour of Mr Kiromvokis awarding him damages. The District Court Judge suggested that a concrete ramp could have been put in place to provide a ramp over the slipway rails. The slipway rails could have been painted yellow. The District Court Judge in essence found that the club was negligent in failing to provide a raised access ramp for persons to provide a level surface for a person to walk over the rails.

The Association appealed. Obvious risk was the real issue. The Court of Appeal ultimately allowed the appeal and found in favour of the club.

His Honour Justice Tobias noted:

> *"The club did not owe a duty of care to its members to ensure that no harm befell them when traversing the slipway area but only a duty to take reasonable care. . . . The relevant inquiry is prospective and not retrospective. It is wrong to focus exclusively upon the particular way in which the accident came about. . . . The examination of the causes of an accident that has happened cannot be equated with the examination that is to be*

Inside

Gillis Delaney Lawyers
Level 11,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
DavidCollinge dec@gdlaw.com.au

undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. One of the possible answers to that inquiry may be nothing."

In this case the Association had, subsequent to the accident, constructed a concrete ramp to enable the slipway rails to be traversed without stepping over them and had painted the rails yellow.

Justice Tobias noted that the relevant risk was that an elderly member of the club, carrying his fishing gear, including ice, might misjudge the position or height of one of the slipway rails and thus trip, fall and suffer injury. So what was a reasonable response to that risk? The duty was not a duty to remove that risk by the adoption of simple and cheap measures which are practical. The question is whether the response of a reasonable person was to do nothing rather than implement the simple and cheap measures that were actually carried out after the accident.

When examining issues it is necessary to consider the magnitude of the risk and it's degree of probability of occurrence. The Court of Appeal also noted that this was not a case where the club had done nothing. It provided illumination to the slipway area.

As Justice Tobias noted:

"The duty imposed upon the Appellant (the Association) was no more and no less than one of reasonable care. Given that the determination of breach of duty must be one which is determined prospectively and not retrospectively without the benefit of hindsight, in my opinion the exercise of reasonable care did not require the Appellant to take any steps to eliminate the relevant risk other than which it had already taken, namely, to ensure that the relevant area of the slipway was fully illuminated at night."

Handley AJA in his judgment noted Kiromvokis was familiar with the area, having used it for about 10 years, rails were a normal feature of boatsheds and the area was well lit and the rails were obvious. The inescapable conclusion in those circumstances was that the accident was caused by Kiromvokis' inattention or lack of care for his own safety. Justice Handley noted that it would always be possible after an accident to point to some further precautions that could have been taken but that does not establish negligence. The provision of strong illumination during hours of darkness was a reasonable response and as far as the club was concerned, there had been no problems for 10 years. Accordingly, the club had performed its duty to exercise reasonable care.

Once again the Court of Appeal has gone to great lengths to clarify that the obviousness of a risk is an issue that must be taken into account when determining whether or not there has been a breach of duty of care. The duty owed is not one to eliminate all risks but to act reasonably. In this case the carelessness of Kiromvokis was seen to be the cause of the accident and there was no breach of duty by the Association.

A Situation of Conflict Does Not Always Lead to a Foreseeable Assault

Employees often encounter unruly behaviour on the part of guests at leisure centres. Leisure centres attract young children who can be very unruly. The NSW Court of Appeal has recently considered a claim by a person who was injured at a leisure centre when a young girl punched another visitor, Milvia Conti, in the face.

Conti was a member of the leisure centre and had participated in a spin class. When her class finished she went to the showers and there were people screaming and using foul language in the showers. There was a two minute limit on the showers and she waited for about five minutes during which time the conduct continued. She then sought assistance from the leisure centre staff. A centre staff member confronted the occupants of the showers and told them to get out. The screaming stopped for a short period, the staff member left but the visitors did not leave the showers and the screaming soon resumed. Conti then sought further assistance from another centre staff member. The occupants of the shower emerged and all were minors. One was a 16 year old girl. there was another girl about 11 years of age and two boys 5 years of age. The 16 year old girl was verbally abusive towards Conti and the staff member. The staff member confronted the visitors asking them to leave, waited five minutes during which time the youths made no attempt to leave. The centre staff member again asked them to leave and advised she would call the police and have them removed. She ultimately left to call the police and after calling the police returned with another staff member to the change room.

Whilst the leisure staff member was away from the room, Conti went into a shower cubicle, locked the door and then one of the youths threw a towel over the wall of the door followed by a half full bottle of mineral water which struck Conti on the head. Conti gathered her belongings and went to leave and as she passed the youths, the 16 year old punched her in the left eye. The youths were escorted from the centre and detained for about 15 minutes but left when the police had not arrived.

Conti argued the escalated state of affairs in the change room should have led the staff to realise that Conti should have been separated from the abuse.

The Court of Appeal confirmed that a landowner's duty as an occupier of land does not extend to taking reasonable care to prevent physical injury to an injured employee resulting from the criminal behaviour of third parties although there have been cases where it has been decided that a duty of care was owed by licensees of hotels to patrons in relation to the risk of violent behaviour of other patrons. In those cases the existence of a duty of care turned on the element of control of the licensee of premises.

Justice McColl concluded that the conduct of Conti and the leisure staff was powerful evidence which could be taken into account in an objective assessment, to conclude that there was no risk imposed by the situation in the change room at the time the leisure centre employee departed to call the police.

Justice McColl noted:

> *"The situation was that four minors were behaving in a juvenile and irresponsible manner. They had not engaged in any violent behaviour at the centre prior to the incident in which Conti was involved. Apart from pointing a finger towards Conti and the leisure centre staff member and asserting she was not stupid, the principal protagonist had not exhibited untoward physical behaviour. There was no suggestion she was physically superior to Conti. There was no suggestion that she would behave violently towards Conti. The suggestion that the 11 or 5 year olds posed any risk only has to be stated to be dismissed as absurd."*

The District Court Judge had concluded that there was no foreseeable risk of harm to Conti and the Court of Appeal agreed.

It was not foreseeable that the unruly children would escalate their behaviour to the stage to engage in a criminal act of assault.

Conti did not leave the room and no doubt if she felt in danger she would have left the room. Conti's failure to recognise any potential risk demonstrated that the risk was not a foreseeable one.

Unruly behaviour does not necessarily result in criminal activities. On this occasion the leisure centre was not liable for the damages claim as the risk that ultimately eventuated, namely the risk of injury through assault, was not a foreseeable risk.

Evidence Of Negligence Of An Injured Person May Be Enough To Defeat A Claim

In some situations the precise circumstances which lead to an accident are unclear. It is sometimes necessary for the courts to draw inferences to determine what was the most probable cause of the accident. This leads to difficulties where there are a variety of scenarios which are possible causes for an accident.

The NSW Court of Appeal has recently considered a claim by a person who was rendered a quadriplegic in a car accident when he ran off an unsealed road.

Matina Lujans was driving his vehicle at approximately 100 km/hour along an unsealed private road and ran off the road on a right-hand bend. His vehicle rolled and he suffered injuries which resulted in quadriplegia. At the time of the accident it was daylight, the weather was fine and there were no other vehicles or large animals or large objects on the road which could have caused the accident. There was no evidence of mechanical defect or damage to the tyres.

Lujans sued the occupier of the road, her employer and its road maintenance contractor alleging that the road surface was defective. In essence, it was alleged that the appearance of the road was deceptive because a careful driver could not tell where the hard centre section of the road ended and the soft shoulder began. Lujans suggested that this had caused or contributed to her driving onto the shoulder at the bend and losing control of her vehicle.

The original District Court trial judge held that the defendants had been negligent and awarded substantial damages. All defendants appealed.

Handley AJA in his judgment noted that the District Court judge had drawn an inference that the deceptive appearance of the roadway at its boundary caused Lujans to drive off the centre until her near-side wheels were on the shoulder when she lost full control of her vehicle. Handley AJA noted that prior to the accident Lujans had passed one driver and another vehicle had driven behind her vehicle, albeit at a distance and neither of them had observed her to be exceeding the speed limit nor was there any suggestion that the vehicle was travelling in an abnormal or erratic fashion.

Handley AJA noted:

> *"Since there was no evidence of any defect in the vehicle or its tyres or the presence of anything else on the road surface, the movement of her vehicle off the road was some evidence of negligence by Lujans in her control and management of the vehicle . . . It was not, per se, evidence of negligence on the part of those responsible for the construction and maintenance of the road".*

Handley AJA noted:

> *"The most probable explanation for Lujans finding herself approaching the guide post is that she was not keeping a proper look out. She was only 45 metres from the guide post when she began to drift onto the shoulder. She should have been aware of the guide post on the right-hand bend for some considerable time before that. Her failure to apply her brakes and the sudden veer to the right provides compelling evidence that she only became aware of the guide post when it was immediately in front of her. The compelling inference is that it was inadvertence rather than the deceptive nature of the road's surface where the shoulder began which caused Lujans' accident".*

This case once again serves to demonstrate that it is not enough to simply point to one possible scenario of facts which amounts to negligence in order to succeed in a claim. The claimant must still demonstrate that the compelling inference which should be drawn from the facts is one where the defendant was negligent.

Claimants must still adduce sufficient evidence to mount a compelling argument that the cause of the accident was the negligence of a defendant, especially where there is some need to speculate on the cause of the accident.

No Damages For Rescuers

There is a terrible accident. Police, paramedics, fireman and passersby attend the scene to provide assistance. As a consequence of this one of the police officers sustains psychiatric injury. Can the police officer bring a claim for nervous shock? The Supreme Court of NSW has considered this scenario in *Wicks v RailCorp* and *Sheehan v State Rail*.

David Wicks and Peter Sheehan were both police officers who on 31 January 2003 attended the scene of the Waterfall train derailment. At the scene they assisted injured passengers and moved the bodies of the deceased. Wicks also had an ongoing involvement in that part of his duties was to collect and return passenger's personal items. Wicks and Sheehan contend that they suffered nervous shock as a consequence of their involvement and commenced proceedings against RailCorp and the State Rail Authority of NSW respectively (the liabilities of State Rail now vest in RailCorp).

In NSW claims for nervous shock or pure mental harm are governed by the Civil Liability Act 2002. Section 30 of the Act specifies who can bring a claim and provides that a claimant is not entitled to bring a claim for damages unless:

- the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or
- the plaintiff is a close member of the family of the victim.

Section 32 of the Act sets out when a duty of care is owed in claims for pure mental harm and provides that no duty of care is owed "unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken." The "circumstances of the case" include whether or not the mental harm was suffered as the result of a sudden shock, or whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril.

In this case the real issue for the Court was whether or not the police officers had witnessed passengers being put in peril. Associate Justice Malpass commented in his judgment:

"There is no identification of any particular victim. The highest point of the evidence is the seeing of certain unknown and anonymous passengers who were already dead or injured or who may have been at risk of their condition further deteriorating. In my view, the evidence does not demonstrate that either of the plaintiffs witnessed any passengers being put in peril."

In these circumstances the police officers' claims failed.

It will be interesting to see if the police officers take their case further. We suspect that they might although given the state of the law in NSW they will have difficulty in succeeding in their claims. If the claims are successful the floodgates will undoubtedly open and rescuers will be entitled to bring claims for nervous shock where they have sustained psychiatric injury after seeing the aftermath of an accident.

No Compensation Where Injury Arose From Breach of Employer's System of Work

An employer operated an abattoir in Queensland. The employer was a self-insurer for workers compensation.

The system of work for sharpening and carrying of knives (the "Policy") had been drawn to the worker's attention on a number of occasions and he had executed documents indicating he had read the Policy and was aware that he was required to observe it.

The worker had his own routine for sharpening his knife. He kept a knife sharpener in his locker. The worker concealed his knife in his pocket and took it into the locker-room against the Policy. On his way back from the locker-room he swung his arm and cut the nerve in his hand. The worker brought a claim for compensation.

Section 130 of the Workers Compensation and Rehabilitation Act, 2003 (Qld), states that an employer may reject a claim if the worker's injury is caused by the "serious and wilful misconduct" of the worker. A Magistrate held that the injury was caused by wilful misconduct but not "serious and wilful misconduct". The employer's first appeal to an Industrial Magistrate was unsuccessful. The employer then appealed to the Industrial Court of Queensland.

Both parties accepted the worker's conduct in taking the knife to the locker-room was wilful misconduct. The company's Policy was clear and enforced.

President Hall noted the requirement that the misconduct must be "wilful" adequately protects injured workers who might otherwise lose everything because of a momentary lapse into carelessness. The President considered where a worker appreciates the possibility of dangers or factors which might enlarge the danger such findings were may be sufficient to justify the characterisation of the wilful misconduct as "serious".

The employer had a requirement to carry knives in a pouch. It was obvious to carry a knife in a pocket was accompanied by the risk of serious injury. The President noted the worker wrapped the blade in paper as evidence that he was appraised of the risk of injury. At the first hearing the worker also conceded he had carried the knife with the blade upwards because otherwise the knife would pass through his pocket and cut his leg.

The Court was of the opinion the worker was not complacent about the risk. The worker was complacent about his capacity to manage the risk which goes to the seriousness of the failure to observe the employer's system of work.

The worker argued there was inconsistent enforcement and compliance with Workplace Safety Procedures. The worker argued that some supervisors failed to discharge their responsibilities by enforcing the employer's Policy. However the Court did not consider any alleged failure to enforce the Policy led the worker to be unsure whether the employer's system of work was a "paper" policy or a real policy.

The Court noted employers are required to develop systems of work which will safeguard not only the cautious and the alert, but the foolhardy and the distracted. Whilst such systems may be tedious and time-consuming or inconvenient, the temptation of a more convenient course is no excuse.

The President was satisfied the worker's injury was caused by serious and wilful misconduct and the employer's appeal was allowed.

This decision sends a timely reminder to employers and employees that safety policies and regimes should be adhered to by employees as a deliberate failure to comply with the safety policies may result in a disqualification for that employee to any workers compensation benefits should that employee sustain an injury whilst performing an activity in breach of the safety policy.

Employers should remember that their safety policies need to be real policies and not just "paper" policies which are not enforced by the managers and supervisors. A breach of a policy that is not enforced is not likely to result in a finding of serious and wilful misconduct.

Employee's Access to Insurance Doctor's Notes

An employee allegedly suffered an injury at work and lodged a claim for compensation. For the purposes of the workers compensation claim, the worker underwent a medical examination at the request of the legal representative of the employer.

The worker ultimately lost his claim. He requested a copy of his medical records held by the medical practitioner who performed the examination on behalf of the insurer. This included all hand written notes made by the doctor during the examination.

The National Privacy Principle 6.1(e) provides that if an organisation holds personal information about an individual, it must provide the individual with access to the information if requested by the individual. However, there is an exception if the information relates to existing or anticipated legal proceedings between the organisation and the individual and the information would not be accessible by the process of discovery in those proceedings.

The Privacy Commissioner determined that the medical practitioner could not rely on legal professional privilege to withhold the notes from the worker as the substance of the information sought by the worker had already been provided to the court.

Employers and insurers should be aware their letter of instruction and information given to a medical practitioner may also be required to be produced to an employee who makes an application for his personal information.

Claims By Workers Compensation Insurers Against Motor Accident Insurers May Be a Thing of the Past and There Has Been a Shake-Up in the Management of Motor Accident Claims

On 5 December 2007 the New South Wales Government passed the *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Act* which will come into effect on days to be announced by proclamation.

There are a number of significant changes affecting motor accidents claims. Perhaps one of the more significant changes is the power granted to the Motor Accidents Authority to enter into arrangements with one or more licensed insurers under the Workers Compensation Act, 1987, for the payment by the Motor Accidents Authority on behalf of licensed motor accident insurers of amounts required to be paid by motor accident insurers by way of the indemnity referred to in Section 151Z of the Workers Compensation Act, 1987.

Where workers are injured on their way to work in motor accidents and the worker was not at fault, the workers compensation insurer would bring a claim against the motor accidents insurer to seek to recover payments made. The recovery is under section 151Z of the Workers Compensation Act, 1987.

The introduction of the new provision in the Motor Accidents Act will ultimately result in a scheme where motor accident insurers through the Motor Accidents Authority will make a lump sum payment to the Nominal Insurer in the NSW Workers Compensation scheme to account for the recovery potential of all 151Z claims, and thereby eliminate the need to bring claims against motor accident insurers.

This will result in a significant saving in legal fees, and remove the need for litigation to recover payments from motor accident insurers under section 151Z of the Workers Compensation Act.

The legislation also includes a number of substantive changes for motor accident claims which include:

- Parties to a claim will be required to participate in a settlement conference and exchange offers of settlement before

assessment of the claim by a Claim Assessor.

- Parties will be required to exchange all documents on which the parties propose to rely for the assessment of the claim prior to the settlement conference.
- Parties must participate in a settlement conference and make an offer of settlement within 14 days after the settlement conference concludes.
- Claims Assessors will have authority to impose a costs penalty on a party in an assessment of up to 25% (imposed by increasing the cost to be awarded against the party, or decreasing the cost to be awarded in favour of the party, by up to 25%), where a party has failed without reasonable excuse to participate in a settlement conference or has failed to make an offer of settlement as required, or where the party has failed without reasonable excuse to provide a copy of a document before the settlement conference.
- The introduction of the concept of payment of loss of wages by motor accident insurers on an interim basis in cases of financial hardship.
- Amendments to the Civil Procedure Act to enable the Court to make an award of damages for economic loss in a motor accident claim on a provisional basis if the award is necessary to avoid financial hardship.
- The status of medical assessments is elevated so that any medical assessment certificate is conclusive evidence as to the matters certified in any Court proceedings or in any assessment by a Claim Assessor.
- A prohibition on claims assessors from taking into account documents that have not been exchanged by the parties unless the assessor determines that the probative value of the document substantially outweighs any prejudicial effect it may have on another party.
- A Claims Assessor will be able to make an assessment of costs when an award of damages is made including costs for legal services and fees for medico-legal services.
- Compensation for economic loss will be payable for the first 5 days of loss of earnings. Previously compensation was not payable for this period.

The changes are substantial. They attempt to refine processes to ensure that claims are expeditiously dealt with, informal dispute resolution techniques are implemented which will result in substantial cost savings, and ensure both claimants and insurers adopt a realistic approach to settlements and exchange of information to allow proper assessments, otherwise, cost penalties may apply.

An Employee Shoots Another Employee! Can The Employer Be Liable?

The interaction of employees in the workplace can result in confrontations between co-workers. Confrontations can escalate. A failure to take action to properly deal with employees involved in conflict can lead to serious consequences for an employer.

The NSW Court of Appeal has recently considered a claim brought by an employee against his employer after he was shot by a co-worker outside work premises.

Mr Pavkovic was a stonemason and was employed by Gittani Stone Pty Limited ("Gittani Stone"). He was shot 3 times by a Mr Le, who was also a stonemason employed by Gittani Stone. Pavkovic was Serbian and had been displaced from Croatia in the early 1990s and arrived in Australia in October 1998 and commenced employment in February 1999. Mr Le commenced employment around Christmas 1999. Gittani Stone had approximately 10 people working in the factory. The owners of the company worked in the business. After Le commenced employment there were a number of incidents at the workplace involving Le and it was the employer's lack of response to these incidents that was alleged to be the negligence that caused Pavkovic's ultimate injury when he was shot 3 times by Le.

Le had been involved in a number of altercations with various work colleagues. In April and May 2000 he had an altercation with Pavkovic in which he committed an unprovoked assault, punching Pavkovic in the head. Le also picked up a heavy bar with the apparent intention of striking Pavkovic, but others intervened. In finding out about the events, the owner, George Gittani, told Le and Pavkovic that if they did something similar again they would have to leave the factory and discouraged Pavkovic's suggestion of involving the police. There was no meaningful disciplinary action taken.

In December 2001 Le and Pavkovic had another altercation. Le screamed at and verbally taunted Pavkovic for 2 consecutive days. When Pavkovic reproached Le for his conduct, Le became angry, swore at Pavkovic and began aggressively shaking his clenched fists at him. The foreman on site told Pavkovic that Le was a sick man and counselled Pavkovic to stay away from Le. Jason Gittani then asked Pavkovic and Le to shake hands. Le left the workplace without permission. A fellow worker heard Le say "I will be waiting or I'll be outside". After work, Pavkovic went to his car which was parked on the street outside the factory, to change his boots, and at that point Le drove up and shot Pavkovic 3 times and seriously injured him.

Pavkovic sued his employer for failing to take action to discipline and/or terminate Le. A District Court Judge found in favour of Pavkovic and ordered the employer to pay damages.

The employer appealed to the Court of Appeal. The employer argued that it had no duty of care to protect Pavkovic from an unforeseeable extreme act of violence committed outside the hours of employment on a public street. The real questions for the Court of Appeal in *Gittani Stone Pty Limited -v- Pavkovic* was what was the scope of the duty of care owed by the employer, was there a breach of that duty and was the kind of injury suffered foreseeable.

Pavkovic argued that Mr Le had shown himself to be a violent, irrational man and it was reasonably foreseeable that he might inflict serious harm on his co-workers, hence it was negligent for the employer to have failed to take appropriate steps to prevent this occurring. It was argued that the steps which should have been taken should have including dismissing Le, thereby removing him from the workplace.

Justice Ipp in his judgment noted that:

> *"An employer has a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards."*

Justice Ipp confirmed that the relationship between employer and employee may give rise to a duty on the employer to take reasonable care to protect the employee from the criminal behaviour of third parties. Justice Ipp concluded that it was reasonably foreseeable that Le for some irrational and unpredictable reason might take it into his head to assault a co-worker violently, and it was reasonably foreseeable that such an assault might occur after hours and outside the workplace. On that basis the employer, by continuing to employ Le in the workshop, rendered it unsafe. Accordingly, the fact that the injury occurred after working hours and outside the workplace was irrelevant.

In the case, the question of foreseeability was largely determinative of whether the employer was negligent and whether the employer was liable for the kind of damage that resulted from the negligence.

Justice Ipp concluded that the first assault should have made the employer aware that Le was a serious danger to his co-workers. He had threatened serious injury and had to be restrained. Justice Ipp concluded that it was reasonably foreseeable that Lei might use extreme violence. In essence Justice Ipp concluded that Le should have been dismissed by his employer, and failing to do so resulted in negligence and the shooting was a foreseeable consequence of the negligence.

At the end of the day, the Court of Appeal held that the employer breached its duty of care in failing to dismiss Le from employment. But why does it follow that the failure to dismiss Le caused the injury? The Court concluded that on the balance of probabilities the shooting would probably not have occurred had the employer not breached its duty. It was not necessary that the employer foresaw that there was a risk of a shooting, rather it was necessary to determine whether there was a foreseeable risk of the kind of damage that resulted and in this case there was. The answer for the employer was to dismiss the employee.

A most interesting decision. A failure by an employer to adequately discipline and deal with a worker and in fact dismiss a worker was seen to be negligent and the cause of an injury suffered by a worker as a result of the criminal actions of a co-worker.

The case has serious ramifications for employers. The duty to adequately deal with confrontation remains a real issue. If adequately dealing with confrontation means that an employee should be dismissed, the failure to dismiss the employee can amount to negligence, and if another employee is injured by a co-worker who was not dismissed (even if the injury occurs outside employment hours), the end result may be a substantial damages award against the employer.

Attempting to smooth matters over will not be the answer when more significant disciplinary action is required. Employers must ensure that they carefully consider the impact of all confrontations and adequately deal with the issues and where necessary remove employees. No doubt a natural flow on of this decision will be similar claims where employees are exposed to harassment and discrimination.

OH&S Roundup

Crane Collapse Leads to $180,000 in Fines

Dubel Pty Limited was engaged to carry out work on the Jindabyne dam wall situated on Kosciusko Road, Jindabyne. An employee of the company was operating an 82 tonne mobile crane to lift an elevated work platform. Whilst the platform was being lifted the crane became unstable and toppled over, causing minor injuries to Mr Murphy, the driver, who was trapped in the crushed cabin of the crane for more than an hour. A dogman was exposed to a risk of injury when the crane toppled. The dogman was not an employee and fortunately was able to avoid injury.

WorkCover prosecuted Dubel for breaches of the Occupational Health & Safety Act for failing to ensure the health and safety of employees and other persons who were not employees. There were two charges. The company pleaded guilty.

The company had an integrated management system that incorporated occupational health and safety and rehabilitation, environmental, industrial relations training and quality management. The company was certified to ISO9001:2000. The OH&S system was certified to IS4801-2000. The company had pre-qualified to undertake substantial public infrastructure projects. The company had been involved in various committees where occupational health and safety issues in the construction industry were discussed frequently and had utilised the services of the MBA NSW to conduct unannounced site inspections to review safety performance.

The Court noted that the starting point for consideration as to penalty is the objective seriousness of the offence. The true measure of the penalty lies in the nature and quality of the offence. The question of foreseeability is relevant to the assessment of the seriousness of the offence and whilst the reasonable foreseeability of an accident may not be relevant to the question of liability under the Act, the degree of foreseeability is a significant factor to be taken into account when assessing the level of culpability of a defendant.

The absence of foreseeability does not necessarily render the offence as being nominal or not serious. The Court noted that the damage and injury suffered is also relevant in the context of the gravity of the offence. Finally the Court noted that issues of general and specific deterrence were relevant in sentencing.

The crane collapse appeared to have resulted from the crane over-balancing, where the weight of the load was not properly assessed and it was concluded this gave rise to a serious risk of injury. The crane had an in-built load indication system and although the crane driver was an experienced driver, he only received one day's instruction from the supplier of the crane.

A number of employees had not made reference to the identification plate on the platform which included details of the gross weight. The load of the platform was assessed at 4.1 tonnes when the actual weight was 10.2 tonnes.

The Court held that if the workers had been properly instructed and trained they could have identified the correct weight of the platform. The lack of information and training highlighted the company's failure to carry out a risk assessment despite the OHS management system requiring hazard identification and risk assessment.

In this case the Court held there was a significant breakdown in the system as no proper assessment of the risk occurred. In those circumstances the Court determined that although the maximum penalty was $825,000 for each offence the appropriate fine would be $180,000 for both offences after the Court discounted the fine by 25%.

A significant penalty for what could have been a serious accident, but once again the case serves to remind all that it is sufficient for there to be a significant risk to attract a substantial fine.

$200,000 Fine for Fatality. An Extensive Safety System is Not Always The Answer

Consolidated Extrusions Management Pty Limited were recently fined $200,000 for a breach of the Occupational Health & Safety Act arising as a consequence of a fatality to one employee and an injury to another when metal pipes in racking fell from the racking.

The case serves as a reminder that a comprehensive paper occupational health and safety system is simply not enough.

The comments of the Court played loud and clear when the Court assessed the company's safety system. The judge noted:

> *"It has to be observed that all the time and money in the world, spent on the production and implementation of elaborate, expensive, written safety systems in which employees from the most junior to the most senior are extensively trained, is simply wasted, if proper attention is not paid to something as fundamentally and obviously unsafe, as bundles of metal rods weighing up to 500 kilograms, stored in a warehouse at a height on a rack system, when these bundles are able to slip off the racks if disturbed. The risk existed because the racks were not capable of ensuring that the heavy bundles stored on them, could not be knocked off or jolted off, when they were retrieved from those racks, or otherwise handled".*

In this case items had fallen off the racks previously. The Court noted:

> *"Despite the defendant's elaborate, expensive safety system, still the defendant had not effectively dealt with the problems which so obviously confronted it, given the racking system it had devised and implemented. Its safety systems plainly did not operate effectively in practice. And even when it engaged an expert to advise in relation to the racking system, the advice it sought was directed to the load-bearing capacity of the racks, rather than the propensity of heavy items being able to fall off those racks".*

In this case the Court determined that the company had failed to ensure that its operating personnel took the necessary practical steps to ensure that safety obligations were met. In this case a serious risk in the warehouse was recognised but not adequately dealt with.

The Court stated in this case:

> *"Quite incredibly, in the face of all of this evidence as to attention that the defendant generally paid to its safety obligations, this was particularly in relation to the safety of the racking system here in question, the evidence revealed that the defendant still failed to identify and deal with the very evident deficiencies of the various components of the racking system and how the work required to be undertaken in and around its vicinity was organised. This was so, even though the risk in question had earlier materialised, employees were known not to be abiding by the defendant's safety instructions".*

Once again employers need to be mindful that complex paper systems lead to obligations and those obligations must be carried out. Employers need to make sure that they do more than maintain a paper system. A proper risk assessment needs to be undertaken for all work undertaken by a company.

No doubt the case lends credence to the argument that it is sometimes better to spend money on personnel who can undertake risk assessments rather than spend money to engineer safety systems with the need for extensive documentation.

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