GD News

Gillis Delaney Lawyers

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Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Out Goes Work Choices And In Comes Fair Work

The Federal Government in late November introduced the *Fair Work Bill* into Parliament. The *Fair Work Bill* is a rewrite of industrial relations laws in Australia. Rather than amend existing legislation the Government has crafted a new piece of legislation which will replace the Workplace Relations Act. The *Fair Work Bill* has 613 pages and although it is a new Bill it contains many of the provisions in the old *Workplace Relations Act*. But there are significant changes.

The *Fair Work Bill* is subject to the same limitations as the *Workplace Relations Act*, namely that it will apply to constitutional corporations, although it is possible that the State Governments will refer their industrial relations powers to the Federal Government which would then permit the legislation to apply to all employers and employees in Australia. We will have to wait and see if this occurs.

The Bill is expected to pass the Senate in early 2009, possibly with some amendments, and commence operation on 1 July 2009 with some aspects commencing on 1 January 2010. The Bill is approximately half the size of the previous legislation and is easier to read.

The key changes are:

One Stop Shop For Industrial Relations - Fair Work Australia ("FWA")

FWA is a new independent statutory agency that will deal with disputes, provide advice for industrial disputes concerning industrial matters including bargaining, general protections, right of entry and stand down and unfair dismissal. It will have responsibility to approve and vary enterprise agreements, determine disputes, provide information and advice and ensure compliance with workplace laws, awards and agreements, facilitate collective bargaining and regulate unions and registered industrial organisations.

The Bill also includes a range of offences that are punishable by imprisonment of up to either six or twelve months, similar to the offences in the Workplace Relations Act and prosecutions will be brought before FWA. All current Australian Industrial Relations Commission members will be offered roles within FWA. There will also be the Fair Work Ombudsman, as also created by the Bill and its role will include monitoring and compliance, carrying out investigations and bringing legal proceedings, issuing compliance notices and educating employees, employers and organisations about their rights and responsibilities.

The Implementation of National Employment Standards ("NES") Specifying Minimum Standards from 1 January 2010.

Minimum standards relate to maximum weekly hours of work, the right to request flexible working arrangements, parental leave and related entitlements, annual leave, personal/carers leave and compassionate leave, community service leave, long service leave, public holidays, notice of termination and redundancy pay and provision of a Fair Work information statement. There will be a right for an employee to cash out annual leave by written agreement with the employer subject to retention of four weeks annual leave after cashing out. Employees with less than six

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months service will not be entitled to the minimum notice of termination prescribed by the NES.

Modern Awards

The Australian Industrial Relations Commission is in the process of making a series of modern awards generally along industry lines which will take effect from 1 January 2010. The awards are intended to supersede current Federal and State awards other than current Federal enterprise awards and greatly reduce the number of Awards. There will be four yearly reviews of modern awards which will be the primary form of change to the awards as scope to revoke or vary or change an award will be quite limited. There will be minimum wages in the awards which can be varied by determinations made by FWA. A high income employee - $100,000 per annum (indexed) may agree that a modern award not apply to the employee. The terms of the modern awards will deal with minimum wages, type of work performed, hours of work, rostering and breaks, overtime rates, penalty rates, annualised wage or salary, allowances, leave and leave loading, superannuation and consultation in the workplace.

Significant Changes To The Unfair Dismissal Laws and General Protection From Unlawful And Discriminatory Conduct.

Unfair dismissal laws will apply to all employees and employers covered by the proposed legislation. An employee will be able to bring an unfair dismissal claim if they have been employed by an employer for at least six months (or 12 months in the case of an employer who employs less than 15 employees). The laws will only apply to employees earning less than $100,000 per annum (indexed) and there will remain the right to dismiss employees because of genuine redundancy. It must be remembered it will not be a genuine redundancy if it was reasonable to redeploy the employee within the employer's enterprise.

Consultation regarding redundancy will be a requirement as consultation will be part of the modern awards that will apply to employees.

A claim for unfair dismissal will need to be lodged within seven days and FWA will determine claims by holding a conference, or a hearing, if there is a dispute about facts. The remedies for unfair dismissal will be reinstatement or compensation capped at 26 weeks of remuneration. FWA will have the power to permit the employer to pay compensation by instalments. FWA will not be entitled to include a component by way of compensation for shock, distress or humiliation or other analagic hurt caused by the person's dismissal. Any misconduct of the employee which contributed to the employer's decision to dismiss will require FWA to reduce the amount it would otherwise order by an appropriate amount on account of the misconduct.

There will be a small business fair dismissal code for employers with less than 15 employees and if the employer complies with the code, an unfair dismissal claim will not be available.

The existing laws relating to termination for discriminatory and other prohibited reasons are retained, however an employee will now have the right to seek an injunction from the Court to prevent an employer from taking action to terminate his or her employment for a discriminatory or prohibited reason. Employees will be entitled to bring claims for unlawful termination within 60 days of the termination.

There will be a restricted capacity to use lawyers and bargaining agents in unfair dismissal claims and permission will be required from FWA for the lawyer or agent to have the right to participate in the claim. FWA will have the capacity to make a costs order against the lawyer or paid agent where the lawyer or bargaining agent has encouraged the person to start or continue with the claim and it should have been reasonably apparent that the person had no reasonable prospects of success or where costs are incurred because of an unreasonable act or omission of the lawyer or agent.

Expansion Of Unions Right Of Entry To The Workplace

The Bill has substantially expanded the circumstances in which union officials will be entitled to enter a workplace. It is no longer necessary that employees be covered by an industrial agreement binding on that union for that union to enter the workplace. Union officials will have a right of entry to visit employees:

- to investigate breaches of industrial law, awards or agreements;
- to hold discussions with employees who are, or are eligible to be, members of unions; or
- to investigate breaches of occupational health and safety laws.

The union official will require an entry permit before entering the premises and the official must be a fit and proper person before being issued an entry permit. FWA will determine whether or not the union official is a fit and proper person. The union official will need to give the employer an entry notice during working hours, at least 24 hours but not more than 14 days before the entry.

The union official will have the right to inspect or make copies of any record or document related to a suspected breach, even where the record or document relates to non members of the union.

Entry notices will need to be given to both the occupier of the premises and the affected employer.

There are also provisions which will govern facilities that may need to be provided to union officials, such as meeting rooms and the like.

Major Changes To The Transmission Of Business Rules

There have been substantial changes to the transmission of business rules which will impact on a large number of commercial transactions. Effectively, outsourcing or in-sourcing of work from or to an employer can result in a transmission of business.

There will be a transfer of business if, within three months after the termination of an employee's employment the employee becomes employed by a new employer and performs the same or substantially the same work for the new employer and there is a connection between the old and new employer. A connection will exist if there is a transfer of ownership or use of assets, an outsourcing arrangement, an in-sourcing arrangement or if employees are transferred between related entities. The test will focus on the nature of the work performed by employees rather than looking at whether a business has been transferred. Significantly, all outsourcing or in-sourcing of work will result in industrial instruments which apply to the old employer transferring to the new employer.

New Rules & Procedures For Collective Bargaining Which Include A Requirement To Bargain In Good Faith

Enterprise agreements will be the way forward with the Fair Work Bill. There will be single enterprise agreements or multi enterprise agreements. The concept of Greenfield agreements will still exist, however there will only be union Greenfield agreements which will be between the employer and the respective unions relevant to a new business enterprise.

Employers will be required to notify employees of their right to be represented by bargaining representatives within 14 days of the employer agreeing to bargain or initiating bargaining. For union members the union will automatically become a bargaining representative in enterprise bargaining.

There are no formal rules for the bargaining process. Bargaining for an agreement can occur at any time.

Bargaining representatives must meet good faith bargaining requirements including:

- attending at and participating in meetings at reasonable times;
- disclosing relevant information in a timely manner;
- responding to proposals in a timely manner;
- giving genuine consideration to proposals and reasons for any response to the proposal; and
- refraining from capricious or unfair conduct that undermines the collective bargaining.

FWA will be able to make a bargaining order which can limit the number of bargaining representatives if there are too many representatives for employees and can require multiple bargaining representatives to appoint one of them to represent the others.

If negotiations break down, a bargaining representative can ask FWA to deal with the dispute, however FWA will only arbitrate the dispute if all the parties agree.

The enterprise agreements will have permitted and prohibited content and there will be a requirement that the agreements contain a flexibility term which enables the employer and employee to agree on arrangements which vary the effect of the agreement.

The maximum period for an agreement will be four years.
An enterprise agreement must not contravene an NES and must not contain:

- discriminatory terms;
- provisions for bargaining services fees;
- provisions which exclude or modify unfair dismissal laws;
- terms which are inconsistent with the Fair Work Bill;
- terms that provide for right of entry inconsistent with the Fair Work Bill's right of entry.

Employers will be entitled to request employees to approve an agreement by voting for it. For a period of seven days before the vote employees must be given a copy of, or access to the agreement. All employees must be notified that the vote will occur. It will be passed by a majority vote.

Once an agreement has been reached it must be approved by FWA and FWA must be satisfied that there has been a genuine agreement and the agreement passes a "better off overall test".

The collective agreements will need to be more beneficial to employees than relevant awards.

Industrial Actions

The Bill retains many of the procedures in the Workplace Relations Act, however introduces extensive new rules regarding payments made to employees where they have imposed partial work bans or overtime bans and has removed the concept of the bargaining period before protected industrial action will be permissible.

There will be three types of protected industrial action:

- Employee Claim Actions;
- Employee Response Actions; and
- Employer Response Actions.

Employees will no longer bear the onus of proof in showing that action is taken on the grounds of health and safety rather than industrial action.

Conclusion

There are substantial changes on the way. Some of the changes are no more than six months away. Businesses need to ready themselves for the change.

We look forward to working with our clients to meet the challenges that lay ahead.

Damages For Defective Design In Building Works

The terms of engagement of an engineer or an architect when they are engaged to design a building are extremely important as they will ultimately impact on the calculation of damages where there has been a breach of the agreement by the engineer. Damages for breach of contract are designed to put the party in the position they would have achieved if the contract had been performed absent of a breach. So how do you assess damages for defective building works attributable to design defects?

A recent decision of the NSW Court of Appeal in Roluke Pty Limited & Anor v Lamaro Consultants Pty Limited & Anor provides guidance on the calculation of damages for a breach of a contract where an engineer failed to carry out his obligations under a contract.

Lamaro was a consulting engineer. He was provided with architectural plans and engineering plans for commercial premises with a concrete roof with a topping slab and waterproof membrane. The roof was to be used for parking. Lamar submitted a quotation noting that he would design and draw items as shown on the preliminary architect's drawings and would provide the architect with structural information, column sizes and locations, slab thickness and setdowns, beams etc, sufficient to produce working drawings on time.

The quotation was accepted. At a subsequent site meeting discussion took place between the owners' representative and Lamaro where it was pointed out that the roof slab was designed as a detention basin and it had to have various functions which included the parking of cars, traffic and pedestrian access, detention of the stormwater and the enclosing of the workshop below. Lamaro suggested that he could design an extra thick slab that would adequately meet all of these functions including waterproofing and there would be no need for a topping slab or membrane. That was said to be the best way to proceed. The design subsequently proceeded on that basis.

After erection of the building cracks appeared in the slab and water penetrated the slab. A waterproof membrane was applied which then failed and then another membrane was applied which again failed. Proceedings were then commenced in the Supreme Court by the owners claiming damages for the engineer's failings in design.

The original Trial Judge accepted the opinion of experts that a slab could be properly designed to waterproof without the incorporation of a membrane and topping slab however there would need to be adequate F72 reinforcement in accordance with Australian Standards and there was a need for minimal restraint by columns and walls and the slab needed to be post-stressed and contain an appropriate waterproofing additive. The design of Lamaro was defective because there was no concrete additive the slab was not post-stressed, the design was restrained by columns and perimeter walls and the difference between the dimensions of the beams and dimensions of the slabs was so great as to result in differential shrinkage contributory to cracking. In addition there was insufficient reinforcement specified.

The damages claimed included rectification costs for repairs to cracks in the slabs, as well as a claim for the diminution in the value of the building as the owner contended that purchasers would pay less for a building which had been repaired compared to a building which had no defects. A valuation report was tendered to support this argument.

So what was the contract and what was the measure of damages for a breach?

Damages for breach of contract will put a person in the position that they would have been in as if the contract had been performed.

The owners argued that the contract with Lamaro Consultants was to produce a result, namely to provide drawings for the construction of a waterproof building without a membrane and topping slab. The measure of damages was said to be the cost of providing a building which conformed to the contract. Such a building would require the construction of a steelwork roof over Level 3. On this basis the claim amounted to about $2.3 million including the cost of past repairs.

The engineers argued that the contract was for the provision of professional services for the design of waterproof slabs. The measurement of damages was the amount required to put the owners in the same position as if they had not sustained the injury for which damages had been claimed. On this basis the owners were entitled to the cost of installation of a membrane, the cost of past and future repairs and compensation for business interruption. It was submitted that the appropriate award was $539,000.00.

For the purposes of identifying the proper measure of damages the Trial Judge distinguished between a contract to produce a result and a contract to exercise due skill and diligence in the performance of work. The Trial Judge saw the contract as one for professional services which required Lamaro to exercise due skill and diligence in performing structural design work which initially included the design of Level 3 as a slab which was made waterproof by the incorporation of the membrane and topping slab. The Trial Judge concluded on the evidence that had the slab been built as originally contemplated it would have been waterproof for about 10 years without repairs and he allowed damages to deal with the cost of repairs to take the waterproofing of the slab to 10 years which in the Judge's opinion required one replacement of a sound membrane. The owners appealed.

The Court of Appeal noted:

> *"It is, however, important to observe that the assessment of damages in a case of a defective design cannot be resolved simply by characterising a particular contract as one to achieve a result or as one to exercise professional skill in designing a structure. In a sense all contracts are to achieve a result, even if the result is a design for a structure that is the product of reasonable professional skill and care. The terms of a particular design contract may require the designer to achieve a specific result. In any event, damages for breach of contract cannot be properly assessed unless the precise nature of the contractual obligations and the breach have been ascertained. "*

The measure of damages for failure to exercise professional skill in a particular case may be *"the costs involved in getting to a particular result".* Everything must depend on the terms of the contract and the circumstances of the case.

The Court of Appeal also noted that

> *"loss flowing from negligent engineering design may fall into at least three categories. First, simple repairs may be required not involving any work which initially should have been specified had there been proper design. Second, work may involve performance of structural work which should have been included in the initial design, and would have involved additional original construction costs, had there been proper design. Third, work may involve both the above categories. In the first category, loss is the total repair cost. However, in the second and third category, in determining actual loss suffered, regard must be had to the additional construction costs which would have been incurred had there been no negligence in the initial design. Failure to deduct the original additional construction cost from the present cost of performing that and other work would be to inflate the loss beyond that actually suffered."*

The measure of damages recoverable by the building owners for breach of a building contract is the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by breach. In this case the Court of Appeal noted that:

> *"to award damages to the owners on the basis that Lamaro promised to use reasonable skill and care to design a waterproof slab with an indefinite life would be to overcompensate the owners…and give the owners what they have not lost."*

Lamaro originally quoted to provide design for a building with a slab with a membrane. The oral variation to the agreement did not result on him taking on a new contract or a variation to the existing contract. He was obliged to design a building with the characters consistent of a building with a properly designed slab with a waterproof membrane and topping. The Court of Appeal noted that the expert evidence tended to the view that a slab with a membrane and topping appropriately applied could have a life expectancy of 20 years. Accordingly, the damages assessed should be based on the costs to provide a roof which would remain waterproof for 20 years, rather than the 10 years originally assessed by the Trial Judge.

In relation to the claim for the diminution in value of the property, the Court of Appeal rejected that claim not on the basis that it was not a head of damages that could be recovered but rather that the expert evidence relied on did not contain evidence that supported the valuations proffered by the expert. The expert's report did not explain why potential buyers of the premises would be likely to pay less because the particular building had defects, notwithstanding that the defects had been satisfactorily repaired. The report did not make reference to the expert's experience with potential buyers of commercial buildings of this kind or how his experience led him to believe there would be a difference in price. The Court of Appeal concluded that the valuer's report was of no probative value on the issue and the owners had not discharged the onus resting on them to prove that they had suffered a loss in the form of a diminution in value.

In this case the owners contracted with the engineer to provide a design that incorporated a roof with a waterproof membrane. The type of membrane was not specified by the architect and left to the engineer. In those circumstances the owner could expect that a properly designed roof with a waterproof slab and topping could have a life of up to 20 years based on expert evidence. The owners did not receive a building with these features as a consequence of the negligent design. They were entitled to compensation to accommodate any costs that would be incurred by them in achieving this outcome and those costs would include the costs of failed repairs in the past and the costs of rectification. In addition, if there was a diminution in value in the property by reason of the property having defective repairs, the owner would be entitled to compensation for that loss (although in this case the evidence did not stack up on this issue).

However, there will be limitations to the damages awarded. If additional costs would have been incurred in achieving the result that was bargained for but those additional costs were not incurred due to the deficient design, the damages recovered by the owner from the designer will be reduced by the amount which the owner would have to have paid to carry out the necessary works which were not undertaken. The question will then be - What would the additional costs have been to carry out the works if the works were properly designed? - and if those costs have not been incurred, they must be deducted from the damages awarded to the owner.

The terms of contracts are crucial in an assessment of damages for breach of contract to determine what was actually bargained for. Damages are designed to put a person in the position that they would have been in if the contract had been performed without any breach. In this case the owner received compensation of approximately $1 million predominantly

comprised of rectification costs and failed repair costs. The owner did not benefit from a damages claim to achieve a result that was better than what he bargained for, a concrete roof with a membrane and concrete topping slab.

No Recollection Of Accident- Can They Still Win?

In a personal injury claim sometimes the injured person will find it difficult to produce evidence to identify precisely what caused their injuries. Courts are sometimes left to draw inferences from the facts as to what caused an accident. However, there are limits to what inferences can be drawn.

In addition, the actions of the persons injured may contribute to their demise and their negligence will result in a reduction of damages. The intoxication of a person is one factor which may contribute to an accident and in NSW the Civil Liability Act, 2002 in New South Wales provides a regime which can lead to a mandatory reduction in damages as a consequence of intoxication contributing to an accident.

The NSW Court of Appeal in *Jackson v Lithgow City Council* has recently considered a claim which provides some guidance on the interaction between section 50A of the *Civil Liability Act, 2002* and the court's right to draw inferences from facts.

Jackson was found lying unconscious in a concrete drain in a park in Lithgow shortly before 7am on a winter's morning with serious head injuries, a head injury, fracture to his thoracic vertebra, a fractured wrist, cuts and abrasions. He had taken his dogs for a walk at 3.30am whilst intoxicated. He had no memory of the events in question or the events from the middle of the day before. No-one saw the accident. There was no direct evidence as to the position of his body in the drain when he was found. He sued the local council having care and management of the park alleging that he had fallen over the low, unfenced retaining wall of the drain and down approximately 1.5 metres onto the concrete drain. A District Court judge found in favour of the Council. The District Court Judge held that the Council owed someone in the position of Jackson walking in the park at night, a duty to exercise reasonable care for his or her safety and that such duty was breached by the Council failing to take steps to avoid the risk of foreseeable injury to someone falling over the wall at night. However Jackson had not proven how he fell and came to be injured as the evidence did not permit a conclusion that he had stumbled over the low wall and fallen down to the concrete. On this basis Jackson had not proved his case and he failed in the claim. Jackson appealed.

The Court of Appeal did not agree with the trial judge. The Court of Appeal noted that when considering facts it is appropriate to draw inferences as to what occurred. As the Court of Appeal noted

> *"… you need only circumstances raising a more probable inference in favour of what is alleged … where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is [a] mere matter of conjecture … . All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than on the balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood.'*

The law does not authorise a Court to choose between guesses where the possibilities are not unlimited on the basis that one guess is more likely than another, there must still be facts that form a reasonable basis for a definite conclusion affirmatively drawn of the truth.

The Court of Appeal noted that the District Court judge had found that the drain and the presence of the wall were apparent during daylight but not readily apparent during the night and that a sober person walking through the park at night and taking reasonable care for his own safety would not have seen the wall or the drop, if approached from the high side. The Council argued that drawing of an inference that Jackson fell over the wall after approaching the wall from the high side was entirely speculative as other scenarios were available, such as Jackson falling off the wall while standing on it, Jackson falling into the drain from the side having tripped or stumbled or after being assaulted. It was also argued that there was speculation as to whether the accident occurred before or after daylight.

The Court of Appeal noted that as Jackson had left home at 3.30am to take the dogs for a walk it was unlikely from human experience that he remained out in the chill of the Lithgow winter morning for somewhat over 3 hours before falling over the wall. It was far more likely that if the Court accepted he fell over the wall that the fall had occurred in the dark, some not too lengthy time after leaving home.

The Court of Appeal also noted that the extent of the injuries also appeared to be more consistent with a significant fall of 1.5 metres rather than stumbling into the shallow drain. The concept of falling off the wall having been standing on it was also seen as less likely due to the position of blood from the base of the wall and the impressions of the ambulance officers concerning the cause of the fall. These factors lent credence to the drawing of the inference that Jackson tripped over the wall.

Accordingly, the Court of Appeal found that it was appropriate to draw an inference that the injuries were caused by tripping over the wall and therefore there had been negligence.

Nevertheless, the trial judge had also found that evidence established that Jackson when he left the house was at least moderately intoxicated. He had consumed 6 or 7 beers at licenced premises and then more beers at his house before he went on a walk.

Section 50 of the *Civil Liability Act, 2002 (NSW)* provides that where it is established that a person injured was intoxicated at the time of injury to the extent that his capacity to exercise reasonable care and skill is impaired, then no damages are to be awarded for the injury unless a Court is satisfied that the injury is likely to have occurred had the person not been intoxicated. The trial judge then concluded that once it was established that Jackson was intoxicated it was then up to him to establish that the accident would have occurred to a person not intoxicated.

Section 50 provides that a Court is not to award damages in respect of a liability unless satisfied that the death, injury or damage is likely to have occurred even if the person had not been intoxicated. If this is proven then it is presumed that the person was contributorily negligent unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of death, injury or damage. Where there is a presumption of contributory negligence the Court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25% or a greater percentage determined by the court to be appropriate in the circumstances of the case.

Effectively there is a statutory presumption that there is an operative contributory negligence of at least 25% when a person's intoxication contributes in any way to the cause of the injury. The Court of Appeal noted on all the evidence it could not conclude that there was no contribution of the intoxication to the fall over the wall. The Court of Appeal did not believe that a reduction greater than 25% should apply in this case especially as Jackson fell over a 1.5 metre wall above a concrete drain which was unlikely to have been seen by a sober person. Accordingly Jackson's damages were reduced by 25%.

At the end of the day Jackson recovered more than $200,000.00 for his injuries and the case serves as a reminder that just because the injured person cannot recall what happened they will not lose their case if there are compelling inferences that can be drawn from the available facts as to what caused the injury and those inferences reflect a scenario that establishes negligence.

You Can't Keep Damages And Workers Compensation Payments

In New South Wales the *Workers Compensation Act, 1987* provides a regime where workers injured at work or in a journey to and from work receive workers compensation payments including compensation for lost wages, medical expenses and lump sum compensation for work injuries even if the employer is not negligent.

In some situations the employee's injuries are caused by the negligence of a person or entity other than the employer. This gives rise to a damages claim against that person or entity and workers compensation payments are likely to be paid before the damages claim is assessed. The injured worker is not entitled to retain both damages and the compensation paid. A regime has been established by section 151Z of the *Workers Compensation Act, 1987* which requires that the negligent party must reimburse the workers compensation insurer for the benefits it has paid by deducting the workers compensation from the damages payable.

However, there are limits to the refund which is required.

The refund of workers compensation is limited to the actual damages payable by the negligent party. If workers compensation payments have exceeded the damages awarded, the negligent party will only be obliged to refund to the workers compensation insurer the damages leaving a shortfall. In addition section 151Z(4) of the *Workers Compensation Act* provides that where the damages awarded include amounts for loss of future earnings or future incapacity or for future expenses the

worker is not liable to repay the workers compensation payments out of those amounts.

Effectively, the workers compensation insurer can only recover compensation payments limited to the damages payable by the negligent party less that portion of the damages attributable to future economic loss and future expenses.

The NSW Court of Appeal in *Mohmoud Tamerji v Hou Ihn Rhee* recently considered a claim where a worker sought to further limit the amount of workers compensation that would be deducted from his damages by arguing that the refund should be limited to the damages recovered by the worker for each category of damages that was comparable to a corresponding component of the workers compensation payments. It was argued that the medical expenses that could be refunded should be limited to the allowance for past medical expenses in the damages and the refund for weekly payments of compensation should be limited to the allowance for past economic loss in the damages award. Refunds for any lump sum compensation impairments should be limited to any allowance for non-economic loss (pain and suffering). The Court of Appeal rejected this argument.

The Court of Appeal confirmed that when a worker recovers any amount of compensation under the *Workers Compensation Act* for an injury and later recovers damages in respect of that injury from some person other than the employer, the total amount of damages that the worker recovers is a fund from which the worker is liable to repay the total amount of the compensation that a person has paid in respect of the injury, subject to the limitation in section 151Z(4) which provides that the allowances for future economic loss and future medical expenses are not to be included in the amount that may be refunded.

The Court of Appeal also confirmed that where there was a finding of contributory negligence which reduced the award of damages, the amount under section 151Z(4) which will not be applied to any refund of compensation payments is the amount allowed by the Court under those heads of damages after the deduction for the contributory negligence.

At the end of the day provided a worker has recovered damages from some other person, the workers compensation benefits that have been paid must be refunded subject to the limitation of section 151Z(4). If a worker recovers damages for items for which workers compensation benefits are not payable, for example claims for domestic assistance and future domestic assistance, the damages recoverable from these heads of damages will be available for and applied to the refund of workers compensation payments as these damages will simply be seen as a fund from which compensation must be refunded.

The underlying concept is that a worker should not be entitled to both damages and workers compensation payments. The damages are designed to compensate the worker for his loss and if he were entitled to keep his workers compensation payments as well he would be compensated twice for his injuries.

When calculating the workers compensation refund there is no matching of the heads of damages to the types of compensation payable. However, the refund will be limited to the damages assessed less any allowance for future expenses and future economic loss.

Big Win For Brain Damaged Plaintiff

An injured person who sustained brain damage at birth has recently been awarded damages totalling $7,281,319.00 by the NSW Court of Appeal (Kaled Elayoubi BHNF Taman Kolled v Dr Gabriel Zipser; South Western Sydney Area Health Service and Northern Health).

Kaled Elayoubi was born on 13 October 1984 at Bankstown Hospital, which was managed by the South Western Sydney Area Health Service. Elayoubi suffered deprivation of oxygen whilst he was being delivered as a result of his mother suffering a ruptured uterus. As a consequence Elayoubi suffers from spastic quadraplegia and intellectual disability. Dr Zipser was a visiting medical practitioner at Bankstown Hospital and was responsible in part of Elayoubi's mother's care. Elayoubi was his mother's fifth child; her fourth child, Wosif, was delivered by caesarean section in 1978 at the Preston and Northcote Community Hospital for which the third defendant to the proceedings is responsible. The doctors at Preston Hospital were said to have been negligent as they had not advised the mother of the risks she faced if she were to have another child by vaginal delivery as a consequence of the nature of the caesarean performed.

Elayoubi commenced proceedings in the Supreme Court in 2001 and the claim ultimately proceeded to hearing in 2006. Elayoubi was unsuccessful in his claim before the trial judge and appealed. Elayoubi had been successful at trial in establishing that all three defendants were in some respects negligent however the trial judge was not satisfied that if this had

not been the case it would have made any difference.

The evidence before the Court demonstrated that at some stage on the evening of 12 October 1984 Mrs Kolled had her first contractions and she arrived at the labour ward at Bankstown Hospital at 11:00pm. She was examined and it was determined that she should undergo a caesarian section which took place at 12:25pm.

The issues before the Court of Appeal were:

- Whether Preston Hospital had warned Mrs Kolled of the nature of the procedure undertaken at that hospital and its ramifications for future pregnancies;
- whether Mrs Kolled's position would have been different if she had been warned by the doctors at Preston Hospital of the risks consequent on a caesarean section;
- whether details of the 1978 operation had been correctly recorded by the doctors at Preston Hospital;
- whether the trial judge was correct in finding that neither Dr Zipser or Bankstown Hospital were responsible for any damage that might have resulted from the failure to make enquiries of Preston Hospital because the critical information would not have been supplied;
- whether if there had not been any negligence this would have made a difference on 12 October 1984.

So what did the Court of Appeal decide? The Court found that there was negligence on the part of all the defendants. The Court accepted that the doctors at Preston Hospital had not warned Mrs Kolled about the nature of the caesarean that they had performed and its ramifications if she were to undergo a vaginal delivery. If Dr Zipser had known the true situation (and he should have made enquiries of Preston Hospital to find out) then he should have advised Mrs Kolled a vaginal delivery should not be considered and therefore the operation would have been undertaken more expeditiously and irreversible brain damage suffered by Elayoubi would more likely than not have been avoided.

The Court of Appeal ultimately determined that Bankstown Hospital (who were also responsible for the negligence of Dr Zipser) were two-thirds to blame and Preston Hospital one third to blame.

OH&S Roundup

Corporate Structuring Has Impact On OH&S Penalties

Bruce Miller was working at Bunnings Hardware at Tuggerah and was dealing with a faulty and leaking 9kg LPG gas cylinder. He started to release the gas from the cylinder into the atmosphere so that it could be emptied. While he was doing this there was an explosion and he was caught in the middle of a fireball and badly burned. The LP gas had ignited and the source of ignition could not be identified. The accident could have been avoided if instead of releasing the LP gas into the atmosphere Mr Miller had stored the defective cylinder in a secure, well-ventilated area away from sources of ignition and arranged for it to be picked up by the supplier. Alternatively, if he had to release the gas he should have made sure that he did so in a large open space to allow vapour to mix and disperse and away from any possible source of ignition.

Two companies within the Bunnings group of companies were prosecuted under the OH&S Act. BBC Hardware Limited was prosecuted as they were the employer. Bunnings Group Limited was charged with failing to ensure that people other than its employees were not exposed to risks to health or safety from the conduct or undertaking of Bunnings. In essence Bunnings owned the premises and operated the business and BBC Hardware Limited employed the employee. The BBC Hardware chain was being incorporated into the Bunnings Group. Bunnings and BBC pleaded guilty to the charges.

Both Bunnings and BBC were ultimately owned by Wesfarmers. A question arose as to whether the penalty to be imposed which would be borne by the ultimate owner of the multiple corporations should be moderated or whether two penalties should be imposed.

The Industrial Commission noted that there had been a number of Full Court decisions of the Industrial Commission which provide guidance on the approach to adopt.

In *Inspector Green v Big Rivers Timbers Pty Limited* the Full Court of the Industrial Court considered prosecutions under the OH&S legislation against two corporations with a close relationship. The companies had common directors and shareholders.

Ultimately a penalty was imposed on each of the companies based upon the culpability of each defendant for the offence. The Court noted it was not appropriate to determine a total penalty and then divide it appropriately the defendants. Rather, it was necessary to assess a penalty for each defendant. To assess a total penalty and then apportion the penalty would be to apply the principles of totality which is a well-known principle at law and it was not appropriate to do this in a case involving two defendants with common directors/shareholders.

In *JT & LC Tippett Pty Limited and RD & LF Tippett Pty Limited v WorkCover* two corporate defendants were carrying on a partnership. They were each charged with the same breach of the *Occupational Health & Safety Act.* The Court held that although the defendants had been found guilty of the same offence that was in the same terms and arose out of the same circumstances, their offences related to corporate co-offenders who were in partnership and the partnership was the actual employer. The partnership was the employing entity and should therefore bear a penalty on the basis that there was one defendant. In the Tippett case the principles of totality were not applied. Rather it was determined that there was only one real defendant, being a partnership. That was seen to be the difference between the decision in the Big Rivers and Tippett.

After considering these two cases Justice Marks concluded that in light of the decision in Big Rivers Timber he was not entitled to apply the principles of totality to the two prosecutions against BBC and Bunnings. However, Justice Marks concluded it was appropriate to consider whether it was appropriate to ameliorate the penalties which would otherwise be imposed on each of the corporate defendants having regard to the close relationship and in particular the fact that the impact of any monetary penalties will be borne by the same person, namely Wesfarmers. In this case it was clear that in an overall sense the control of the store was in the hands of Bunnings personnel and that Bunnings' operational and other systems including OHS systems were utilised. BBC Hardware was not entitled to escape liability in the sense it could not hide behind the requirements to abdicate the implementation of OHS measures to Bunnings, however Bunnings were more culpable.

Justice Marks determined that an appropriate penalty on Bunnings would be $130,000. That left for consideration the circumstances of BBC Hardware. It was noted they were less culpable and without any further amelioration of the offence a fine of $95,000 would be appropriate for BBC. However, Justice Marks reduced the penalty so as to ensure that the shareholders of the Wesfarmers group who would ultimately bear the burden of both penalties were not unduly and unfairly penalised in circumstances where each of the prosecutions had been initiated by reason of the same incident and involved the exact same particulars of breach. The penalty imposed on BBC was reduced to $10,000.

Instead of an aggregate penalty of $225,000, the ultimate penalty imposed was $140,000 which was borne $130,000 by Bunnings and $10,000 by BBC.

The Court in this case has sent a clear message that the corporate structure of defendants does not necessarily result in significantly increased penalties where ultimately one person will bear the brunt of the penalty.

It is probable that this case will be the subject of an appeal and the Full Court will be called on to determine once and for all whether or not it is appropriate to ameliorate a penalty in circumstances similar to this case. For now the law is as follows:

- Where there are partners in a partnership and the partnership is the employer, it is appropriate to impose one penalty as there is one entity involved in the offence.
- Where there are two companies with common shareholders and directors involved in an undertaking it is necessary for there to be 2 penalties, one on each of the companies.
- Where there are two companies involved in an undertaking and the companies are owned by one entity such that the ultimate penalty imposed on each corporation will be borne by that one entity, it is necessary to impose two penalties but the penalty may be reduced as a consequence of the circumstances.

We will have to see whether the Full Court agrees with this approach.

Terminating Previous Workers Compensation Commission Awards

The Workers Compensation Legislation contains provisions allowing for employers to seek a reduction or termination of formal awards of compensation previously determined by either the Commission or the Compensation Court. In particular, Section 55 allows for the Workers Compensation Commission to end, reduce or increase the payment of weekly compensation due to a change of circumstances. The most common application to the Workers Compensation Commission for a change of circumstances is through the application of employers seeking to reduce the payments of weekly compensation to zero on the grounds the injured worker would now be capable of earning equal to or in excess of their pre-injury earnings. This calculation is contained within Section 40 of the NSW Workers Compensation Legislation.

Deputy President Moore recently determined the interaction between Section 40 and Section 55 of the NSW Legislation in the

decision in *Roads & Traffic Authority of NSW - v - Morio*. The worker had initially suffered an injury whilst working as a lollipop lady for the RTA in 2001. At that time she was in receipt of approximately $60.00 per week for five hours of employment. The Workers Compensation Commission initially determined that she would be totally incapacitated for that employment and she was entitled to an ongoing award of $60.00 per week.

The worker was effectively unemployed for six years but more recently obtained some casual employment as a taxi driver. She worked for three weeks, earning on average $127.00 per week. This was calculated on the basis of $150.00 for the first week, $180.00 for the second week but only $50.00 for the third week as it was purely on a commission basis.

The Deputy President determined that the Arbitrator had correctly identified there had been a change of circumstances in that the worker had been able to return to some employment and was now not totally incapacitated. The identification of a move to partial incapacity required the Arbitrator to calculate the appropriate award for partial incapacity benefits pursuant to Section 40. The Arbitrator had initially determined that the worker's comparable earnings would have been $101.00 and her recent average earnings as a taxi driver were $127.00. The normal test under Section 40 would have resulted in the worker's award being reduced to zero.

However, Deputy President Moore believed the Arbitrator applied an incorrect discretion to reflect the vagaries of the worker's new employment as a taxi driver. Deputy President Moore commented that previous Court of Appeal decisions had determined that it was not necessary for a Judge to anticipate that the worker may or may not in the future be able to sustain the current level of earnings. If the worker is forced to cease work, the compensation would merely need to be reassessed in accordance with Section 40. It was not simply enough to suggest that due to the unpredictable nature of earnings as a taxi driver that a discretion should be applied in calculating the partial incapacity benefits. Having found probable earnings of $101.00 per week and the actual earnings were $127.00 per week, there would not be any loss. Once the calculations established that there was no loss there was then no room to exercise the discretion on matters of conjecture such as job security.

This decision is a reminder of the discretion that Arbitrators should apply when calculating the award for partial incapacity benefits. Once an Arbitrator has embarked on a Section 40 assessment, the discretion that is applied should only be used to reduce further the difference between the worker's pre-injury earnings and the current actual earnings where appropriate. This discretion is not available for an Arbitrator to increase the difference, thereby allowing a greater award in the worker's favour.

Of course, if the worker were to demonstrate in the future such through a deterioration of her condition that the change of circumstances resulting in a reduction of the weekly compensation to zero was not appropriate, then the worker themselves would have the benefit of invoking the change of circumstances provisions in Section 55 of the Act.

Changes To Death Benefits In Workers Compensation Claims - NSW

The NSW Government has passed legislation that commenced on 10 December 2008 that substantially changes the approach to death benefits for injured workers in New South Wales.

Previously a lump sum payment of compensation was payable where a worker left partial or total dependants and lump sum benefit was apportioned having regard to the extent of dependency.

The consequences of the new legislation apply to work accidents and injuries which occur after 30 June 2007 and the death occurs after 24 October 2007. For these claims the full lump sum death benefit will be paid to dependants even if there is only one partial dependant. If there are no dependants the death benefit will be paid to the estate of the deceased worker.

The new lump sum benefit is $425,000 which is a 23% increase on the amount previously payable to dependants who were totally dependant.

Where compensation has already been paid for accidents which occurred after 30 June 2007 and the death occurred after 24 October 2007 those claims will have benefits topped up to the new lump sum benefit level.

This approach will remove the need to argue about the extent of dependency other than where there are multiple dependants and then the extent of dependency will be relevant for apportioning the lump sum benefit between those dependants.

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