GD News

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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.

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Can A Rescuer Recover Damages?

The High Court of Australia has recently determined that rescuers may be entitled to bring a claim for psychological injury arising as a consequence of a rescue.

Phillip Sheehan and David Wicks were police officers who attended the scene of the train derailment at Waterfall early on 31 January 2003 in which seven passengers died and others of the forty two passengers on the train were very seriously injured. Wicks and Sheehan forced their way into the damaged carriages of the train and assisted passengers, some of whom were so badly injured that they were obviously deceased. Others were trapped, seriously injured and very distressed. Wicks and Sheehan assisted the survivors to a place of safety. Both remained at the scene for a considerable time, Wicks until about 4.00 pm and Sheehan until about 2.00 pm that afternoon.

Both Wicks and Sheehan contend that as a consequence of being present at the scene and as a consequence of what they witnessed they sustained psychological and psychiatric injuries, post traumatic stress disorder, nervous shock and major depressive disorder. Wicks and Sheehan therefore commenced proceedings against the State Rail Authority of NSW who had conceded responsibility for the derailment.

In New South Wales section 30(2) of the Civil Liability Act 2002 provides that:

> *"A claimant is not entitled to recover damages for pure mental harm unless:*
>
> *(a) the claimant witnessed, at the scene, the victim being killed, injured or put in peril; or*
>
> *(b) the claimant is a close member of the family of the victim."*

The issue in this matter was whether or not Wicks and Sheehan had witnessed victims of the derailment "*being killed, injured or put in peril*".

As discussed in our previous editions of GD News both the trial judge and the NSW Court of Appeal were of the view that they had not witnessed victims of the derailment being killed injured or put in peril and their claims were rejected. Wicks and Sheehan were granted leave to appeal to the High Court.

In a unanimous decision, the High Court determined that Wick and Sheehan were not precluded from bringing a claim for damages for psychological injury as a consequence of the provisions of section 30(2) of the *Civil Liability Act 2002*. The High Court determined that the provisions of section of 32 of the *Civil Liability Act 2002* must be considered before moving on to a consideration of section 30(2) of the Act.

Section 32 provides:

> *"(1) A person (the defendant) does not owe a duty of care to another person (the plaintiff) to take care not to cause the plaintiff mental harm 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*

Inside

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were not taken.

(2) For the purposes of the application of this section in respect to pure mental harm, the circumstances of the case include the following:

(a) whether or not the mental harm was suffered as a result of a sudden shock;

(b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;

(c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;

(d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

(3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injuries suffered by the plaintiff.

(4) This section does not require the Court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff."

The High Court concluded the necessary condition for establishment of a duty of care is that a defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognisable psychiatric illness if reasonable care were not taken. According to the High Court section 32 assumes that foreseeability is the central determinant of a duty of care and a duty of care is not to be found unless the defendant ought to have foreseen a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness.

The High Court stated:

> *"Because neither 'sudden shock', nor witnessing a person being killed, injured or put in peril, is a necessary condition for finding a duty to take reasonable care not to cause mental harm to another, section 30 will be engaged in only some cases where a relevant duty of care is found to exist. As section 30(1) makes plain, section 30 will be engaged only where the claim is for 'pure mental harm', where the claim is alleged to arise 'wholly or partly from mental or nervous shock', and where the claim is alleged to arise from shock in connection with 'another person … being killed, injured or put in peril by the act or omission of the defendant'."*

The High Court commented that it could not determine on the evidence whether or not Wicks or Sheehan were owed a duty of care and this was an issue that should be considered by the NSW Court of Appeal.

In the High Court's opinion the claim of both Wicks and Sheehan can be said to be a claim arising wholly or partly from "a series of" mental or nervous shocks. The issue to consider was then whether or not the claims arose from mental or nervous shock in connection with another person being killed, injured or put in peril by the negligence of State Rail.

The High Court commented that State Rail's argument was that neither Wicks nor Sheehan had "*witnessed, at the scene, the victim being killed, injured or put in peril".* The High Court disagreed.

The High Court stated:

> *"The consequences of the derailment took time to play out. Some aboard the train were killed instantly. But even if all of the deaths were instantaneous (or nearly so), not all the injuries sustained by those on the train were suffered during the process of derailment. And the perils to which living passengers were subjected as a result of the negligence of State Rail did not end when the carriages came to rest.*
>
> *Most, if not all, who were injured suffered physical trauma during the process of derailment. It may readily be inferred that some who suffered physical trauma in the derailment suffered further injury as they were removed from the wrecked carriages. That inference follows from the fact that some were trapped in the wreckage. It would be very surprising if each was extricated without further harm.*
>
> *Further, it may be readily inferred that many who were on the train suffered psychiatric injuries as a result of what happened to them in the derailment and at the scene. The process of their suffering such an injury was not over before Mr Wicks and Mr Sheehan arrived. That is why each told of the shocked reactions of passengers they tried to help. That is why each did what he could to take the injured to safety looking straight ahead less the injured see the broken body of one or more of those who had been killed. As they were removed from the train, at least some of the passengers were still being injured."*

The High Court concluded:

> *"A person is put in peril when put at risk; the person remains in peril ('is being put in peril') until the person ceases to be at risk.*
>
> *The survivors of the derailment remained in peril until they had been rescued by being taken to a place of safety. Mr Wicks and Mr Sheehan witnessed, at the scene, victims of the accident being put in peril as a result of the negligence of State Rail."*

So what is the effect of the decision? Are the floodgates open and can rescuers such as firemen, ambulance officers and policemen, like Wicks and Sheehan, bring claims for nervous shock? Can a passerby who assists after a bus crash bring a claim for nervous shock if he or she has sustained psychological or psychiatric injury? The decision of Wicks and Sheehan certainly supports this stance. In NSW it is clear that it is not necessary to witness the actual occurrence of an accident; the aftermath will be sufficient if the victims of the incident are still in peril. But how far does this go? Is there a distinction between an ambulance officer who loads an injured victim onto the ambulance within the accident site and the ambulance officer who assists an injured victim within the ambulance at the accident site?

We await with interest the decision of the NSW Court of Appeal on the issue of forseeability of the duty of care to rescuers however as the claims are not precluded by section 30 of the *Civil Liability Act 2002* a quick settlement may well mean that the issue is not determined by the Court.

Insurers need to be aware of the risk that there will be an increase in claims as a result of the Wicks and Sheehan decision with negligent tortfeasors facing the prospect that they owe a duty of care to a rescuer and may be liable to compensate the rescuer for psychological injuries suffered as a consequence of witnessing the aftermath of an accident. In addition workers compensation insurers of the employers of fire fighters, ambulance officers the police and other emergency rescue personnel may now look to those who cause an accident to recover workers compensation benefits paid to employees in connection with psychological injury caused by attending the scene of an accident.

Time will tell.

Unfair Contract Terms Regime Commences 1 July 2010

The Governor General has proclaimed that the new "unfair contract terms legislation" will commence on 1 July 2010. Businesses need to review all standard form consumer contracts to ensure that the terms in contracts will not fall foul of these new provisions.

The legislation only applies to standard form consumer contracts and will not impact on business to business contracts. The ACCC has released a Guide to the "unfair contract terms laws" which can be viewed at the ACCC website on www.accc.gov.au/content/index.phtml/itemId/930750.

The Guide is designed to assist businesses and consumers but is not a law and has no binding legal effect. The Guide is indicative of the Government's attitude towards the unfair contract terms laws.

The Guide notes that standard form contracts are typically used for the supply of goods and services relating to telecommunications, finance, domestic building, gyms, motor vehicles, travel and utilities and the fair contract laws will apply to these contracts.

At this stage the unfair contract laws do not apply to contracts covered by the Insurance Contracts Act 1984.

The new laws provide that a term of the consumer contract is void if the term is unfair and the contract is a standard form contract.

A consumer contract is a contract for supply of goods or services or sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. The intended use of the goods is the determining issue.

In determining whether a contract is a standard form contract, a Court may take into account such matters as it thinks relevant, but must take into account the following:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which
- they were presented;
- whether another party was given an effective opportunity to negotiate the terms of the contract;
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction;
- any other matter prescribed by the regulations created pursuant to the legislation.

If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

A term of a consumer contract is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In determining whether a term of a consumer contract is unfair a court may take into account such matters as it thinks relevant, but must take into account:

- the extent to which the term is transparent;
- the contract as a whole.

A term is transparent if the term is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term

The following are examples of the kinds of terms identified in the legislation that may be unfair:

- a term that permits one party (but not another party) to avoid or limit performance of the contract;
- a term that permits one party (but not another party) to terminate the contract;
- a term that penalises one party (but not another party) for a breach or termination of the contract;
- a term that permits one party (but not another party) to vary the terms of the contract;
- a term that permits one party (but not another party) to renew or not renew the contract;
- a term that permits one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- a term that permits one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- a term that permits one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- a term that limits one party's vicarious liability for its agents;
- a term that permits one party to assign the contract to the detriment of another party without that other party's consent;
- a term that limits one party's right to sue another party;
- a term that limits the evidence one party can adduce in proceedings relating to the contract;
- a term that imposes the evidential burden on one party in proceedings relating to the contract;
- a term of a kind prescribed by the regulations created pursuant to the legislation.

The above list is not exhaustive nor is it intended to be exhaustive.

The Courts will have the power to make orders:

- declaring the contract void from the start
- declaring a term an unfair term
- declaring terms of the contract are void

- varying terms
- preventing enforcement of terms
- directing refunds of money
- ordering compensation

Reform Of Consumer Laws

The Australian government's substantive reforms to Australian consumer laws and the national harmonisation of consumer laws which will occur as a result of the enactment of legislation in the various States and Territories throughout Australia in the same terms as the Commonwealth legislation is not far away.

The *Trade Practices Amendments (Australian Consumer Law) No. 2 Bill ("ACL Bill")* was introduced into Parliament in March 2010. We reviewed the changes proposed by the Bill in our April newsletter. Debate on the Bill was adjourned when the Bill was referred to a Senate Committee for further consideration. That consideration has been completed and the Bill was returned to Parliament on 23 and 24 June with a number of amendments as a consequence of the Senate Committee's recommendations and input from stakeholders.

The Bill in its amended form has been passed by both Houses of Parliament and we now have the final form of the proposed legislation. The Bill is receiving bipartisan support in its progression through Parliament and although the Bill is yet to be passed into legislation when it does the reforms will commence on 1 January 2011.

The first phase of the changes to Australian consumer laws came into effect from 1 July 2010 with the introduction of unfair terms legislation. The introduction of the ACL Bill is the second phase of the reform.

Key changes to the Bill

When the ACL Bill was introduced in March it contained a definition of consumer which varied from the definition found in the Trade Practices Act. Whilst many of the provisions of the Bill apply to all persons and are not limited to a defined class of consumers there are provisions that apply only to the defined class of consumers. For example, the consumer guarantee provisions will only apply to consumers.

The Bill as initially drafted would have removed an element from the definition of consumer that extended protection to some business to business transactions. The amendments reverse that position.

A person will be taken to have acquired goods or services as a consumer if they are required for personal, domestic or household use or consumption or if the price of goods or services is less than $40,000.

With the extension of consumer guarantees to business to business dealings for goods and services that are valued less than $40,000 the Government decided to permit businesses to limit their liability under the proposed legislation for breaches of consumer guarantees but only if the goods or services are not ordinarily required for personal domestic or household use or consumption.

Businesses will be able to limit their liability for breaches of consumer guarantees provided that:

- the goods are not ordinarily acquired for personal, domestic or household use or consumption; and
- not all liability is excluded as liability may be limited to the replacement of goods or services, the supply of equivalent goods or services, the repair of goods, the payment of the cost of replacing the goods or services of acquiring equivalent goods or services or the cost of having the goods repaired. Businesses will be able to limit their liability to the costs of replacing the goods, the cost of obtaining equivalent goods or services or the cost of having the goods repaired, whichever is lowest.

The limitation of liability will not be available if it is not fair or reasonable for the supplier or manufacturer to limit liability. Matters which will be taken into account when assessing whether it is fair and reasonable include:

- the strength of the bargaining position of the persons who supplied the goods;
- whether the buyer received an inducement to agree to the terms and whether there was an opportunity to acquire the goods or services from any source under a contract that did not include that term;
- whether the buyer knew or ought reasonably to have known about the existence and extent of the term;
- whether the goods were manufactured, processed or adapted for a special order.

Another change to the Bill which has brought some relief to architects and engineers is an amendment which exempts qualified architects and engineers from one of the consumer guarantees. Architects and engineers will be exempt from the consumer guarantee that services must be fit for a purpose or achieve a desired result that a consumer makes known to a supplier. The exemption does not apply to excuse architects or engineers from liability that may arise from services that do not fall within their respective areas of professional expertise. As an example, if an engineer contracted to carry out building services to a consumer in addition to providing engineering services the exemption would not have application.

Architects and engineers have lobbied the Government to exempt these professions as they often experience difficulties ascertaining the wishes of consumers.

Whilst these professions have been exempted for now the situation will be reviewed in three years time. Architects and engineers will not be exempted from the other consumer guarantees which are imposed by the Bill.

There are also amendments to the reporting requirements which provide that suppliers must report to the Commonwealth in circumstances where the supplier became aware that the consumer goods had been associated with the death or serious injury or illness of any person. The provision has been watered down and now a report must be made where the supplier considers or becomes aware that another person considers that the death, serious injury or illness was caused or may have been caused by the use or foreseeable misuse of the consumer goods.

Conclusion

These are busy times for businesses. The Commonwealth Government is working its way through significant reforms that will impact on all businesses throughout Australia. We have seen the introduction of the Fair Work legislation and the effective national harmonisation of employment laws. National harmonisation of consumer laws is almost complete. The national harmonisation of occupational health and safety laws will come into effect at the end of 2011.

We also have the PPS legislation which will from May 2011 introduce a national scheme for regulation, registration and enforcement of personal property securities.

National harmonisation of laws will ensure consistency but for now the learning curve for businesses needs to continue its growth as businesses continue to respond to the demands that will come with the legislative changes and come to grips with the impact of these changes.

NSW Insurance Protection Tax To Be Abolished From 1 July 2011

Following the collapse of HIH Insurance Limited the NSW Government introduced the Insurance Protection Tax which is payable by insurers registered in Australia and insureds where an offshore insurer provides insurance over property and/or risks in New South Wales.

For insurers the amount paid is calculated by comparing the total annual general insurance premium in New South Wales against the insurer's total insurance premium for general insurance. The amount payable by an insured with an offshore unregistered insurer is 1% of premiums for general insurance. Payments are made quarterly and collections are managed by the Office of State Revenue.

The tax was introduced to cover outstanding CTP claims and home builders warranty claims following the collapse of the HIH Insurance Group. The Building Insurers Scheme Guarantee Fund and the Nominal Defendants Fund were set up to deal with the outstanding claims. The amount currently collected by the Funds is $69 million per annum and insurers are prohibited from passing the tax on to insureds.

With the NSW Government's announcement that the Income Protection Tax will not be payable from 1 July 2011 insurers will no longer be funding the sins of the past and an administrative burden and cost on insureds who place their insurance offshore will also be removed.

The Henry tax review has recommended scrapping of the Fire Services Levy (FSL) (payable in Victoria, NSW and Tasmania) and stamp duty which are State taxes imposed on insurance policies. The Henry review stated (recommendation 79) 'All specific taxes on insurance products, including the fire services levy, should be abolished'

Will the removal of State taxes continue?

Recreational Services And The Trade Practices Act

The *Trade Practices Act, 1974 ("TP* Act") is Commonwealth legislation which provides consumer protection and comes into play when persons are injured as a consequence of services provided to consumers. Section 74 of the *TP Act* provides that in every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill. The States and Territories throughout Australia have introduced legislation to regulate civil liability claims. Where there is inconsistency between State and Federal legislation, the Federal legislation will prevail where it is intended to cover the field. Consequently the *TP Act* also includes provisions which seek to preserve the intended effects of State legislation in some circumstances.

The NSW Court of Appeal's recent decision in *Insight Vacations Pty Limited v Stephanie Young* however presents the NSW Government with a real conundrum as the Court of Appeal has determined that the provisions in the *Civil Liability Act* that provide suppliers in the recreation and leisure industry with the right to contract out of liability for services provided in those industries are inconsistent with the provisions in the *TP Act* and the *TPA Act* prevails with the end result that a contract for the supply of recreational services that contains a clause excluding or limiting liability for a breach of the *TP Act* will not be effective to exclude that liability as the clause is void.

Stephanie Young was a passenger in a coach travelling on a motorway in Slovakia. She was standing next to her seat in order to retrieve an item from the overhead compartment when the driver of the coach slammed on the brakes to avoid a collision and she was thrown backwards, hitting her head on the floor and suffering injuries. The incident followed a road rage incident in which the coach driver and the driver of a car had been involved earlier. The tour was part of a 20 day European tour which had been purchased by Young in Australia.

Young commenced proceedings in the District Court of NSW alleging negligence and alleging a breach of an implied term of the agreement that the tour operator would act with reasonable diligence, care and skill in carrying out the services. The contract for the supply of services contained two exclusion clauses and the District Court determined that these clauses could not be relied on as they were inconsistent with the terms of the contract implied by the *TP Act*. Damages of $22,371 were awarded.

An appeal followed.

In NSW Section 5N of the *Civil Liability Act* provides:

> *"1. Despite any other written or unwritten law, a term of a contract for the supply of recreational services may exclude, restrict or modify any liability to which this Division applies that results from a breach of an express or implied warranty that the services will be rendered with reasonable care and skill.*
>
> *2. Nothing in the written law of NSW renders such a term of a contract void or unenforceable or authorises any Court to refuse to enforce the term, to declare the term void or to vary the term.*
>
> *3. A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.*
>
> *4. In this section, recreation services means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity."*

Recreational activities are defined to include any pursuit or activity engaged in for enjoyment, relaxation or leisure.

Section 68(1)(c) of the *TP Act* renders void provisions in the contract that exclude, restrict or modify liability for a breach of a condition or warranty implied by the provisions of the *TP Act* including Section 74.

Section 74 of the TP Act also includes the following provision:

> *"(2 A) If:*
>
> *a) there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this section; and*
>
> *b) the law of a State or Territory is the proper law of the contract, the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any) in the same way as it applies to limit or*

preclude liability, and recovery of the liability, for breach of another term of the contract."

Section 68B of the TP Act also provides that:

> *"A term of a contract for the supply by a corporation of recreational services is not void under Section 68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:*
>
> *a) the application of Section 74 to the supplier of the recreational services under the contract; or*
>
> *b) the exercise of a right conferred by Section 74 in relation to the supply of the recreational services under the contract; or*
>
> *c) any liability of the corporation for a breach of a warranty implied by Section 74 in relation to the supply of the recreational service under the contract."*

The District Court Judge saw a constitutional inconsistency between the NSW *Civil Liability Act* and the *TP Act* and determined that Section 68 should prevail to exclude the application of the two exclusion clauses in the contract which were as follows:

> *"3 In the absence of their own negligence, neither the Operators nor their agents or co-operating organisations shall be responsible for any cancellations, delays, diversions or substitution of equipment or any act or omission whatsoever by air carriers, transportation companies, hotels or any other persons providing any of the services and accommodations to passengers including any results thereof, such as changes in services or accommodations necessitated by same. Nor shall they be liable for any loss or damage to baggage or property, or for injury, illness or death, or for any damages or claims whatsoever arising from loss, negligence or delay from the act, error, or negligence of any person not its direct employee or under its exclusive control. The Operators are not responsible for any criminal conduct by third parties.*
>
> *4 Where the passenger occupies a motorcoach seat fitted with a safety belt, neither the Operators nor their agents or co-operating organisations will be liable for any injury, illness or death or for any damages or claims whatsoever arising from any accident or incident, if the safety belt is not being worn at the time of such accident or incident."*

So what did the Court of Appeal determine?

Recreational services are defined in the *TP Act* to include any sporting activity or a similar leisure time pursuit or any other activity that involves a significant degree of physical exertion or physical risk and is undertaken for the purposes of recreational enjoyment or leisure.

With all of those legislative provisions, Chief Justice Spigelman concluded that it was by force of Section 74(2A) that Section 5N of the *Civil Liability Act* has effect to "limit or preclude liability for …. Breach" of the term implied in the contract by Section 74(1) by allowing the operation of a clause which excludes it. However the rest of the Court of Appeal did not agree as Chief Justice Spigelman noted:

> *"Basten JA and Sackville AJA conclude that s 5N does not fall within the protective umbrella of s 74(2A) as a matter of statutory interpretation. Their Honours interpret s 74(2A) to apply only to a State law which, in terms, precludes liability for breach. Section 5N does not have that direct effect. It protects a contractual provision which so provides. Their Honours distinguish between a statutory limitation on, or preclusion of, liability and a contractual limitation or preclusion."*

The appeal by the tour operator was ultimately refused based on the majority judgements of Basten J and Sackville AJA which concluded that the exclusion clauses could not apply.

Basten J concluded that Section 74(2A) of the *TP Act* should not be construed as giving effect to Section 5N(1) of the *Civil Liability Act*. Justice Basten noted that:

> *"s 74(2A) the subject matter of s 68 is not a law of a State or Territory, but a term of a contract. It renders void any* such term *which purports to exclude, restrict or modify the application of, amongst other things, s 74(1): see s 68(1)(a). It will have that effect only where the term "does so expressly or is inconsistent with" that provision: s 68(2). This provision would seem to be unaffected by s 74(2A), even if the latter picked up a State law which permitted a contractual variation of liability. Section 74(2A) assumes the existence and operation of the implied warranty under s 74(1) and assumes that there has been a breach of that implied warranty: it does not pick up a State law which*

purports to exclude the existence of the implied warranty nor, a fortiori, a State law which permitted a contract to exclude the operation of the implied warranty. Accordingly, the addition of s 74(2A) cannot have affected the operation of s 68(1)(a), although there may be a fine distinction between a State law which assumes breach and precludes liability for the breach and one which purports to preclude the existence of a liability in the first place. "

Justice Basten concluded the key question arises where the term of a contract purports to exclude, restrict or modify "any liability" of a corporation for breach of an implied warranty under S74(1) In those circumstances Justice Basten found that:

"A State law which has that effect will be untouched by s 68(1), on any view of its operation. It can preclude liability for the breach of s 74(1) warranties. However, where the State law purports to give effect to a term of a contract, as does s 5N(1), it will have no effect because, pursuant to s 68(1)(c), the contractual term will have been rendered void as a result of inconsistency between the State law and the Commonwealth law. …..The effect of a State law which, in its own terms, restricts or precludes liability is a known quantity, not manipulable by contractual arrangements. The purpose of a Commonwealth law accepting the operation of such a State law is, therefore, also a known quantity. Different considerations might arise in relation to a State law which gave carte blanche to contracting parties to exclude the operation of a contractual term which would otherwise give rise to liability. Given that the Commonwealth law addressed the former class of State provisions and was effective in doing so, it is undesirable to extend it by judicial fiat to include a broader class of State provisions absent linguistic, historical or contextual support. Particularly is that so where the effect of that expansion is to limit the effectiveness of relief otherwise available under Commonwealth law.

It follows that s 74(2A) does not limit liability arising under s 74(1) by way of a State provision in the form of s 5N(1). To the same effect, s 5N(1) does not give effect to the term of a contract rendered void by s 68 of the Trade Practices Act. It could not have that effect otherwise than by the operation of a Commonwealth law. It is not suggested that there is any contender having that operation, other than s 74(2A)."

Sackville AJA also concluded that Section 74(2A) of the *TP Act* does not pick up or apply Section 5N of the *Civil Liability Act*.

Justice Sackville also concluded a State law that does not purport to exclude or authorise a term excluding the implied statutory warranty, but merely limits or precludes liability for breach of the warranty is picked up and applied by Section 74(2A) of the *TP Act*, however Section 5N of the *Civil Liability Act* is a law that does not purport to permit the parties to a contract to exclude the implied warranty, rather it allows the contract to include a term that excludes or limits liability for a breach of the warranty.

Sackville AJA considered clause 4 of Insight contract did not purport to exclude the warranty implied under Section 74 of the *TP Act* but acted to deny liability of a breach of the warranty where a passenger in a motor vehicle is injured while not wearing a seat belt.

Sackville AJA agreed with Basten's view that Section 74(2A) of the TP Act does not provide an unequivocal answer and the better view is that Section 74(2A) does not apply to a State law which merely authorises a contractual provision that limits or precludes liability for a breach of the implied statutory warranty. Sackville AJA concluded:

"the better view is that s 74(2A) does not apply a State law which merely authorises a contractual provision that limits or precludes liability for a breach of the implied statutory warranty. Section 74(2A) of the TP Act applies only State laws which, by their own terms, limit or preclude liability for breach of the implied statutory warranty. Section 74(2)(a) picks up and applies a law of the State which satisfies expressly identified conditions"

So, at the end of the day Insight's contractual provision that sought to preclude liability in accordance with the effect contemplated by the NSW *Civil Liability Act* was found to be invalid as it impinged on prohibitions in the *TP Act*.
The judgment now presents a conundrum for those who provide recreational services and their insurers. Recreational service providers have implemented contracting arrangements which incorporate limitations of liability. In NSW those clauses which seek to limit liability will not be enforceable as a consequence of the majority judgment in the Insight case which found such clauses have no effect as they are void by virtue of the fact they are in breach of the *TP Act*.

An implied term that services must be provided with reasonable care which is implied in a contract for recreational services by virtue of the *TP Act* effectively counters any attempt by a recreational service provider to contractually limit its liability by reason of the rights which were supposedly created by the NSW *Civil Liability Act*.

So, what is likely to happen?

Of course, an appeal to the High Court is a possibility, however the relatively minor amount involved might mean the case proceeds no further.

If the case goes no further, the majority judgment will be binding on Supreme Court and District Court Judges in NSW. The NSW Government's hands are somewhat tied in that legislation that it has enacted does not have the intended effect of permitting recreational service providers to contract out of liability in certain circumstances. The only way that this can be overcome by the NSW Government is by amending the Civil Liability Act to exclude liability for recreational service providers for a breach of the implied term to provide services with reasonable care which is implied by s74 of the *TP Act*. This may be seen as a step that is too large to take.

However an amendment to the *TP Act* by the Federal Government to specifically validate State legislation which permits a recreational service provider to contract out of liability for a breach of a term implied under s74 of the *TP Act* will be effective in restoring the intended effect of the *Civil Liability Act*. So the NSW Government is likely to put pressure on the Federal Government to amend the *TP Act*.

For now recreational service providers cannot rely on provisions in their contract that seek to remove liability for a breach of the implied term to provide services with reasonable care. Without an amendment to the *TP Act* recreational service providers and their insurers will no longer have the comfort of contractual limitation provisions in contracts.

Interesting times are ahead but for now those who have been injured as a result of the provision of recreational services in NSW will not have their claims defeated by contractual limitations in recreational service contracts.

Civil Dispute Resolution Bill 2010

On 16 June 2010 the Federal Government introduced the Civil Dispute Resolution Bill 2010 into Parliament which is intended to promote alternative dispute resolution in civil proceedings in the Federal jurisdiction. The Bill aims to ensure that parties take "genuine steps" to resolve their dispute before commencing legal proceedings in the Federal Court or the Federal Magistrates Court.

The explanatory memorandum of the Bill states that the Bill aims to:

- change the adversarial culture often associated with disputes;
- turn minds to resolution before becoming entrenched in a litigious position;
- where a dispute cannot be resolved ensure that issues are properly identified reducing the time required for a Court to determine the matter.

Parties in proceedings in the Federal jurisdiction will be required to file a "genuine steps statement". An applicant will first file a statement setting out the ADR steps it has taken before commencing proceedings. The respondent in the proceedings must then provide its response indicating whether it agrees with the applicant's statement.

The Bill is not prescriptive in that it does not specify the ADR steps that must be taken but does provide examples of the steps which can be taken such as:

- notifying the other party of the issues that are or may be in dispute and offering to discuss them;
- responding appropriately to such notification;
- providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;
- considering whether the dispute could be resolved by a process facilitated by another person such as mediation, conciliation, arbitration, expert appraisal, or early neutral evaluation.

The Bill does not require parties to settle disputes rather it is aimed to encourage parties to consider ADR.
As the key obligation on applicants and respondents is to inform the Court of the genuine steps they have taken to try to resolve the dispute before commencing proceedings, Courts have been given the power to consider those steps when exercising powers. Orders which the Court can make include:

- referral of the matter to mediation or other ADR procedures;
- setting time limits for undertaking tasks in the proceedings;
- dispensing the proceedings in whole or in part;

- striking out, amending or limiting any part of a party's claim or defence;
- disallowing or rejecting any evidence;
- ordering a party to produce documents in its possession, custody or control.

Case management will clearly become a focus.

In addition the Courts will take into account any failure to comply with the requirements of the legislation when exercising their discretion to award costs against a person or a lawyer.

Lawyers will have an obligation to disclose to their clients the requirements of the legislation.

The legislation will not apply to proceedings under the Fair Work Act legislation or family law disputes. In addition it will not apply to proceedings for the contravention of a civil penalty provision or in proceedings in various tribunals including the Administrative Appeals Tribunal and the Australian Competition Tribunal. Further, it will not be necessary to file a genuine dispute statement in appellate proceedings.

The Bill has had its first reading and we will keep readers informed of the Bills progress. One thing for sure is that "genuine steps statement" will become part of civil disputes in the Federal jurisdiction.

OH&S Roundup

WorkCover's Obligations To Disclose The Nature Of A Charge

The NSW Industrial Relations Commission has handed down the first judgment in NSW which required a consideration of the issues raised by the High Court in the Kirk judgment, namely that WorkCover is obliged to identify the specific measures that should have been taken of by a defendant when it brings a prosecution for a breach of the *Occupational Health and Safety Act.*

In *Inspector Hamilton v John Holland Pty Limited*, John Holland were prosecuted for a breach of the Occupational Health and Safety Act following the collapse of the Lane Cove Tunnel. John Holland argued that the charge brought by WorkCover failed to meet the requirements set down by the High Court decision in *Kirk – v Industrial Relations Commission* and argued that the charge did not specify the measures that should have been taken by John Holland to ensure the health and safety of their employees. John Holland argued that as the charge did not disclose the measures that should be taken, it did not allow John Holland to identify the charge against it.

Unfortunately for John Holland, the Industrial Relations Commission determined that it was sufficient for the act or omissions alleged by WorkCover to be identified in an Application for Order which supports the formal charge document.

The Industrial Relations Commission determined that it was not necessary for the details of the acts and omissions committed by John Holland to be included in the Statement of Charge, rather those acts and omissions could be provided in an Application for an Order which is filed with the actual Statement of Charge. The Application for an Order provides a description of the circumstances which are alleged to give rise to a breach of the *Occupational Health and Safety Act*.

As a consequence of the High Court decision in *Kirk* it is necessary for WorkCover to identify the risks and alleged failures on the part of a defendant, however it will be enough for a defendant to receive details of this information from the Prosecutor, and the information need not necessarily be included in the actual Statement of Charge.

Designers Beware!

The Industrial Relations Commission of NSW, in Inspector Ching v Hy-Tec Industries Pty Limited & Ors has sounded a warning for designers that a breach of the Occupational Health and Safety Act will bring home to roost a substantial penalty if plant supplied for use in the workplace is not safe.

Melissa Maybury lost her life in somewhat extraordinary circumstances. Ms Maybury had arranged to drive home an employee of Hy-Tec who was, amongst other things, responsible for closing the gates at a concrete batch plant. The employee experienced difficulty closing the bi-sliding metal gates which were operated by an electronic system. He disengaged the motor and commenced to manually close the gates. This type of problem had occurred previously. Ms

Maybury came to the assistance of the employee and as they were pulling one of the gates, the front edge of the gate moved out of its supporting portal and fell on Ms Maybury, causing her fatal injuries.

Simpson Design Associates Pty Limited (No. 2) was the structural engineering firm that provided the structural steel design for the framework of the gate. Hy-Tec operated the batching plant. Lejah Pty Limited had designed and supplied the general mechanical equipment for the concrete batching plant and fabricated and supplied the steel components and running gears for the gates. These companies were prosecuted for breaches of the Occupational Health and Safety Act. Others involved in the installation of the gate were not and they included the company that supplied and installed the operating equipment for the gates and the installation of the motors for the operation of the gates.

Lejah were prosecuted for failing to ensure that the plant supplied was safe and without risk to health when properly used. Simpson Design were prosecuted on the same basis. Hy-Tec were prosecuted for failing to ensure the health and safety and welfare at work of all of its employees and of persons other than its employees, namely Melissa Maybury.

The relevant failure of Simpson Design was that it had failed to include in the design any or any adequate devices to prevent the western leaf of the western gate falling during manual operation. Lejah had failed to manufacture safe plant or erect and install and assemble plant with adequate devices to prevent the gate from falling during manual operation.

Each company faced a maximum penalty of $550,000.

A lot of time and energy during the trial was expended by the defendants pointing fingers at each other.

The Court concluded the common thread was all defendants had an obligation to consider the manual operation of the gates and the risks that might attend such an occurrence. The Court could not detect any appreciable difference in the culpability of the defendants.

Simpson Design was a relatively small to medium professional structural engineering business. It was concluded that the company was unlikely to offend again in this way. Lejah no longer conducted business and its only directors were Mr and Mrs Rea. Simpson Design was charged with one offence under the OH&S Act and was fined $185,000. Lejah was charged with two offences, arising out of the same facts and were fined $77,500 for each offence. Hy-Tec Industries were also charged with two offences and were fined $67,500 for each offence. The differences in fines took into account varying discounts on the ultimate penalty which arose from different approaches to the prosecutions.

The case serves to sound a warning to those who design and install plant for businesses- if the plant is not safe substantial penalties for breaches of the OH&S Act can follow.

The Bigger They Are The Harder They Fall

Boral Construction Materials Pty Limited were recently fined $90,000 for a breach of the Occupational Health and Safety Act whilst another business involved in the incident, North Coast Cranes were fined $5,000 for its involvement.

A dust extraction unit located approximately 15 metres above ground level at one of Boral's asphalt batching plant became blocked and a Boral employee was instructed to clear the blockage. This involved cutting the duct with an acetylene cutter and using a rod to clear the blockage. The blocked duct could not be accessed via the unit. Boral intended to hire an 80 foot boom lift to perform the task, however none were available on the day and an alternative work method was decided upon and employees were to be lifted in a work box suspended by a crane.

Boral engaged North Coast Cranes to provide the necessary plant and a crane driver and dogman. Two employees were suspended in the work box for approximately an hour. When the work box was being lowered, either the hydraulics or the controls of the crane failed causing the work box to fall to the pavement. The box did not free fall due to the mechanical resistance in the crane working mechanism, however the two employees sustained serious injuries.

The allegations in the case were that Boral failed to undertake a risk assessment with regard to the use of the crane and the work box and failed to obtain detailed specifications of the work to be performed and instead relied on North Coast Cranes. It was also alleged that Boral failed to obtain service and maintenance records from North Coast Cranes and failed to have an adequate system for selecting suppliers of plant and equipment.

The Court noted the fact that the work involved a one off and unusual task did not facilitate a finding the risk was not reasonably foreseeable. The apparent lack of relevant expertise associated with the provision and operation of the crane could not allow Boral to escape liability.

North Coast Cranes had previously been convicted and fined $5,000 for a breach of the OH&S Act arising from the incident. Boral argued that the culpability of North Coast Cranes was greater than Boral's. Boral also argued that parity should come into play and a comparable penalty to that of North Coast Cranes should be imposed. However, North Coast Cranes was a small family company and Boral was a large corporate group.

Even though North Coast Cranes' culpability was somewhat greater than Boral's, the Court determined it was appropriate to impose a more substantial penalty on Boral. The Court noted that when North Coast Cranes had been prosecuted the Court could not determine the objective seriousness of the offence as charged no doubt due to the way the prosecution proceeded. The objective seriousness of the offence this time could be determined and the offence was a serious one and this was a reason proffered by the Court to justify a much greater fine for Boral.

Strictly speaking the size of a business should only impact on considerations concerning the capacity of a defendant to pay a fine which is a factor taken into account when a penalty is determined. In this case it appears that the size of the company did influence the ultimate financial penalty.

Workers Compensation Commission 2009 Annual Review

The Workers Compensation Commission has recently published its annual review for the calendar year ended 2009. The report provides general statistics of the Commission and details of the structural changes currently being introduced in the Commission. One of the key changes in the Commission procedure is a transition from an existing group of part-time sessional arbitrators to a smaller group of full-time or substantially full-time arbitrators. The Commission is of the view that this significant reform will enhance the consistency and durability of Arbitral decisions. The recruitment process for the arbitrators has now concluded and the full-time arbitrators will commence their duties from 1 July 2010.

Reflecting stability in the Workers Compensation Commission, the number of applications received by the Commission in 2009 amounted to 11,436. This is remarkably consistent to the total applications received in 2008 which numbered 11,432 applications. The continued used of the conciliation process has resulted in nearly 70% of matters being finalised without the need for a written determination. 18% of matters were resolved through a settlement between the parties and a further 21% were either discontinued or otherwise resolved.

Although 30% of applications were still finalised by formal determination, it should be remembered that more than 80% of those applications involved only a medical certificate of determination issued by the Registrar to finalise section 66 (lump sum compensation) entitlements. Although there were nearly 8,500 applications filed, only 468 were finalised by a written determination issued by an Arbitrator.

Increased attempts by the scheme agent to finalise long term workers compensation claims has resulted in 250 commutation settlements given final approval by the Workers Compensation Commission in 2009. Although a Commutation settlement is initially approved by WorkCover, the final payment of the Commutation settlement cannot be made until the Commission provides the final approval. This is an increase of nearly 70% on the matters approved in 2008.

There has also been an increase in the number of common law matters in the Workers Compensation Commission. Common law actions brought against an employer for negligence are referred to as work injury damages matters. Part of the alternative dispute resolution process is for the majority of these matters to be subject to mediation in the Workers Compensation Commission. Almost 700 mediations were held by the Workers Compensation Commission in 2009 which represents an 18% increase from 2008 and a cumulative increase of 71% from 2007 matters. Five additional mediators were appointed by the Commission to deal with these matters as expeditiously as possible.

59% of all applications to mediate resulted in a settlement. When those that did not proceed to mediation are excluded from the data (such as when a defendant wholly denies liability or a matter is discontinued or struck out or matters involving multiple defendants), the proportion of matters settled during the period increases to 67%.

Matters referred to the Commission for work place injury management disputes (disputes over a worker's capacity) and medical appeals (from Approved Medical Specialist decisions) both declined in 2009. Applications for costs, Arbitrator

appeals and expedited assessments all remained stable.

45% of all dispute applications were resolved within three months and 85% were resolved within nine months. Even when appeals are included, 98% of all matters are resolved within 12 months of filing. Consistent with 2008, on average it takes 105 days for the Commission to resolve a dispute application.

The second half of 2010 will finalise the implementation of the E-screen lodgement facility. Already a large proportion of documentation is dealt with under an electronic filing regime and we would expect a largely paperless Commission by the time the 2010 Annual Report is released.

Currently under discussion is the possible re-introduction of a "circuit" arbitration process. Prior to the disbanding of the Compensation Court in 2003, matters from the same country geographical region were grouped together and heard by a Judge on a weeklong circuit. The Workers Compensation Commission process resulted in the abandonment of those circuits. Although the reintroduction of a regional circuit has been touted previously, the use of part time Arbitrators has made the implementation of circuits virtually impossible. We expect with the appointment of the full-time arbitrators regional circuits will provide a workable solution to reduce the current costs of hearing individual matters at various regional New South Wales centres. The only difficulty we foresee with the re-implementation of regional circuits could be the possible delay of matters being heard if the circuits are infrequent. How the Commission balances their aims of timeliness with the efficiency of the regional circuit system remains to be seen.

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