GD News

Gillis Delaney Lawyers

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

High Court Rejects Post Traumatic Stress Disorder - Wyong Shire Council -v- Shirt Is Here To Stay.

Foreseeability of a risk of injury is an essential element in a negligence action. If the risk of injury is not foreseeable an injured person will fail in their claim to recover damages for loss resulting from their injury. The foreseeability test applied by the courts has developed over the years however the Courts generally turn to the decision in *Wyong Shire Council -v- Shirt* to define the test of foreseeability. Nevertheless the common law changes with time and the High Court has recently delivered a judgment in *Fahy v The State of New South Wales* where the High Court was invited to revisit the decision in *Wyong Shire Council -v- Shirt* and reformulate the "foreseeability test". The claim arose from an alleged breach of a duty of care by the Police Service when a police officer suffered Post Traumatic Stress Disorder after she was confronted by the aftermath of an armed robbery at a video store.

Gemma Fahy was a police officer at Green Valley. In the course of her duty she attended the aftermath of an armed robbery at a video store. The video store manager was seriously injured during the robbery and decamped the scene to take himself to a doctor's surgery nearby. Fahy attended the doctor's surgery following the incident and assisted in the video store manager's treatment. The injuries were substantial, including a number of extensive lacerations which Fahy needed to try to hold together to assist the doctor. Fahy was working with another officer who left Fahy with the doctor to return to the scene of the crime leaving Fahy without support. Fahy alleged that the unsupportive behaviour of her partner and other officers when she was left with the doctor and the victim without the support amounted to a breach of duty of care. Essentially Fahy argued that when working in pairs a partner should be there to provide support and should not leave their partner. Fahy developed post-traumatic stress disorder following this incident. Fahy also alleged that the Police Service had been negligent in failing to provide further support after the event.

The NSW Court of Appeal originally determined that Fahy's colleague's behaviour in not staying with her providing support immediately following the incident contributed to the PTSD and amounted to a breach of duty of care

The High Court on appeal did not agree. The High Court ultimately determined that the Police Service had not been negligent, however, the decision was not unanimous. Three Judges concluded that the Court of Appeal had been correct in their assessment whilst four Judges found that the Police Service had not been negligent.

In a negligence action a Court is called on to determine:

- Was there a foreseeable risk of injury?
- Did the defendant owe a duty of care?
- What was the extent of the duty of care owed?
- Was the defendant's conduct in breach of the duty owed?
- Did the defendant's conduct cause the loss?

The foreseeability of the actual risk was not seen as a difficult issue in Fahy's circumstances and the High Court accepted that the risk was foreseeable.

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Justices Callinan and Heydon who were in the majority that found the Police Service had not breached their duty of care delivered a joint judgment rejecting the claim and finding:

> *"The Police Service is not under an obligation to provide and maintain a system of work requiring the presence of a minimum of two officers, except when, as a matter of real necessity, that is not possible."*

The majority of the High Court effectively dealt with the claim by considering the extent of the duty owed and determining that there had been no breach of duty by the Police Service.

Having found the risk foreseeable it was not necessary to decide whether the test in *Shirt's* case should be reformulated. However the High Court had been invited to reformulate the foreseeability test. Was this the time for a change?

The method of assessing foreseeability has for over 25 years been based on the decision of the High Court in *Wyong Shire Council v Shirt*. In Fahy's case it was opportune to at least consider whether it was time to move on from the decision in *Wyong Shire Council -v- Shirt:*

Justice Kirby in his judgment noted the decision in *Shirt* is so well known and frequently applied that it is often not cited by its name. Sometimes the application of the foreseeability test is described as the "application of the *Shirt* Calculus".

When assessing whether or not a risk of injury is foreseeable the *Shirt* Calculus requires a court to determine:

- Whether a reasonable person in the defendant's position would have foreseen that the conduct involved a risk of injury to a person or a class of persons including that person; and
- If so, what would a reasonable person do by way of response to such risk.

So how do you determine what would a reasonable person do by way of response? The answer is found in the judgment of Justice Mason in *Shirt's* case

> *"The tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.*
>
> *The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."*

The *Shirt* calculus has weathered the passage of time. From time to time Courts have been critical of the application of the test and generally the criticism stems from the erroneous assessment of what is a reasonable response to a risk. So should the test be reformulated to eliminate the so called misapplications of the test?

Chief Justice Gleeson in his judgment in Fahy did not think so. Justice Gleeson noted:

> *"There may be cases where courts have lost sight of the ultimate criterion of reasonableness, or have adopted a mechanistic approach to questions of reasonable foreseeability, risk management or risk avoidance. Complaints about failure to warn seem to give rise to problems of that kind. There have been occasions when judges appear to have forgotten that the response of prudent and reasonable people to many of life's hazards is to do nothing. If it were otherwise, we would live in a forest of warning signs. That, however, does not warrant reconsideration in this case of what was said by Mason J."*

Chief Justice Gleeson was not in favour of reformulating the foreseeability test and four other Justices shared that view.

However, two of the Justices concluded that the case for a reconsideration of *Shirt* is very strong and perhaps it was time to restate the law even though in this case it was not necessary to do so. A reformulated foreseeability test was suggested by Justices Callinan and Heydon. What should be foreseen is a risk that is "significant enough in a practical sense". An alternative to that test that was considered was that an event should only be regarded as a foreseeable one for the purposes of the law of negligence if it is "not unlikely to occur". However, the first test was found to be preferred. On balance however the first test was seen to have the advantage of greater practicality and flexibility.

The Police Service had argued that the High Court should reformulate the foreseeability test in *Shirt*. The argument failed, although not without finding some support. A tantalising opportunity to reformulate the law was presented to the High Court and passed up. Perhaps this was not the right case as there was little doubt that the risk of Fahy's injury was foreseeable.

For now the test in *Shirt* will continue to apply. However, the possibility of change cannot be ignored.

There are at least two High Court Justices that will advocate for a reformulation of the foreseeability test when given the appropriate circumstances. In addition Justice Creenan in the case determined that as the existence of the risk was incontestable, the case did not provide an opportunity to consider whether the test in *Wyong Shire Council v Shirt.* Perhaps in the right circumstances Justice Creenan could see a need to reconsider the foreseeability test. Justice Kirby who determined that the test in *Shirt* is a correct statement of the law will retire from the High Court later this year which will introduce a new member to the High Court and new views. The numbers are not necessarily stacked against change.

Nevertheless it must be noted that Justices Gummow and Hayne in Fahy's case concluded there was no persuasive argument mounted for the view that Shirt's case should be reconsidered and seem uninclined to reformulate the foreseeability test.

The rumblings are there and perhaps we will see a redefined foreseeability test at some stage in the future. For now though "a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk." and "A risk which is not far-fetched or fanciful is real and therefore foreseeable". We will see what happens with time.

New South Wales- The Civil Liability Act Caps On Economic Loss Do Not Apply To All Claims.

When a person is injured they are entitled to claim damages for losses that they sustain including economic loss. But what happens when a company suffers a loss when it loses one of its key employees? Is that company entitled to bring a claim for damages against the negligent party for causing a loss due to the loss of services of a key employee due to injury? Further, in New South Wales the Civil Liability Act, which came into effect in March 2002, introduced caps on economic loss claims arising from the negligent injury of a person. The legislation effectively introduced caps on potential awards for past and future economic loss. If the company can bring such a claim, will the damages be regulated by the Civil Liability Act?

Justice Howie in the New South Wales Supreme Court recently considered these issues in *Chaina - v - The Presbyterian Church (NSW) Property Trust & Others*.

Justice Howie considered a claim which arose from the death of a school boy who drowned while attending a school camp for a weekend. Proceedings were commenced by the deceased's two brothers, his father and mother claiming damages as a result of nervous shock or psychiatric injury occasioned by the death of the school student. These were claims for personal injury as a result of the negligence of one of more defendants. The claims were subject to the Civil Liability Act.

In addition, two companies also sought damages in respect to the loss that they allegedly suffered as a result of the nervous shock suffered by the parents. The claims by the companies are what are commonly known as a loss of services claim. The loss claimed is a loss of an employer resulting from the loss of the services of an employee occasioned by the injury suffered by the employee as a result of the wrongful conduct of a defendant.

In New South Wales the Motor Accidents Compensation Act 1999 abolished claims for damages for the loss of the services of a person in respect of motor accidents. Had the deceased been killed in a motor vehicle accident, the companies would receive no compensation for the loss occasioned as a result of any nervous shock suffered by the parents.

Justice Howie considered the claim brought by the companies and concluded that the companies were entitled to maintain the claims. Justice Howie concluded that such claims were alive and well in New South Wales where the accident involved is not a motor accident.

In addition, in the Civil Liability Act there is no reference to a cause of action for loss of services of employees. Justice Howie concluded that such claims were not restricted by the caps on economic loss found in the Civil Liability Act.

Justice Howie noted that it seems irrational, illogical and unfair that claims arising out of the same accident might be treated differently. Claims for personal injuries to individuals are capped by the Civil Liability Act whereas claims by companies arising from loss of services of a key person are not.

The Court noted that it would be open for the New South Wales Parliament to limit these loss of service claims to be based upon weekly earnings of employees generally in the same way that caps are placed on personal injury claims for individuals. It was noted this has been done by the Queensland Parliament. Nevertheless the New South Wales legislation has not limited these claims.

The end result for defendants and insurers in New South Wales is an exposure to a substantial economic loss claim by a company in the event that it loses the services of a key person.

This is a significant issue for defendants who face significantly increased economic loss claims which are not subject to caps in the potential damages payable for negligent action where the injured person operates a business through a company. Where a company suffers a loss as a consequence of the loss of services of an employee, the economic loss damages payable will not be capped by the Civil Liability Act in New South Wales. Nevertheless a company will still be under an obligation to mitigate its damage, find an appropriate replacement employee and perhaps this is one of the major reasons why loss of service claims are not more common.

With the trend towards independent contracting in Australia, the numbers that conduct their business through companies will increase, and no doubt we will see an increase in the number of loss of service claims.

Assaults- Civil Liability Act Does Not Apply

In New South Wales the Civil Liability Act does not apply to intentional torts and the restrictions on awards of damages imposed by the Act have no application to an intentional assault. This exposes defendants who commit intentional acts to larger awards and punitive damages for wrongful conduct. But what about employers who are liable for their employees' actions? Is their liability subject to the Civil Liability Act?

The New South Wales Court of Appeal has recently considered a claim for damages by a patron of a hotel who was assaulted by an employee of a security company engaged by the Clovelly Hotel. The end result was an award against the security company that was not subject to the Civil Liability Act.

Mr Zabrow was injured outside the Clovelly Hotel in an unprovoked assault by one of the security guards employed by Zoroom Enterprises. The issues considered by the Court of Appeal were:

- whether the security company was vicariously liable for the assault by the security guard;
- whether the Civil Liability Act and the limitation of damages in the Civil Liability Act applied to the company if it was vicariously liable for the conduct of its employee, where the employee had committed an intentional tort; and
- whether it was appropriate to award exemplary damages.

An employer is liable for the acts of its employees only if the acts are shown to come within the scope of the employee's authority, either as an act he was employed to perform or which is incidental to his employment. An employer will be liable for unauthorised acts if they are regarded as modes, albeit improper modes of exercising authority given to the employee.

The Court of Appeal noted that although it is important to identify the acts of an employee by reference to their contractual duties which may be defined with some precision, which will not always provide a ready answer as to whether or not the employer is liable for an intentional act committed by an employee.

An assault by a security guard may be done in the employer's interest or in the intended performance of the contract of employment or within the authority with which the employer gave the employee.

The assault on Zabrow constituted a single blow when he was punched with considerable force in the vicinity of his right eye

which caused him to fall with his head hitting a pole or the back of a motor vehicle. The Court of Appeal held that the employee's actions in relation to the assault were unnecessary and excessive, a view that was shared by other security officers who took the employee away from the scene.

The Court of Appeal noted the language of the security guard demonstrated that he was seeking to disperse a group and have them move on, albeit in an entirely unacceptable fashion and the fact that he struck not merely one person but three persons in a short period of time demonstrated that he perceived himself as acting in the interests of his employer in the performance of his duties.

Ultimately the Court determined that the employer was vicariously liable for the actions of the employee as they were actions in the course of his employment.

Consequently, it was necessary for the Court of Appeal to determine whether or not the Civil Liability Act had application to the claim against the security company. The Civil Liability Act has no application to claims for damages based on an intentional tort and the Act restricted damages regime does not apply to a damages claim based on an intentional tort. In addition, the Civil Liability Act exemption from the award of exemplary damages will not apply.

The Court of Appeal found that there is no purpose or policy underlying the Civil Liability Act which would suggest that a different approach should be taken to the civil liability of an employee as compared to that of the employer when each is in respect of an intentional tort. Accordingly, the exclusion provision in the Civil Liability Act which provides that the Act does not apply to intentional torts will be applicable when considering a claim against an employer who engaged an employee who commits an intentional tort.

In this case the original Trial Judge awarded Zabrow $10,000.00 for exemplary damages in addition to his damages assessed pursuant to common law principles. The Court of Appeal upheld the award.

One wonders whether or not the security company's insurance policy had an exclusion clause that excluded liability for awards of damages for aggravated or exemplary damages. If so, in this case, the security company will be directly liable for the exemplary damages awarded and the insurer will be liable for the balance of the award.

Little wonder that publicans and hotels often outsource security to companies rather than assume the risk of conducting the security services themselves, particularly where there is a real risk that a security guard, overstepping the mark, may inflict considerable damage to a person and if they do the damages recovered by the injured person may not be regulated by the Civil Liability Act and may include exemplary damages.

Are You Keeping A Proper Lookout?

Picture this scenario. You are walking down the street, and you are on your mobile telephone and not paying sufficient attention to where you are going. You bump into a cage protruding from as column by 250mm. Was it simply your fault or was there someone to blame? Personal responsibility continues to be a focus for personal injury claims however the negligence of an injured person does not absolve others from their duty to take reasonable care for even those who are inadvertent.

In *Skulander - v - Willoughby City Council* the Court of Appeal was called on to consider a claim by a pedestrian against the council which arose from an accident that occurred when a pedestrian, who was not looking where she was going, walked into a iron cage containing a gas sensing device attached to a column. Unfortunately the column was at head height and the pedestrian was walking, looking down, and punching numbers into her mobile phone when she walked into the iron cage.

The claim was brought against the Council who was the occupier of the area where the accident occurred. The Council had not installed the monitoring devices but it was responsible for maintaining them and the cages subsequently erected around them to prevent vandalism.

The case originally proceeded before the District Court and the injured claimant failed in the claim. However on appeal, the claimant succeeded in the claim but was found to have also contributed to her own demise and her damages will be reduced by 50%.

The accident occurred in the vicinity of the Chatswood Bus interchange. The Court of Appeal noted that the Council was the occupier of an area to which members of the public had frequent access. The Council owed a duty to take reasonable care

which was not negated by pointing to the carelessness of a particular person. The Court of Appeal noted that this seemed to have been the basis of the District Court Judge's thinking when he dismissed the claim.

The Court of Appeal confirmed that in the exercise of reasonable care by a Council, regard must be had to the carelessness of some entrants onto land which the Council controls.

The cage protruded from a column by approximately 250 mm, was described as dirty yellow in colour and the claimant had not seen the cage before she walked into it. The claimant alleged that it was very dark at the time of the accident and the cage was very dark and was not obvious. The claimant argued that because she walked very close to the wall her inadvertent use of the telephone was exactly what the council should have taken better precautions against.

The real issue for the council was the location of the sensor at head height, the absence of a warning in respect of an unusual danger and the failure to ensure that the cage was sufficiently contrasted by colour from its background.

Why wasn't a rubbish bin placed below the cage to force pedestrian to walk around the area? Why wasn't a cylindrical curved hand rail placed around the column to restrict access in the vicinity of the cage? Why wasn't the cage placed in a different position? Why wasn't the cage more conspicuous at night?

The Court of Appeal noted,
"The issue of breach is to be determined according to community standards of reasonable behaviour. The inquiry is prospective, not retrospective. It is not enough for a person to show that additional measures could have avoided the accident. . . . The world is full of risky situations and sometimes risks come home with most unfortunate consequences. The Council was entitled to factor into its decision making that pedestrians are capable of exercising responsibility for their own safety, but a duty of reasonable care remained."

The Court of Appeal noted that a busy place like a bus station will attract people who are distracted and at times inadvertent. The Court of Appeal also noted that it may be accepted that pedestrians should be conscious of the needs to avoid obstacles on a footpath or pavement. These will include seats, rubbish bins, poles, signs and other similar constructions. On the other hand, ankle height barriers or head height protrusions are less likely to be found in a pedestrian thoroughfare.

The Court of Appeal noted that the cage in question was relatively low and may well have provided little risk to persons of average height. An object at eye level is more likely to be perceived than one above it and a collision with an object at shoulder level is less likely to cause harm than one at head level. The Court of Appeal noted,

"By the same token, the cage would have been at or even above eye level for a short person, including some children, who should have been expected to use the interchange. Accordingly, the Council did owe a duty of care to a class of such people including the claimant to alleviate the risk of head injury resulting from people walking into the cage."

The Council owed a duty of care and steps should have been taken which were not unreasonably expensive, difficult or inconvenient to the Council. Notwithstanding, the Court of Appeal determined that the claimant's carelessness in failing to observe the cage before commencing to use her phone was such that she was as equally liable for her injuries and her damages will be reduced by 50%.

The Council now finds itself liable for 50% of the claimant's damages. Personal responsibility, once again, was seen as a major influence in the final determination of damages however the negligence of an injured person will not absolve others from their duty to take reasonable care.

RIC Liable For Failure To Fence

Rail Infrastructure Corporation ("RIC") has recently been ordered to pay substantial damages to a claimant as a consequence of the failure to maintain a fence.

Leigh Ann Russell is a mildly intellectually handicapped young woman who, at the age of 21, walked through a missing panel in a chain link fence in a suburban street at Mascot that gives access to the Port Botany freight line. Russell climbed onto the side of a slow moving goods train, copying one of the youths that she was with, who, according to Russell, made it look easy. The train increased its speed and Russell let go and was dragged some distance over the rocky ballast that was adjacent to the train track. Russell sustained severe injuries including amputation of her right leg below the knee.

As a consequence of her injuries, Russell commenced proceedings in the Supreme Court of New South Wales against RIC alleging that RIC had been negligent as a consequence of the failure to maintain the fence.

At the time of the accident, February 2002, RIC owned the railway track and were responsible for the fencing. The evidence demonstrated that the panel of the fence had been missing for at least six months before the accident and there was a well worn path from the missing fence to the train line. Apparently the shortcut was used by members of the public as a shortcut to the Botany swimming pool, neighbouring factories and the wetlands behind the Eastlakes golf course. One of the locals gave evidence to the effect that after the fence was repaired it would not remain intact for more than one or two days. After the accident the fence was replaced with a high security metal fence which has remained intact since its installation.

At trial, RIC argued that it had no liability for Russell for a number of reasons, including the fact that it did not own the lot that the path ran through leading to the train line and also that the injury to Russell was not foreseeable.

The judge disagreed. The judge was of the opinion that the fact that there was a worn path leading from the gap in the fence to the train track should have made RIC aware that there was regular access from the suburban street to the train track. The judge was also of the opinion that it was reasonable to expect that the people coming through the gap in the fence to use the path would include children or mildly intellectually handicapped people.

The judge therefore found RIC liable but deducted 50% from Russell's damages for her own negligence.

It will be interesting to see whether RIC appeal the decision. The decision is a tough one when RIC was, at the time of this incident, responsible for hundreds of kilometres of train track and fencing along the train track. The judge no doubt thought that it was significant in this case that a maintenance inspection of the track was carried out weekly and the path would have been visible to someone carrying out such an inspection.

Will the decision stand if appealed in these times where personal responsibility is of such importance? Time will tell.

The School Was Negligent- But The Student Was Also Substantially To Blame

The New South Wales Court of Appeal has continued their tough approach in considering the negligence of claimants in the recent decision of *Sheldrick v State of New South Wales.*

Neil Sheldrick was severely injured when the pushbike he was riding was struck by a car. At the time of the collision Sheldrick was 14 years old and in year 9 of high school. The collision occurred following an excursion with the school cycling group. At the end of the excursion the teachers told the school kids that they were dismissed and could go home. Sheldrick was struck by the car on his way home at an intersection. The other four boys who were riding with Sheldrick at the time passed through the intersection safely. Sheldrick, who was cycling 15 to 20 minutes behind the other boys, was struck whilst attempting to cycle through the intersection.

At the trial in the District Court, the trial judge found that there was no negligence on the part of the driver of the car. The trial judge did however find negligence on the part of the school teachers responsible for the excursion for a failure to supervise the excursion, which was found to be a direct cause of Sheldrick's injuries. The trial judge also found Sheldrick substantially responsible for his own injuries and deducted 40% from Sheldrick's damages as a consequence of his own negligence.

Sheldrick appealed. The only issue on appeal was whether or not there should have been any deduction for Sheldrick's negligence and, if there should be, whether this deduction should be less than the 40% deducted by the trial judge.

The State of NSW accepted the trial judge's findings that the teachers had been negligent and this was not at issue in the appeal.

The Court of Appeal agreed with the trial judge that Sheldrick had failed to take care for his own safety. Sheldrick cycled into the intersection and failed to slow down or stop at a give way sign, actions that could be expected of a 14 year old boy, albeit a fatigued one.

The Court of Appeal confirmed the trial judge's finding of contributory negligence of 40%.

This is not a particularly surprising result given the Court of Appeal's recent tough approach to determining to what extent a claimant has been negligent. Personal responsibility is an issue for everyone, even children.

Appeals. You Might Win But If You Pay Out Before The Appeal Is Heard Will You Get Your Money Back

In litigation, the majority of cases resolve to the satisfaction of both parties. Some say that a good settlement is one where all parties are unhappy. But settlements cannot always be achieved. Sometimes, for one reason or another, a case is unable to resolve. For some it is a matter of principle, for others they just want their day in Court, and some just can't see the facts and the risks involved in the case. Cases sometimes have to run to judgment, and when they do the parties have divergent views which from time to time remain even after a judgment. So what next? An appeal? But surely to the victor goes the spoils. The winner at first instance will want to immediately receive the fruits of the victory. But if you intend to appeal and you hand over the money will you get it back? Will the winner fritter away their win before the appeal to ensure the money cannot be paid back if the appeal is lost? Will the winner simply disappear never to be found again?

How does an unsatisfied party who appeals a decision ensure that the benefits of a successful appeal are not defeated by the actions of their opponent? Simple, make sure you are not obliged to pay out on the judgment. The judgment is a court order which must be complied with unless the court suspends the operation or execution of the judgment and this is done by way of a stay of the judgment. That is an order that the judgment monies not be paid to the claimant until the conclusion of the appeal.

So you need to seek a stay of the judgment. That way, if the appeal is successful, there is no issue that you will be able to enjoy the full benefit of your successful appeal.

In the past, the approach of the Court tended towards the grant of a stay of execution of judgment on the basis that a portion of the judgment monies were paid out to the claimant. This was in some respects to overcome the dilemma that a claimant was entitled to the fruits of their judgment which had been delivered by an independent umpire. However, in more recent times, where there is an issue as to liability in a case, the Courts have tended to grant a stay of execution of the entire judgment. The fact that a claimant is entitled to interest on unpaid judgment monies (the current rate of interest is 10%) is seen as providing some protection to claimants.

The New South Wales Court of Appeal has recently considered this issue again in *Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor Lesvos* had been successful at trial in persuading the trial judge that they had reached an agreement with Penrith Whitewater Stadium that they would operate a café at the stadium. The trial judge found for Lesvos in the sum of $298,477.00. Penrith Whitewater Stadium appealed. The difficulty for Penrith Whitewater Stadium was, of course, if the judgment monies were paid and the appeal was successful, then they may not get their money back.

Justice McColl noted that the overriding principle in an application for a stay is to ask what the interests of justice require.

Justice McColl stated

> *"(a) Where there is a risk that an appeal will prove abortive if the appellant succeeds and a stay is not granted, the Court will normally exercise its discretion in favour of granting a stay;*
> *(b) the onus is upon the applicant to demonstrate a proper basis for a stay;*
> *(c) it is a matter of discretion whether the Court grants a stay and if so as to the terms which would be fair as part of the granting of a stay;*
> *(d) what is important in considering whether or not a stay ought be granted is the balance of convenience and the competing rights of the parties before it;*
> *(e) it is not necessary that special or exceptional circumstances should be made out; it is sufficient for the applicant to demonstrate a reason or an appropriate case to warrant the exercise of discretion in its favour."*

Penrith Whitewater Stadium submitted that if a stay was not granted, the appeal would be rendered nugatory because the opponents were insolvent and, presumably, would be unable to make restitution of the judgment sum if paid over. Penrith Whitewater Stadium also argued that the opponents have not demonstrated they need the judgment monies to start any other business. On the evidence before the trial judge each plaintiff company had ceased trading. It also appeared that the principal of each of the plaintiff companies had commenced operating another business.

Justice McColl in the Court of Appeal agreed with Penrith Whitewater Stadium that there was a real risk that the judgment

would not be repaid if the money was handed over to Lesvos. Justice McColl therefore granted a stay of execution of the totality of the judgment.

The evidence in the original proceedings was sufficient to establish the evidence necessary to support a finding that the money may not be repaid if the appeal was successful. Parties in litigation need to ensure that when a trial is running, they keep their eye on the ball and not just the case that is running. If a judgment does not go your way there may be an appeal and a need to seek a stay of a judgment and questions should be asked during the trial which will lead to information that could support an application for a stay of a judgment if you appeal. If you appeal and you want a stay of the judgment the onus is on you to prove that there is a real risk that the money will not be repaid following a successful appeal.

An important victory for Penrith Whitewater Stadium and an approach of the Court that continues to bring comfort to defendants where liability is an issue in an appeal and there is a risk that an appeal is worthless where money paid out following a judgment cannot be recovered after a successful appeal.

OH & S ROUNDUP

Fatal Electrocution

Redland Pty Limited was recently fined $65,000.00 following a fatal electrocution of a contractor. The company had been contracted to de-fit a shop in Westfield and the contractor was engaged by Redland to perform the de-fit. It was alleged the company failed to provide a safe system of work in that it failed to ensure that energised electrical wiring was adequately identified. There was no safe method for the removal of electrical wiring adopted. The energised wiring had not been sufficiently identified and the company had failed to ensure that its subcontractor had in place a safe work method statement for the removal of the wiring. The company pleaded guilty.

The company engaged Mr Vegas who was 28 years of age and self-employed to perform work to de-fit the shop in a verbal contract. The work method statement was deficient as it did not refer to the removal of electrical cabling or identify the risk of energised electrical cabling. Redland's work method statement also did not address the removal of the electrical cabling. Mr Vegas had indicated to other workers on the site that he was going to cut some wires and he set up an aluminium ladder in the shop. A short time later he was found on the ground with his body stiff, holding a wire in his left hand a pair of tin snips in his right. He had been electrocuted and fallen off the ladder.

After the incident it was revealed several live cables, including a cable that supplied a light to the adjacent shop were hanging down from the ceiling of the housing wire and the wiring for the shop had the same appearance. The Court noted that the heart of the tragic incident was a lack of communication between the parties involved in the de-fit and further, the certification provided by the electrician did not make clear that there were live cables in the shop ceiling other than those left by them for the purposes of allowing electrical equipment to be used. The facts revealed that there was no way for a lay person to discern which of the wires were live and which were disconnected.

The Court accepted that the company had a comprehensive work method program in place and had risk assessed its normal work procedures although the work method statement and risk assessment did not refer to the removal of electrical cabling. It also failed to identify the risk which arose when energised electrical cables were left in a ceiling during a refit. It was noted Westfield had been provided with a copy of the work method statement and the safety management plan and failed to identify the risk.

The company argued that consideration should be given to the fact that no prosecution had been brought against Westfield or the deceased's company or the electrical company that had worked on the de-fit. The Court however noted that penalties are fixed for the offence found to be proven, and it is therefore the offence itself to which attention is directed and not the occurrence of the accident or the contribution of other persons for what occurred.

The Court accepted there was contribution by other parties to the incident. However, the company's own breach was a serious one and the penalty was set having regard to the actions of the company.

The penalty in this case seems to be a moderate one. An early plea of guilty had been entered and significantly the company had made an ex gratia payment of some $10,000.00 to the widow as a sign of contrition and the owner of the company gave evidence which demonstrated that he was a man suffering deep depression, was on medication and had registered for social security payments. The evidence also revealed that the financial situation of the company was desperate and that once the

prosecution had been finalised, the owner would resign as a director of the company and the company would be wound up. Nevertheless, the owner had agreed to meet all liabilities of the company including the potential fine.

The company's financial state and the fact that it was no longer trading clearly influenced the level of penalty, a fine of $65,000.00.

Crane Collapse Leads To Substantial Fines.

Sebastian Builders and Developers ("SB&D") were constructing townhouses in Wollongong as the principal contractors of a project. They employed Mr Maletic as a project manager for the site. During the project, Francisco Sebastian was a director of SB&D and was also a director and shareholder in Franco Crane Hire Pty Limited. Franco Crane owned a self-erected tower crane that was hired by SB & D.

The crane was being dismantled in order to install components required to be fitted to the crane in order to meet safety standards. Mr Sebastian and Mr Maletic were involved in this task as was an employee of SB&D who was required to place a detour sign in the area and to act as an observer to keep the area clear. Franco Crane was to use a mobile crane to remove the counterweights on the self-erected crane. A number of counterweights were removed and a small number of permanent counterweights remained. Sebastian and Maletic were sitting near the crane considering the user instruction manual and Maletic operated the controller to move the trolley on the crane jib to fold the jib and as the trolley moved the mast of the crane began to move and the crane overbalanced and fell to the ground. When the crane fell, the jib travelled some 11 metres laterally under overhead power lines, over a footpath and a public road and came to rest in a public car park outside the construction site. An employee's car which was parked in the car park was damaged but no-one suffered injury. There were at least three or four workers on site at the time.

Charges for breaches of the Occupational Health and Safety Act were brought against SB&D, Francisco Sebastian, Franco Crane and Mr Maletic. Ultimately SB&D were fined $113,700.00 and convicted of two offences. Francisco Sebastian was also convicted of two offences and fined $12,000.00 for his role in SB&D. Franco Crane was convicted of one offence relating to its ownership of the plant and equipment and fined $97,500.00. Sebastian received a further fine of $6,000.00 arising out of his involvement in Franco Crane Hire.

Interestingly, in this case, the employee, Maletic, was prosecuted but not convicted. The Court found the offence proven and determined to proceed without conviction and ordered that the charges be dismissed. This occurred under what is commonly known as the first offender provisions in the Crimes (Sentencing Procedures) Act. It was accepted that Maletic's conduct fell short of a prudent operator. A heavy crane was dismantled with an extended jib by people who were not qualified to perform the task and presented a clear risk to safety, not only to the small number of people on the site but those members of the public in the vicinity of the site.

This was a first offence for Maletic only, having regard to his age, character and nature of the offence the Court concluded this was one of the rare cases where the appropriate course was to find the offence proven but not to record a conviction. Maletic was acting in accordance with the directions of Mr Sebastian, the owner of the company, which is not an uncommon event in an Australian workplace and it requires a particularly strong person to reject the directions of an employer, even where considerations of safety are present. The Court accepted that Mr Maletic's conduct was not such that the Court should personally penalise him.

Who is a previous offender?

In New South Wales, the Occupational Health and Safety Act provides that "previous offenders" under OH & S legislation are subject to a maximum penalty for an OH & S offence that is 50% greater than for a first offence.

Some say lightning never strikes twice. Unfortunately, some companies find that they experience a run of accidents separated by relatively short periods which lead to OH & S prosecutions. The timing of a hearing of a prosecution is not determined by the date of an alleged offence. Rather, the date that a prosecution is commenced, and Court availabilities tend to dictate the ultimate hearing date. It is quite possible for a prosecution for one offence to proceed to hearing before a prosecution for another earlier alleged offence. In this case when is a defendant a previous offender? A tantalising conclusion would be that in each prosecution the defendant will be seen as a first-time offender.

The Full Bench of the Industrial Court of New South Wales was recently called on to determine the true meaning of "previous

offender" which was relevant to the maximum penalty in these circumstances.

Two issues were considered. The first was whether or not a person who had been prosecuted for an OH & S offence previously and the offence was found proven but no conviction was recorded pursuant to the first offender provisions found in Section 10 of the Crimes (Sentencing Procedure) Act is a previous offender. The Court concluded the person would not be a previous offender.

The second issue related to a conviction of a company for an OH & S offence that occurred on a date after the offence for another prosecution which was not yet finalised.

James Denson and JBMR were convicted of an OH & S offence for failing to ensure its employees were attached by their safety harness to requisite anchorage points on the roof while working at heights at a site at Erskineville Park. In those proceedings the defendants were treated as persons with no previous convictions. The same defendants faced charges under the OH & S Act to which they pleaded guilty arising from events which occurred on 15 October 2003, that is, shortly prior to the date on which the offence for which the first conviction had been accorded. The original Judge had formed the view that the conviction of the defendants had resulted in the defendants falling within the definition of previous offender and subjected the defendants to the increased maximum penalty.

The Full Bench of the Court did not agree.

In this case:

- the present offences before the Court were committed before a later offence was committed.
- the later offence in time was the subject of a conviction; and
- the conviction in the later offence was imposed before sentencing in the present case.

In those circumstances the Court held that it was still necessary to treat the conviction for the offence on 15 October 2003 as a first offence.

The Court concluded that to be a previous offender a defendant must have been convicted of an offence of any kind against the OH & S legislation provided the offence occurred before the offence which is before the Court. In this case neither Denson nor JBMR were previous offenders.

Both defendants were therefore exposed to the maximum penalty for a first offence.

The defendants, despite being convicted of two offences, faced maximum penalties in each case for first time offences. A lucky break for the defendants this time.

Termination For Genuine Operational Reasons

WorkChoices has restricted the rights of workers to bring claims against employers challenging terminations as harsh, unjust or unfair where the employer is a corporation that employs less than 100 employees. However a corporation that employs more than 100 employees is still subject to claims from employees based on harsh, unjust or unreasonable termination except where the termination is for "genuine operational reasons". So what are "genuine operational reasons"?

"Operational reasons" are reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business or to any part of the employer's undertaking, establishment, service or business.

If a termination of employment of a particular employee is for genuine operational reasons, or reasons that include genuine operational reasons, no application may be made to the Commission for relief in respect of such termination.

This issue was recently considered by the Industrial Relations Commission in *Cruickshank - v - Priceline Pty Limited*, Priceline was acquired by Australian Pharmaceutical Industries Limited in October 2004. Cruickshank commenced employment in March 2005 with Priceline. Priceline was a subsidiary of Australian Pharmaceutical Industries.

By the end of the financial year 2006, Priceline had significant financial discrepancies in its accounts. Shares in Priceline were voluntarily suspended in July 2004. A $17.2 million loss was advised to the market in August 2006.

The new CEO of Priceline instituted an immediate review of its structure and operations. 32 positions were taken out of the business structure. These included the number of space planner positions being reduced from four to two. As Mr Cruickshank and another planner were earning considerably more than the other two space planners, his employer decided there would be significant cost savings and made Cruickshank and the other higher earning space planner redundant.

Cruickshank subsequently found his job advertised at a lower salary.

It was argued the termination of Cruickshank was a sham.

The Commissioner was satisfied the termination resulted from the employer's financial difficulties and subsequent decision to reorganise the structure. There was no evidence to substantiate a "sham", or that Mr Cruickshank's position was unreasonably targeted. Mr Cruickshank was one of 32 persons who were made redundant.

The Commissioner concluded at least part of the decision to terminate Mr Cruickshank was for a genuine operational reason. This was sufficient to disentitle Cruickshank from continuing his claim that his termination was harsh, unjust or unfair.

Workers Compensation-Medical Expenses And Interim Payment Directions

In the recent decision of *Robinson - v - Forster Tuncurry Memorial Services Club Limited*, Deputy President Bill Roache of the Workers Compensation Commission affirmed that medical expenses not yet incurred are not payable under an Interim Payment Direction.

The Deputy President made reference to a previous decision of *Widdup - v - Hamilton*. The Deputy President confirmed that Section 60 (Medical Expenses) of the Workers Compensation Act 1987 is an indemnity provision under which orders can be made for the payment of the cost of hospital and medical treatment. A cost is a financial liability to pay for services provided. Therefore, if a worker seeks to bring an Interim Payment Direction for costs not incurred, there is no financial liability involved. This prevents the Workers Compensation Commission from making a declaratory order for the payment of specific future hospital and medical expenses pursuant to Section 60 because those anticipated expenses are not costs within the meaning of Section 60.

This decision is relatively timely as it appears that workers' solicitors have become attuned to an increased reliance upon Interim Payment Directions in order to secure the payment of weekly compensation and medical expenses. Under an Interim Payment Direction, it is presumed that the Direction should be made and the onus of proof to defeat the Interim Payment Direction shifts to the employer. In other words, employers must show on the balance of probabilities why the Interim Payment Direction should not be issued in favour of the worker.

Whilst this decision has no bearing on incurred medical expenses where the Commission has jurisdiction to determine the matter, the increasing popularity of interim payments to secure a determination for future surgery will subside. Interim Payment Directions are not a valid means of securing payment of future medical expenses.

Workers Compensation - Rejection Of Evidence Can Lead To Error

In the recent decision of *Tweed Shire Council - v - Marriott*, Acting Deputy President Anthony Candy of the Workers Compensation Commission revoked a decision of an Arbitrator relating to a claim for Section 40 benefits. The Acting Deputy President concluded the Arbitrator should not have refused to consider crucial evidence and placed too much weight on the findings of an Approved Medical Specialist in relation to the question of incapacity.

The Arbitrator had refused to admit into evidence an updated report from a treating doctor that reviewed surveillance evidence and indicated a lack of credibility on the part of the worker. The doctor had also altered his previous opinion in relation to any alleged incapacity. The Arbitrator also refused to allow the employer to call the doctor to give evidence.

The Rules of the Workers Compensation Commission require a party to give advance notice of all evidence relied. The Arbitrator refused to consider the evidence on the basis the employer had not provided the evidence to the worker before the commencement of the arbitration. The Deputy President, upon reviewing the evidence, found the finding of total incapacity

would have been different if the evidence was admitted.

Whilst rules are rules the Commission does not in all circumstances require strict compliance. When making decisions an Arbitrator must properly balance the competing interests of the parties and deliver justice to the parties whilst at the same time having regard to compliance with the Rules and the statutory objectives of the Commission. Arbitrators must take into account how specific pieces of evidence could affect the outcome of a matter rather than solely determine evidence cannot be utilised based on a failure by a party to give notice of the evidence and comply with the Rules.

The Deputy President also concluded that the Arbitrator gave too much weight to an Approved Medical Specialists (AMS) certificate in relation to the issue of incapacity. An AMS assessment of whole person impairment is binding upon the parties and is conclusive on the issue of extent of whole person impairment but not incapacity. An Arbitrator will fall into error if too much weight is placed on the AMS's opinion on incapacity. Opinions of treating doctors and specialists cannot be disregarded solely on the basis that they are inconsistent with the opinion of an AMS. AMS certificates should be seen as just one piece of evidence and not the main piece of evidence on incapacity. AMS certificates should be considered in light of the entirety of the evidence presented to the Commission.

Restraint On Independent Contractor Found To Be Against Public Policy

The Court of Appeal of the Australian Capital Territory has confirmed that a contractual clause, which attempted to restrict an independent contractor's right to provide services to competitors, was void on the grounds of public policy.

Capital Aircraft Services Pty Limited ("Capital") provided technical support and services to aircraft owners and operators principally from Canberra Airport. Nicholas Brolin ("Brolin") was an independent contractor.

On 1 March 2001 Brolin entered into an agreement with Capital to provide his services on a casual basis. A restraint clause in the Agreement provided that whilst he was working on Canberra Airport, Albury Airport or any airfield within 75 nautical miles of Canberra Airport, Brolin would work solely for Capital.

It was accepted Brolin, during the term of the agreement, carried out some work for one of Capital's competitors contrary to the terms of the agreement and the restraint clause. There was no evidence of industry practices or standards to establish the reasonableness of the clause. The only purpose of the restraining clause identified by Capital was to protect Capital's current business.

The Court of Appeal noted the agreement did not require Capital to offer Brolin any amount of work. The agreement was essentially an agreement for casual employment. The agreement did not contain any warranty to the effect that any work would be available or if it was available, it would be offered to Brolin in preference to any other suitably qualified person.

The Court also noted that if the work offered to Brolin by Capital had slowed or even ceased, it could not see how Brolin could have mounted any credible action against Capital for breach of the agreement to provide him work.

The Court found there was no implied term in the agreement that Capital would provide Brolin with a reasonable amount of work. Consequently, they determined the restraint clause imposed an unreasonable restraint of trade on Brolin.

The onus of establishing that a restraint of trade on a party is reasonable rests upon the party who seeks to impose the restraint. The party seeking to restrain another party must be able to provide evidence the restraint is necessary to protect their business. However the Court confirmed no person has an abstract right to be protected against competitors in relation to his trade or business.

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