GD News

Gillis Delaney Lawyers

May 2007 Issue

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.

Worker's Claim Is Not A Work Injury Damages Claim! Will The Flood Gates Open?

If you are injured in NSW the damages you can recover are affected by the way that you are injured. Essentially there are three legislative regimes that regulate damages awards. The Workers Compensation Act and the Workplace Injury Management and Workers Compensation Act ("WIM Act") regulate damages for work accidents. The Motor Accidents Compensation Act regulates motor accidents. The Civil Liability Act regulates general common law claims. The damages that can be recovered for an injury under the three schemes are significantly different. There are different thresholds and differences in the heads of damages that can be claimed. Confusion results and the different regimes result in defendants and the injured arguing about what regime applies- for example: It involved loading a truck-Was it a work accident or a motor accident?

The harshest regime for damages in NSW is the work injury damages regime which supplements the no fault payments that employees receive when they are injured at work. Essentially there is no award for pain and suffering in a work injury damages claim although the worker can receive compensation for pain and suffering as part of his statutory benefits but not to the same level as provided in the other damages regimes in NSW.

This leads to tensions and there are regular campaigns mounted in the media that seek to advance the proposition that there should be one system of damages for those injured in NSW. Last year a NSW Parliamentary Committee essentially advocated change and recommended the introduction of a single damages regime however this approach is yet to gain support from the NSW Government.

So what happens when lawyers seek to advance employees' interests? Is there a way to get around the work injury damages regime in NSW? Can a claim be brought by an injured worker that will not be regulated by the work accident damages regime? Can ingenuity prevail? Can what some see as adversity be overcome? Lawyers continue to try to find ways to get around the work injury damages regime and now the Trade Practices Act ("TPA") may well provide one way around the system.

The NSW Court of Appeal recently concluded that a claim by a worker under the TPA is not a "work injury damages" claim as defined in the WIM Act.

Zoran Miskovic an employee of Stryke Corporation alleged that from about 19 July 1999 to May 2002 he was required to patrol an excessive amount of premises as a security officer, so suffering *"work injury damages"* and he brought a claim under the WIM Act. He alleged he suffered psychiatric injury. Miskovic complied with the procedural requirements for a work injury damages claim which include provision of Pre-Filing Statements that include a draft of the claim to be filed in court proceedings. Miskovic commenced proceedings in the District Court of New South Wales by filing an ordinary statement of claim which:

- alleged that Stryke Corporation was liable to Miskovic for breach of the duty of care owed by an employer to employee ;
- claimed to be court proceedings on a claim for "work injury damages" which engaged s318(1) of the WIM Act which effectively limits the right to bring a claim different to that made in the Pre-filing Statement;
- was not materially different from the proposed statement of claim that formed part of the

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
David Collinge dec@gdlaw.com.au

Inside

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

pre-filing statement .

The case was fixed for hearing before the District Court, allocated a hearing date and on the day of the hearing Miskovic gave notice that he intended to amend his claim in three respects:

- to add a count in contract ;
- to add a count for breach of fiduciary duty ;
- to add a claim for damages pursuant to s82 of the TPA based on an alleged breach of s53B of the TPA

Miskovic gave no notice of the intention to seek to amend the claim before 10 am on the first day the matter was listed for hearing. The primary judge granted leave to amend the statement of claim and made consequential orders including an order vacating the hearing date.

The order granting leave to amend the claim was the subject of an appeal to the NSW Court of Appeal.

The appeal sought to overturn the leave granted in the District Court to add a count under federal legislation, namely s53B of the TPA seeking damages under s82 TPA. Section 318 is part of a statutory scheme under WIM for a compulsory pre-trial process. It requires the employee to submit to the employer the former's proposed statement of claim and constrains subsequent amendment to that statement of claim without leave.

Before the Appeal proceeded, Miskovic abandoned the contract and fiduciary relationship counts but intended to proceed with the claim based on the alleged breach of section 53 of the TPA and it was necessary for the Court of Appeal to determine whether the District Court should have granted leave to amend the claim and whether the claim was a work injury damages claim as defined in the WIM Act.

*"**Work injury damages**"* is defined in s250 of WIM as follows:

> "***work injury damages*** means damages recoverable from a worker's employer in respect of:
> (a) an injury to the worker caused by the negligence or other tort of the employer, or
> (b) the death of the worker resulting from or caused by an injury caused by the negligence or other tort of the employer,
> whether the damages are recoverable in an action for tort or breach of contract or in any other action, but does not include motor accident damages.
> (2) In the definition of work injury damages in subsection (1), a reference to a worker's employer includes a reference to:
> (a) a person who is vicariously liable for the acts of the employer, and
> (b) a person for whose acts the employer is vicariously liable.

Section 53B of the TPA provides:

> "A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment."

As noted by the Court of Appeal

> "Section 53B *TPA* is predicated upon prospective employment rather than employment that has already commenced. It thus refers to employment "*that is to be, or may be, offered by the [employer] corporation or by another person*". The prohibition in s53B is against engaging "*in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment*"."

The critical issue was whether the claim sought to be brought seeking damages for breach of s.53B of the Trade Practices Act 1974 (Cth) (TPA) was "a claim for work injury damages" within the meaning of section 318 of the WIM Act. The cause of action sought to be brought was an action for damages under s.82 of the TPA, which provides for recovery, by "a person who suffers loss or damage by conduct of another person that was done in contravention of TPA provisions" including s.53B, of that loss or damage.

The focus for the Court of Appeal was whether an action under s53B of the TPA was an action for a "tort" within the meaning of the definition of "work injury damages" in the WIM Act. The Court of Appeal concluded that the phrase "negligence or other tort" does not extend to proceedings invoking s53B of the TPA and such a claim is not a work injury damages claim.

Effectively the Court of Appeal concluded the s53B statutory obligation does not bear the distinctive or common characteristics

of tort law as this was a requirement for a claim to fall within the definition of work injury damages in the WIM Act.

Justice Santow examined the requirements of a claim under s53B of the TPA when compared to a negligence claim and also the much litigated provision section 52 of the TPA and concluded:

> "I have already indicated that there is no requirement for lack of due care. Liability under both s52 and s53B is moreover essentially strict. There is no requirement that the defendant intend that the conduct be misleading or deceptive. And awards of damages under s52 for breach of s52 and equally s53B would not necessarily be constrained by conduct…… I conclude that the expression "other tort" (as found in the definition of work injury damages in the *WIM Act*) does not encompass the statutory right to sue for damages, such as that found in s53B of *TPA*. I consider that expression is apt rather to cover any common law action other than in contract. That interpretation finds further support in the immediately preceding reference to "negligence" as implying a genus sharing the characteristics of a common law action."

As can be seen in s250 of the WIM Act the concluding part of the definition of "*work injury damages*" refers to damages recoverable "*in an action for tort or breach of contract or in any other action*". The Court of Appeal concluded that this does not expand the cause of action from that of a common law tort to a statutory one despite the reference to "*any other action*". Rather the broad reference to "*tort, breach of contract or any other action*" reinforces the "genus" of a common law claim.

Some form of extension of the usual meaning of "tort" may be suggested by the words "any other action", where appearing in the definition of work injury damages in the context of "whether the damages are recoverable in an action for tort or breach of contract". Nevertheless, in that definition, the reference to "action" was as noted by Justice Santow - "a reference to a "common law cause of action" and is not a reference to "action … to enforce a statutory right by a statutory cause of action"."

Section 53B of the TPA is a provision that relates to pre employment representations rather than representations made during the course of employment. Perhaps this was a good reason for the claim to fall outside a regime that regulates damages for workers? The provision clearly seeks to afford protection to a worker in respect to conduct that preceeds the workers employment.

So are there other TPA actions available to workers against employers?

The High Court in Nelson v Concrete Constructions more than 15 years ago put an end to the threat of actions against employers by workers under section 52 of the TPA by finding section 52 provided consumer protection and not protection for employees as representations to employees were not made in trade or commerce. Section 52 of the TPA can not provide a cause of action against an employer for misleading and deceptive conduct arising from representations concerning safety made to workers during the employment relationship. The simple answer is no. It was not necessary for the Court of Appeal to determine the issue and if it did the Court of Appeal noted that a finding on this issue could give rise to constitutional issues if it was held that a section 52 claim was not a work injury damages claim due to inconsistency between the TPA and WIM if both Acts regulated claims arising in connection with the employment of the worker.

But the door has been left ajar for employees to bring claims based on pre-employment representations. Justice Santow in Miskovic's case noted:

> "An examination of the actual amendments sought to be made to the statement of claim indicates that the claim is directed to alleged conduct on the part of the prospective employer as to "*the nature terms and conditions of the employment*".
>
> Its particularisation is based upon alleged lack of safety and lack of assistance to the respondent in so supervising a large number of high-rise buildings. The claim was based upon alleged representations, express or implied, as to the assistance and back-up the respondent would receive in that task and as to his failing to be informed that he would be working alone and on foot to carry out supervision of up to 15 high-rise buildings; see para 11 under the heading "Claim under the *Trade Practices Act (Cth)*".
>
> The subsequent damage claimed clearly arose when the respondent (Miskovic) commenced employment. It is described in the alleged statement of claim as simply "*damages pursuant to the Trade Practices Act (Cth)*"."

Justice Santow then considered the nature of claims under sections 52 and 53B of the TPA and concluded:

> "I do not consider that the slight variation in wording in s52 *TPA* in its reference to "*engage in conduct that is misleading or deceptive or is likely to mislead or deceive*", as against s53B "*engage in conduct that is liable to mislead*", affects the

basic proposition stated below. That proposition is that the concept of misleading conduct, in either section, does not have as an essential element any notion of failure to take reasonable care, so far as the defendant is concerned. Failure to take reasonable care has never been an element of the cause of action under s52 *TPA* as Gibbs CJ confirmed in *Parkdale Custom-built Furniture Pty Ltd v Paxu Pty Ltd* ... Conduct will, and will only, be misleading or deceptive if it induces or is capable of inducing error. Here, that error alleged by the amendment pleaded and by reference s53B is "*as to … the nature, terms or conditions of … the employment*"; ….. That therefore a defendant may have acted honestly and reasonably and taken all reasonable care will not constitute a defence if there was conduct which induced or was capable of inducing error, subject to proving damage."

Given therefore that the s53B claim is not to be characterised as one in negligence, in order for the appellant (Miskovic) to succeed it must show that the *TPA* claim here brought constituted a claim that fell within the words "*or other tort*".

Justice Santow after considering the issues said:

"I conclude that the expression "other tort" does not encompass the statutory right to sue for damages, such as that found in s53B of TPA. I consider that expression is apt rather to cover any common law action other than in contract. That interpretation finds further support in the immediately preceding reference to "negligence" as implying a genus sharing the characteristics of a common law action. TPA claim was not some "other tort"."

Justice Santow did not limit his findings to the Section 53B claim but rather suggested that all statutory causes under the TPA will fall outside the definition of work injury damages. The other Court of Appeal judges did not go quite as far, however their findings were also essentially based on the conclusion that a statutory claim did not fall within the definition of work injury damages in the WIM Act. Nevertheless section 52 claims will still be unavailable to employees by virtue of the High Court's decision in Nelson v Concrete Constructions.

Miskovic must now run his TPA claim. He will win or lose on the facts but his claim is not a work injury damages claim and his damages if he succeeds will not necessarily be regulated by the WIM Act.

The decision does not mean open slather for claims against employers. There will be limitations to the claims that can be brought under section 53B of the TPA and workers will still need to prove the facts to support the claims as the TPA claims have different ingredients to negligence claims.

Damages assessed under section 82 of the TPA are not necessarily the same as those assessed at common law or under the WIM Act. This issue was not determined by the Court of Appeal although Justice Santow noted:

"Moreover, the damages recoverable for breach of s52 of the Act are not necessarily co-extensive with those recoverable in negligence. In particular, damages are confined to actual loss and, thus, do not include punitive damages. Further, it is possible that they are not limited either by the foreseeability of consequential damage or remoteness. And significantly for present purposes, if s52 had applied in this case, there would be no occasion to consider whether the appellants were "immune from suit". The question could only arise if it were found that the appellants were negligent but that s52 did not apply to their conduct."

The claim of Miskovic may not be limited by the WIM Act damages regime.

But will the workers compensation Nominal Insurer agree to indemnify the employer for the claim? The claim is not for damages for an injury as defined in the workers compensation legislation. The claim is for damages for breach of the TPA. Will the employer be uninsured for the claim? Will the employer have a liability insurance policy with employee exclusions where those exclusions do not apply to the TPA claim as it is framed? There are significant problems that arise from the Court of Appeal's findings.

An appeal to the High Court is a possibility. So is legislative intervention by the NSW government. Nevertheless legislative intervention that may not have retrospective application and further legislation may well throw up constitutional issues that will ultimately be tested.

Liability insurers might need to consider their exclusion clauses and some insurers may well develop policies to provide coverage for what could be a gap in insurance cover if the workers compensation insurer is not liable to indemnify the employer.

For now we will all wait and see, but no doubt, the final outcome of Miskovic's claim will be of great interest to all, and possibly

we will see the rise of claims by workers against their employers based on breaches of section 53 of the TPA for alleged misleading and deceptive conduct concerning representations made to workers regarding safety.

What ever happens, employers, unions, the injured, insurers, lawyers and the Government will now need to carefully consider their next steps cautiously. Miskovic's section 53B TPA claim is alive and well and may sound the bell as a call to arms for others who wish to push the envelope and seek to bring claims for employees against their employers outside the work injury damages regime in NSW. It must also be remembered that the TPA applies to representations by corporations. Individual employers will face similar claims under section 46 of the NSW Fair Trading Act which is in similar terms to section 53B of the TPA.

What are examples of the potential claims? A worker injured using unguarded machinery who asked the employer before they commenced employment if all machinery was guarded according to Australian Standards and they were advised all equipment complied. Perhaps an enquiry about safe working at heights complying with Australian Standards is another example. Finally what about the enquiry do you comply with the OH&S Act at all times.

More is to come and only time will tell what the final outcome will be.

Personal Responsibility - More Problems For Injured Claimants

The New South Wales Court of Appeal has recently considered the obligations owed by landlords to tenants and the extent of the duty of care that should be imposed on landlords. Personal responsibility is a factor and the Court of Appeal in Hume v Department of Housing recently overturned an award of damages to a minor who was injured when he was dropped by his mother after his mother fell while leaving a flat owned by the Department of Housing.

Miss Hume commenced proceedings on behalf of her son, Tyler. Miss Hume rented a flat from an acquaintance which was owned by the New South Wales Department of Housing. The flat was on the ground level and there was a side entrance opening onto a porch which was less than 1 metre above the ground. There were four step risers and three steps to the ground from the porch. There were no balustrades on the porch or handrails on either side of the steps.

Ms Hume had suffered from a problem with her right knee dislocating before the incident. As she descending the stairs her right knee dislocated and she freefell dropping her son in a gap between the stairs and the porch. Some days after the accident a railing was installed which extended up the four steps and across the landing.

A claim proceeded before the District Court where the critical issue was whether or not the Department of Housing had breached its duty of care by failing to install a handrail to guard the porch and the steps. The Trial Judge found that whilst Miss Hume's disability had caused the fall, the Department of Housing's breach had caused Tyler's injury as if there had been a rail Miss Hume would have taken hold of it and Tyler would not have been dropped.

The Department of Housing appealed. The appeal was heard by three Judges of the Court of Appeal. Ultimately the findings in favour of the injured claimant were overturned by the Court of Appeal by a 2:1 majority.

The majority of the Court of Appeal concluded that the landlord owed a duty to the tenant to take reasonable care to avoid foreseeable risk of injury, but did not have to make the premises as safe as reasonable care could make them. Justice McColl stated:

> *"The occupier of premises is only required to take care as is reasonable in the circumstances and a landlord should not be subjected to a higher duty to make premises as safe for residential use as reasonable care and skill on the part of anyone can make them."*

Justice McColl also noted that:

> *"It might be accepted, as the primary Judge held, that Miss Hume would have fallen had there been a handrail, either along the porch or down the steps. It might also be accepted that it was foreseeable that, in the absence of a handrail, a person who fell off either the porch or down the steps might be injured."*

Justice McColl concluded that it was a matter of common sense that there was a foreseeable risk of injury and found in Hume's case:

"However, the failure to eliminate a risk that was reasonably foreseeable and preventable is not necessarily negligent. It is necessary to determine what was a reasonable response to that risk."

In this case the Court of Appeal held that the porch and stairs were no more or less inherently dangerous than any such structures or the many other dangers in premises. There was no doubt the steps could have been made safer but that did not mean they were dangerous or defective.

Justice McColl emphasised:

"There was risk, albeit probably a low one, that a person whose hands were full, whether because carrying a child, shopping or some other household items, might stumble and fall on either the porch or steps and be injured because there was no handrail to break the fall. That risk was one of the many encountered in domestic premises, which, as has been frequently emphasised, are not risk free." and : *"There is no such thing as absolute safety. All residential premises contain hazards to their occupants and to visitors. Most dwelling houses could be made safer, if safety were the only consideration. The fact that a house could be made safer does not mean it is dangerous or defective. Safety standards imposed by legislation or regulation recognise the need to balance safety with other factors, including cost, convenience, aesthetics and practicality."*

The Court of Appeal noted that the building standards in force over the relevant period when the premises were occupied did not require a handrail along either the porch or down the steps. That was not determinative of the issue but reflected what a reasonable person would have regarded as a reasonable response to the risk imposed by the porch and the steps.

Whilst there was a dissenting judgement it is clear that the Court of Appeal regards the duty owed by landlords as less exacting than to provide perfectly safe premises.

Clearly owners of residential premises owe a duty to take reasonable care for the safety of others and ensure that structures are not inherently dangerous. Nevertheless, there is no absolute duty on an occupier to ensure that the premises are made as safe as they could be. A balancing exercise is both sensible and necessary. May the user beware! There are risks that we assume on a daily basis and someone is not always to blame. There is the concept of "Personal Responsibility".

Can You Bring A Claim Based On An Allegation That A Public Authority Did Not Have Sufficient Resources

In New South Wales the Civil Liability Act, 2002 contains a number of protections for public authorities. In a recent edition of GDNews we discussed the special non-feasance protection for roads authorities that section 45 of the Act provides. Section 42 of the Act also provides significant protection for public authorities. This section outlines the principles concerning the resources and responsibilities of public or other authorities and provides that the general allocation of resources by a public authority is not open to challenge by a claimant in Court proceedings.

Just how powerful this protection is was demonstrated by a recent decision of the New South Wales Court of Appeal where a claimant was not even allowed to argue that the funds and resources of the New South Wales Police Service were insufficient.

Gordon Ball was a Detective Chief Inspector with the New South Wales Police Service. From 1995 to 2001 Ball worked within the Child Protection Enforcement Agency ("CPEA"). Ball alleged in a Statement of Claim filed in the District Court that as a consequence of his duties as a police officer he had suffered from post-traumatic stress disorder because of the negligence of the Police Service.

The Statement of Claimed filed by Ball contained a number of allegations in relation to the funds and resources of the CPEA. These included allegations that the CPEA was allowed to operate without sufficient funds or resources to adequately carry out investigations, failing to provide sufficient staff to the CPEA, placing Ball in a position where he was forced to be chronically overworked because of lack of staff, failing to follow up Ball's investigations and expecting Ball to carry out duties that were too burdensome for one individual.

The State of New South Wales argued that Ball should not be able to make such allegations which could not succeed as a consequence of the Section 42 of the Civil Liability Act and these allegations should be deleted from Ball's Statement of Claim.

Ball argued that he should be allowed to make these allegations as the Civil Liability Act did not apply to his claim as a consequence of a section in the Act that states that the Act does not apply when the Workers Compensation Act, 1987 applies. Ball conceded that as a police officer he was not classified as a worker under the Workers Compensation Act, 1987 as only police officers who joined the New South Wales Police Service after 1 April 1988 fall within the definition. Ball attempted to argue that the Civil Liability Act should not apply as the section of the Civil Liability Act should be construed as excluding civil liability claims for any employee in an employer/employee relationship.

The Court of Appeal disagreed with this argument and found that the Civil Liability Act did apply to the claim brought by Ball. The Court of Appeal was also of the opinion that because of Section 42 of the Civil Liability Act, 2002 Ball could not challenge the resources of the Police Service as a consequence of which these allegations should be deleted from Ball's Statement of Claim and the allegations were struck out.

An interesting decision that brings some joy to public authorities. Ball's arguments did not even get off the ground.

The decision also demonstrates the anomalies in the law in New South Wales. If Ball had commenced employment with the Police Service after April 1988 then his claim would have fallen under the provisions of the Workers Compensation Act 1987 and section 42 of the Civil Liability Act would not have been an issue.

Life Expectancy And Section 45 Payments - Ruling For CTP Insurers And Probably Others

The High Court on 19 April 2007 handed down an important decision for NSW CTP insurers - *Golden Eagle International Trading Pty Ltd v Zhang.* The judgment clarifies the law in two areas.

Life expectancy tables

In assessing damages for future losses in personal injury claims, a claimant's life expectancy is a necessary factor in the calculation.

The Australian Bureau of Statistics published tables of life expectancy on a regular basis. There are, however, two sets of tables - the 'historical' tables and the 'projected' tables.

The essential point of difference is that the projected tables factor in assumptions of improvement in conditions of life, medical care and treatment and the like. As a result a claimant's life expectancy under the projected tables is longer.

Until now, it had been usual to use the historical tables in assessing future damages. The High Court has now said it is better to use the projected tables.

Although a motor accident case, it is certain that the change will come to be reflected in other personal injury areas.

This will effectively increase damages awards in many situations.

Section 45 payments

The issue here was whether the 'defence' for payments made under section 45 of the Motor Accidents Act 1988 applied before or after any deduction in the damages award for contributory negligence.

The New South Wales Court of Appeal had decided that the deduction for section 45 payments ought be made first, before reduction in the award for contributory negligence.

The High Court has now held that this is wrong. The appropriate method is to take the whole of the damages assessment - including the amount of the section 45 payments, and apportion that total sum for contributory negligence. Only then are the section 45 payments deducted from the balance to reach the amount of the judgment.

The effect - in a case with contributory negligence - is that the claimant loses the benefit of the section 45 payments to the extent of the contributory negligence.

Can A CTP Insurer Withdraw An Admission Of Liability?

Current legislation governing personal injury (motor accident and workplace in particular) and the 'guidelines' of the regulatory authorities, place emphasis on the quick assessment by licensed insurers of claims made upon them. Often, the easiest way to achieve a quick assessment is to admit liability and accept the claim.

What happens then when - at a later time - the insurer realises that such an admission of liability was not warranted? Does the legislation preclude a withdrawal of the admission?

For the *Motor Accident Compensation Act 1999* ('MAC Act'), at least, the answer is no. Insurers retain the prospect of later denying liability on a claim they previously admitted.

The point was raised in *Nominal Defendant v Gabriel* decided by the Court of Appeal in March 2007.

An insurer had made an out of court admission of liability pursuant to section 81 MAC Act. Subsequently, in District Court proceedings brought by the claimant it sought to deny liability and allege contributory negligence. The question for the Court of Appeal was whether the system of the MAC Act allowed that to be done?

An out of court admission of liability (or breach of duty of care) is, the Court said, no more than an item of evidence that a Court might ultimately accept or reject. It is open to a party who has made such an admission to seek to demonstrate, through other evidence, that the admission was made under a misapprehension, or at a time when not all the relevant information was to hand.

The Court likened the position to that of a motorist who, immediately after an accident says "I wasn't looking where I was going". That is an admission, and can form part of the evidence a Court will have regard to in ultimately deciding liability. It does not however, preclude the party from formally denying liability in subsequent Court proceedings.

Likewise with a section 81 admission. Such an admission, the Court held, has no greater status, once Court proceedings are begun, than any other admission of liability made out of Court. Accordingly, a defence denying liability could be relied on.

It would be prudent, however, in such circumstances for insurers to have available some evidence to explain their change of position. Without that, the evidence of the fact of making the earlier admission may well assume a real significance.

Workers Compensation Insurer Recovers Compensation Payments From A CTP Insurer

In New South Wales the Workers Compensation Act, 1987 provides an avenue for workers compensation insurers to recover workers compensation payments made to a worker when the injury is caused by another party.

Workers compensation legislation in New South Wales also provides workers compensation benefits to workers who are injured on a journey to and from work. Journey claims resulting from motor vehicle accidents are a regular source of recovery claims for workers compensation insurers.

Claims by workers compensation insurer's present problems for CTP insurers. Under motor accidents legislation limitation periods apply to motor accidents. However, the same limitation periods do not apply to a claim for a refund of workers compensation payments.

The New South Wales Court of Appeal in *Turner - v - George Weston Foods* had cause to consider a claim by a workers compensation insurer against a CTP insurer and the Court of Appeal has confirmed the method of assessment of the worker's compensation insurer's claim.

In New South Wales the damages regime for motor accidents is found in the Motor Accidents Compensation Act, 1999. Prior to 1999 the relevant legislation was the Motor Accidents Act, 1988.

In order to determine a worker's compensation insurer's entitlement to indemnity in respect to compensation payments paid or payable, it is necessary for the Court to assess damages to which the worker would have been entitled if the worker had sued the other party, and in the case of a motor accident, the owner and driver of the motor vehicle.

Graham Shears was an employee who was injured on his way to work when he was a passenger in a motor vehicle. The vehicle in which he was travelling was struck from the rear by Turner. The worker's compensation insurer had received reimbursements from the CTP insurer totalling $122,228.51. The worker's compensation insurer commenced proceedings in June 2000. By 27 September 2005 the payments made by the worker's compensation insurer totalled $248,330.43.

The District Court judge who heard the proceedings assessed the damages of the worker against the driver of the vehicle pursuant to the Motor Accidents Act, 1988 and assessed those damages at the date of trial. The damages were assessed at a figure in excess of $600,000.00. The end result was that the worker's compensation insurer would be entitled to recover all payments which it made. As the CTP insurer had already paid to the worker's compensation insurer approximately $122,000.00 a judgment was entered in favour of the worker's compensation insurer in the order of $135,000.00 (the difference between what had been paid out and what was already reimbursed) plus interest of approximately $28,000.00. An additional benefit for the worker's compensation insurer was that payments of compensation made after the judgment would also be recoverable from the CTP insurer provided the aggregate of compensation paid was less than the notional assessment of damages of $606,523.00.

The CTP insurer was dissatisfied with the approach taken by the Trial Judge. The insurer appealed to the Court of Appeal. The CTP insurer argued that any assessment of damages to be carried out by a Trial Judge should be assessed at the date when an action for damages by the worker against the CTP insurer would in the ordinary course of things have been heard. In this case it was thought that an earlier assessment would have resulted in a lesser assessment of damages.

The Court of Appeal rejected the CTP insurer's argument. The CTP insurer argued that damages should be assessed at an earlier time to avoid an unjust result where the delay in the judgment arises from the commencement of proceedings at a much later time than would normally occur where a claimant brings a claim for damages.

The Court of Appeal noted that it is possible for an employer who has paid compensation to recover an indemnity from the person liable to pay damages in respect of the injury to the claimant, even if the action to recover any such indemnity is brought after the limitation period for the worker to sue if the tortfeasor had expired.

Ultimately, CTP insurers face a long wait before they can close their books on their liabilities where workers are injured on their way to and from work. The worker's compensation insurer can choose to bring a claim against the CTP insurer at any time in the 6 year period commencing from the date of the compensation payment. If the insurer is too late to bring a claim for one payment it is not too late for a later payment provided the claim is commenced within 6 years of the later payment. The notional assessment of damages which limits the recovery of compensation is determined at the date of the trial, and as seen in Turner's case, there can be a long delay between the accident and the notional assessment of damages, for Turner's CTP insurer, 14 years after the accident.

OH&S Roundup

Appeal From Conviction Under The OH&S Act

A construction company has recently been held liable for a breach of the Occupational Health and Safety Act following an appeal from a conviction recorded by the Chief Industrial Magistrate. The case is interesting as it examined the defences which are available to defendants under the OH&S Act.

The company was the principal contractor on a building project at Banksmeadow which involved the constructions of a warehouse and associated offices. A contractor who was not employed by the construction company drove a concrete mixer truck into a concrete portal just inside a driveway at the site and a barrier fell forward crushing the cabin of the truck causing the driver to be injured. The Magistrate found the construction company was guilty of an offence and entered a conviction and imposed a fine of $25,000.00. The company appealed.

The site office for the construction project was located at the main entrance to the construction site. There was another entrance to the construction site in an adjoining road which could not be seen from the main entrance. That entrance was secured by way of temporary fencing with a makeshift gate section which was secured by five wire ties and a chained padlock on the adjacent upright post. The alternate entrance was utilised for a four to five week period whilst the main access point was closed. Access to the alternate entrance was secured by contacting the construction company's employees who had a key to unlock the padlock.

The alternate entrance was used for four to five weeks and then concrete footings for a portal were poured a short distance inside the boundary near that entrance.

The accident occurred when the driver of the vehicle gained access through the alternate access point. After the accident it was ascertained that the padlock and chain on the gate were intact. It was apparent the gate was opened after the wire ties had been cut or removed by someone. Carpet layers had access to the site on the day of the incident and had accessed the site through the alternate entrance.

The driver who was ultimately injured had accessed the site through the alternate entrance as he had attended the site 7 to 10 days previously and had used that entrance. The delivery docket for the driver indicated the entrance for delivery was the alternate site entrance.

The Full Court concluded that the relevant risk was a risk of unsafe access to the construction site but that risk did not begin and end at the perimeter point. The Court accepted that it was open to the original Judge to find that the construction company had failed to maintain the closure of the alternate entrance and had failed to inform the driver of the vehicle not to use the entrance. The Court noted that "uncontrolled access to a building site, a place of many and varied hazards - gives rise to risks to health and safety." The Court concluded that a finding that the construction company's system did not of itself cause the incident and that matters outside of the system impacted upon the occurrence of the incident "does not negate a finding that the company's proven failures caused the risk of uncontrolled access to the site."

The Full Court noted that the concept of reasonable foreseeability is not relevant to the duties imposed under the Act although it can be relevant to the defences under the OH&S Act. The Full Court concluded that the Industrial Magistrate was correct in finding that the construction company had breached the Act. Nevertheless the Full Court concluded that the defences argued by the company had not been properly considered by the Magistrate.

In relation to defences to prosecutions, it is necessary to balance the nature, likelihood and gravity of the risk to safety occasioning an offence with the costs, difficulty and trouble necessary to avert the risk. At one end of the scale, it could not be reasonably practicable to take precautions against a danger which could not have been known to be in existence. At the other end of the scale, there will be cases in which known or obvious risks to safety exist and a defendant may not establish their defence where it was reasonably practicable to have complied with the Act by ensuring that persons were not exposed to those risks.

The Full Court noted if there is the potential for serious injury, this factor becomes of greater weight and significance and on the other hand if an event is not reasonably foreseeable then it will not generally be reasonably practicable to make provision against the event. However, the Full Court noted in this case that the question to determine was whether in the context of the alternative entrance being the only possible entrance on the particular day, given that the main entrance was unusable and unavailable, it was reasonably foreseeable that a sub-contractor who needed vehicular access to the site, if unable to find someone with keys quickly, in the absence of specific warning signs, would cut the tie wires to gain access to the site in order to begin work and then fail to close the gate behind them when they finished the work.

The Full Court concluded that this sequence of events was not reasonably foreseeable. The Full Court concluded that whilst an employer's duty under the Act extends to the behaviour of a disobedient employee or contractor, the situation fell into the category of unforeseeable behaviour of a disobedient employee leading to the happening of an event that could not reasonably be foreseen and therefore which was not reasonably practicable for an employer to guard against. Although a finding that the happening of an event was not reasonably foreseeable will generally lead to a finding that it will not be reasonably practicable to make provision against that event, in this case the Court found that it was not reasonably practicable to take additional measures to guard against someone unlawfully gaining access to the gate.

Unfortunately for the company, that was not the end of the matter. WorkCover also alleged that the company should have advised the driver that it should not use the alternate entrance. The Court did not accept that a locked gate was sufficient communication to not use the gate particularly in circumstances where the delivery docket expressly directed use of the gate where the other entrance was impassable. Where a locked gate had been breached and in view of the previous experience of the driver accessing the alternate gate, the company should have done more.

The Full Court concluded that given the gravity of the potential consequences, the fact that the portal presented a newly changed circumstance on the site, and despite the fact that the risk of unlawful access by cutting the fence ties was not reasonably foreseeable, the company did not, on the balance of probabilities, demonstrate that it was not reasonably

practicable to inform the driver not to use the alternate entrance. The Court held that it was reasonably practicable for the company to have done more to have informed the driver not to use the alternate gate entrance.

An alternate limb to the defence argued was that the commission of the offence was due to causes over which the company had no control and against the happening of which it was impractical to make provision. The Full Court confirmed that the task in determining whether actions were impractical requires consideration of the surrounding circumstances in the particular case and assessing whether it was feasible or practical in those circumstances to have further action to ward against the occurrence of the causes of the commission of the offence. The notion of impractical is distinct from reasonably practicable. It requires a person seeking to rely on the defence to show that it was not practical to have made provision or take action to avert the causes of the commission of the offence. This is not judged by reference to an objective reasonableness notion but rather whether in the circumstances of the particular case it was practical to have done more. The Court found that the Magistrate was correct in concluding that the company failed to properly secure the alternate gate and failed to pass on proper information and warning.

Although the company submitted that the commission of the offence was due to causes over which it had no control, namely the unlawful cutting of the gate ties and the driver failing to keep a proper lookout, the Full Court concluded that this failed to recognise the true causes of the accident. The Full Court concluded the failure to pass on proper information and warnings was clearly within the control of the company which failed to make out their defence under the Act. The conviction was upheld. There will now be a re-sentencing of the penalty.

The original charge had two limbs, namely that the construction company had:

- Failed to maintain the closure of the alternate entrance to the construction site; and
- Failed to inform the driver not to use the alternate site entrance.

The defence raised by the company was successful in relation to the first limb of the charge but not the second. The Magistrate had found that both limbs of the charge had been proven and he had determined a penalty based on a breach of both limbs. The Full Court found the company guilty of the second limb only. Whether or not this will result in a reduction in penalty is yet to be determined.

Once again the case highlights the absolute nature of the duty imposed on employers and controllers of premises and the difficulty that is faced by parties who seek to make out the defences available under the Occupational Health & Safety Act.

Platform Collapse Leads to $80,000.00 Fine

Abi Group Contractors Pty Limited was recently fined $80,000.00 by the Industrial Relations Commission for a breach of the Occupational Health and Safety Act. The incident arose out of an accident when a worker suffered fractured ribs and bruising to the right side of his body and leg when a platform on which he was standing collapsed causing him to fall. The platform was being dismantled while the injured worker was standing on it and when it was only supported by the chain slings attached to the crane contrary to the requirements of the Occupational Health and Safety Regulations.

In addition, the work of dismantling the platform was conducted when the injured worker was standing on the platform and his safety harness was not properly secured to an appropriate fixing point.

The Court was provided with a record of 10 previous convictions under the OH&S Act 1983 although the most recently recorded conviction dated back to 1995 and five of the breaches related to a single incident - the Kogarah gas explosion.

The Court noticed the injured employee was wearing a safety harness but it was not effectively connected. The Court also noted that the safe work method statement for the conduct of the work on the day was also deficient.

The Court noted it was apt to describe the incident as a shortcut taken by the team involved in the work that were skilled and knew their obligations. The Court also noted that the company was a very large one employing a large number of people and in certain respects its record might be thought to be a comparatively good safety record. Its long history of operating without breaching the relevant safety laws was considered in the context of a period in which there have been some 10 offences.

The Court accepted that the company had a very well documented audited and apparently enforced system of occupational health and safety in operation throughout its sites. The good corporate citizenship of the company was taken into account in

considering the penalty to apply.

The fine of $80,000.00 reflected the Court's concerns although it is worth noting that the maximum penalty for this offence was $825,000.00.

$60,000 Fine for a Council

The Inverell Shire Council was recently fined $60,000.00 for failing to ensure people other than employees of the Council were not exposed to risk to their health or safety arising from the Council's undertaking while those persons were at the Council's place of work.

Inverell Shire Council were removing concrete slabs from a causeway and failed to ensure that workers remained clear of the concrete slabs whilst they were being lifted by a backhoe. The Council was using a combination of its own employees and employees from a labour hire company. Repairs were needed to the causeway as several cracks required repair through the removal of concrete and replacement of that concrete.

A backhoe bucket was positioned to grab hold of a concrete slab being supported by two men and when the bucket of the front end loader was over the top of the concrete slab in an open position the slab started to fall and one of the worker's arms supporting the slab was pinned between the inner edge of the bucket and the concrete slab. The worker suffered a broken left arm and a fracture to his wrist and nerve damage. The Commission regarded the offence was a serious one. There was no work method statement and there was no instruction information or training regarding the handling of large pieces of concrete. There was no supervisor present when manual handling of the concrete was performed.

Despite the significant breach of the Act, the fine imposed was $60,000.00. Perhaps the fact that a Council has limited funds which are used for community purposes had some sway in the determination of the ultimate penalty.

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.

The Full Bench of the Australian Industrial Relations Commission in Carter - v - Village Cinemas Australia Pty Limited has recently considered an employee's termination by Village for alleged operational reasons following the closure of a cinema complex.

Mr Carter had been employed by Village since 1986. His employment was terminated after 19 years of service. He had worked at nine different locations in various positions. He was a well performing manager and there was no issue as to his capability or standards of performance.

He was managing the Doncaster Cinema for Village when on 15 June 2006, Village received a Notice to Vacate the Doncaster complex.

Mr Carter requested long service leave to enable Village to identify an alternative position. However, his employment was terminated on 25 July 2006.

Mr Carter commenced proceedings pursuant to WorkChoices claiming his termination was harsh, unjust or unreasonable. Village filed a Notice for Dismissal of the application on the grounds Carter's employment was terminated for genuine operational reasons.

On 20 September 2006, the motion was dismissed when Commissioner Hingley noted:

- The applicant was a long serving, multi-skilled employee who had worked at numerous locations.

- Of the 12 staff working at the Doncaster Cinema, only the applicant was made redundant.
- Mr Carter was never asked if he would accept a position of lower status.
- The human resources manager conceded, in evidence, it was possible Mr Carter could have been redeployed as four or five general managers had left the employ of Village in the previous 12 months.

The Commissioner found Mr Carter's employment was not terminated for genuine operational reasons.

Village appealed to the Full Court and ultimately that appeal was successful when the Court found the closure of the cinema was an operational reason for Mr Carter's employment being terminated.

The Court determined that the operational reasons relied upon by an employer need only be a ground or cause for the termination. It need not be something that demands or brings about an obligation to terminate an employee's employment. The termination of employment of a particular employee does not have to be an unavoidable consequence of the operational reasons.

Consequently, it was irrelevant that an employer could have done something other than terminate the employee. In deciding whether the termination was for genuine operational reasons it does not assist to question whether the termination was a logical response to the employer's operational requirements. The real issue is what are the operational reasons.

The Court determined that the expression "genuine operational reasons" should be given its natural meaning. That is, if a termination of employment of a particular employee was 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.

As the cinema complex was closing down, there was no longer a position for a manager at the complex. That circumstance led to the termination of Mr Carter's employment. The closure of the cinema was at least one of the operational reasons for the termination of Mr Carter's employment.

Opportunities to redeploy the employee, even in a lower paid position, allowing the employee to take extended long service leave, did not remove the termination from being for "genuine operational reasons".

In this case the closure of a cinema complex was seen as an operational reason to terminate the manager of the complex. The manager had no right to bring a claim based on a contention his employment was harsh, unjust or unfair.

Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.

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

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

We look at issues from your point of view. Your input is fundamental to us delivering an efficient, reliable and ethical legal service. We like to know your business, and take the time to visit your operation and develop an in depth understanding of your needs. Gillis Delaney is led by partners who are recognised by clients and other lawyers as experts in their fields. Our service is personal and 'hands on'.

Our clients receive the full benefit of our ability, knowledge and effort in our specialist areas of expertise. We provide superior and distinctive services through a team approach, drawing the necessary expertise from our specialists. Our mix of professionals ensures that clients enjoy high level partner contact at all times.

We are committed to delivering a quality legal service in a manner which will exceed your expectations and we maintain a focus on business and commercial awareness whilst delivering excellence in legal advice.

We have a proven track record of delivering commercially focused advice. Whether it is advisory services, dispute resolution, commercial documentation or education and training, a partnership with Gillis Delaney offers:

- practical innovative advice
- timely services
- expert insight
- accessibility
- cost effective solutions

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtn@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.

Gillis Delaney Lawyers