GD News

Gillis Delaney Lawyers

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

Fair Work Legislation

In late March the Fair Work Bill passed through both Houses of Parliament and parts of the legislation will now commence from 1 July 2009. There were significant amendments to the original Bill that was presented to Parliament and our January Newsletter examined the Bill as it existed before the most recent changes. In total there were approximately 200 amendments to the Bill although the most notable was a change to the definition of small business for the unfair dismissal laws. Legislation was also passed to address the transitional arrangements between 1 July 2009 and 1 January 2010 when the Fair Work Act will come into full operation.

So what lies ahead?

Unfair dismissal

There will be a phasing in of unfair dismissal rules for small businesses. From 1 July 2009 a small business employer will be able to defend an unfair dismissal claim on the basis that they have complied with the Small Business Fair Dismissal Code. Until 31 December 2010 a small business will be one where there are fewer than 15 full time equivalent employees. Full time employees are determined by calculating the number of hours worked by all employees in the enterprise and dividing that number by 38 to give the number of equivalent full time employees. After 1 January 2011 the classification of small business will be determined by a simple head count of employees.

Greenfields Agreements

The original Bill provided that employers who intended to make a Greenfields Agreement were required to notify all unions with scope of coverage over an employee that would be employed. This provision has been removed and employees will now be able to make a Greenfields Agreement with a union or unions provided those unions are entitled to represent a majority of the employees covered by the agreement.

The Better Off Overall Test

When assessing proposed enterprise agreements under the better off overall test Fair Work Australia will consider employees in classes to determine whether the agreement passes the test rather than applying the test against each employee. Effectively, Fair Work Australia will be able to group employees of a similar classification level and determine whether or not the class of employees will be better off overall.

Right of Entry

Employers had concerns about the way in which unions would use records obtained by them when exercising right of entry powers.

Now the legislation has been changed to provide a union representative cannot inspect non-member records except when the employee provides their consent in writing or where Fair Work

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Australia orders access to the documents. This amendment does not apply to rights of entry under State or Territory OH&S laws.

In addition, an employer does not need to provide a union access to documents if that would contravene Commonwealth or State law such as privacy laws.

Abuse by permit holders exercising their right of entry without a reasonable suspicion that a breach of the Fair Work Act has or is occurring is an automatic ground for revocation or suspension of an entry permit.

Transition

The new unfair dismissal provisions, the new bargaining arrangements and the transfer of business provisions in the *Fair Work Act* commence from 1 July 2009.

The provisions dealing with modern awards and National Employment Standards ("NES") will commence on 1 January 2010.

The transitional arrangements are complex, however, the following will apply:

- Existing workplace agreements in place prior to 1 January 2010 will continue to operate past their nominal expiry date until terminated in accordance with the current rules for termination or are replaced by new enterprise agreements under the Fair Work legislation. This means agreements will continue until terminated by agreement between the parties or terminated unilaterally after the nominal expiry date by the giving of notice by either party.
- Enterprise agreements submitted to Fair Work Australia before 1 January 2010 will be subject to the no disadvantage test with the current applicable and unmodernised award. This process will continue until the NES and Modern Awards become effective on 1 January 2010.
- From 1 January 2010 Modern Awards and the NES will immediately apply to all employees covered by the legislation. The ten minimum employment standards in the NES will apply even if the employer is covered by an existing industrial instrument (that includes pre-reform certified agreements, workplace agreements made under the Workplace Relations Act or a preserved collective State agreement) that came into existence prior to 1 January 2010..
- The NES will not override benefits in existing workplace agreements that are at least as beneficial as the NES.
- The NES address:
    - maximum weekly hours;
    - requests for flexible working arrangements;
    - parental leave and related entitlements(up to 24 months' parental leave);
    - annual leave
    - personal/carer's leave and compassionate leave;
    - community service leave;
    - long service leave;
    - public holidays;
    - notice of termination and redundancy pay (employers with 15 or more employees to pay redundancy benefits in accordance with a statutory scale);
    - fair work information statements.
- Employees on ITEAs and AWAs will be able to enter into a conditional termination agreement with their employer which will allow them to participate in collective bargaining processes including voting on new collective agreements. If this process is utilised and a new agreement is approved the existing individual statutory agreement will automatically terminate.
- The effect of the transitional provisions is that the Modern Award does not actually apply to an employee or employer that is covered by an existing industrial instrument, eg. a workplace agreement, workplace determination, preserved State agreement or AWA, but the base rate of pay under any such arrangement must be not less than the rate payable under the Modern Award. The base rate of pay is the rate of pay payable for the employee's ordinary hours of work but does not include incentive based payments, loading, monetary allowances and overtime and penalty rates.

- Employers that are covered by an ongoing industrial agreement must pay their employees at least the minimum rate of pay specified in a Modern Award from 1 January 2010.
- Employers who lodge collective agreements in the lead up to 1 January 2010 will do so with the benefit that the rates specified in the agreement will continue to apply save that they must at all times after 1 January 2010 be at least the Modern Award based rate of ordinary hours.

Businesses must ready themselves for the upcoming changes. With the change to unfair dismissal laws due to commence on 1 July 2009 businesses are carefully examining their work needs and personnel and implementing strategies ahead of the changes. But how many businesses are negotiating collective agreements before 1 January 2011? Perhaps we will see an upswing in activity in this area now that employers have the final rules clarified in the legislation that was passed by Parliament.

Medical Negligence- No Compensation for Loss of a Chance of a Better Medical Outcome

Until the recent decision of the NSW Court of Appeal in *Gett v Tabet*, medical practitioners were faced with the possibility of a claim for damages for negligent treatment that deprived the patient of the opportunity of a better medical outcome. The NSW Court of Appeal in a case known as *Rufo* had concluded that damages should be awarded for loss of a chance of a better outcome even though a claimant could not establish that the ultimate damage was causally related to the negligence.

But the tide has now changed and the NSW Court of Appeal in *Gett v Tabet* has determined that *Rufo* is "plainly wrong"; and awarding damages for loss of a chance of a better medical outcome alters the principle of causation as the plaintiff does not need to prove on the balance of probabilities that the damage was caused by the breach of duty. The NSW Court of Appeal has made it clear that if an award of damages for loss of a chance of a better outcome is to become part of Australian tort law it will need to be based on a decision of the High Court which alters the law as it currently stands.

Rema Tabet was diagnosed with a brain tumour on 14 January 1991. She was then aged six. The diagnosis was made following a seizure, CT scan and EEG and was preceded by a history of chickenpox, as well as headaches, nausea and vomiting. Tabet received treatment, including surgery to remove the tumour and suffered irreversible brain damage as a result of the events on 14 January 1991, the tumour and the treatment received. She brought proceedings against Dr Gett, a specialist paediatrician, alleging that he had been negligent in his treatment of her. The primary allegation was that the CT scan should have been done earlier, either on 11 January or 13 January, and that if it had, she would have had a better medical outcome.

The trial judge found that Dr Gett breached his duty of care by failing to order a CT scan on 13 January 1991. The trial judge held that had a CT scan been performed on that date, Tabet's brain tumour would have been detected. The trial judge concluded that Tabet lost her chance of a better medical outcome because of Dr Gett's negligence on 13 January 1991. In assessing damages, the trial judge held that Tabet's decline on 14 January 1991 contributed 25 per cent to her ultimate disabilities and that of that 25 percent, 40 per cent was referrable to her loss of a chance of a better medical outcome.

Dr Gett appealed and contended that the trial judge had erred in three ways: first, by finding that he was negligent in failing both to consider other possible diagnoses and to order a CT scan on 13 January 1991; secondly, by awarding damages to Tabet on the basis of the loss of a chance of a better medical outcome rather than concluding that the found negligence was not causative of Tabet's loss; and, thirdly, by assuming the decision in a case known as *Rufo v Hosking [2004] NSWCA 391; 61 NSWLR 678* to be correct and applicable in calculating the loss of a chance.

Rufo v Hosking and *Gavalas v Singh [2001] VSCA 23; 3 VR 404*, have been put forward as Australian authority for awarding damages for loss of a chance of a better medical outcome so the appeal was a significant one for all medical practitioners as a win had the potential to eliminate claims where the ultimate medical outcome cannot be causally linked to the negligence.

In Rufo's case, Rufo, at about age 13, was diagnosed to be suffering from a serious inflammatory condition (lupus), in which a characteristic rash is associated with widespread internal pathology, including kidney damage. Rufo came under the care of Dr Hosking, a paediatric immunologist, in early February 1992, having first been seen by another specialist paediatrician who had prescribed Prednisolone, a corticosteroid drug. On 24 August 1992, Rufo was diagnosed as suffering from vertebral microfractures, caused by the corticosteroid dosages she had been having up to that time. On 8 June 1992, Dr Hosking substituted a different drug, Dexamethasone, which remained her medication until after the fractures were diagnosed: The trial judge found, relevantly for the issue on the appeal in that case, that the failure to introduce a "steroid sparer" in conjunction

with the changed drug regime was negligent. Notwithstanding the breach of duty, the trial judge found that the appellant had failed to prove that damage had resulted. Strictly, the question whether damages for loss of a chance were available was not in issue in Rufo, as the parties had agreed both at trial and on appeal that such damages were recoverable in point of law. The question was whether a case for damages for loss of a chance had been made out.

The Court of Appeal when considering Rufo's claim noted :

> *"the evidence strongly supported a conclusion that the negligence materially increased a risk, which was otherwise very substantial, that fractures would occur; and that the occurrence of the fractures was a realisation of this total risk (as distinct from the increment to the risk created by the negligence). This gives rise to the question whether the appellant is entitled to be compensated for the loss of the chance that, but for the negligence, the fractures would not have occurred (or would not have occurred at the time or with the severity of their actual occurrence)."*

Justice Hodgson in *Rufo* went on to conclude:

> *"It seems clear that, if avoidance of the loss in question would have depended upon the plaintiff taking a particular course of action, the plaintiff must prove on the balance of probabilities that, but for the negligence, the plaintiff would have taken that course of action. The plaintiff cannot be compensated for the loss of a chance that the plaintiff might have done so. However, otherwise I think it is consistent with the principles established ….. to say that it is enough if the plaintiff proves, on the balance of probabilities, that he or she has been deprived of a valuable chance.*
>
> *That chance must be inherent in the circumstances, not merely an artefact of the way evidence is presented in the case. Thus, if it appears to be a plain fact as to whether treatment would or would not have been successful, and the element of uncertainty arises merely from different expert views, then the plaintiff will not be compensated for the chance that one expert might be correct. On the other hand, if it appears that the very best medical science can do is to say that the treatment had a quantifiable chance of success, then in my opinion that can be treated as a valuable chance for the loss of which a plaintiff can be compensated. As with other questions concerning causation, a common sense approach should be taken to the question of whether a valuable chance has been lost, or whether the situation is rather one where one or other alternative would definitely have occurred, and the only uncertainty is due to imperfections in the evidence."*

So what options did the Court Appeal have? Did it have to follow its earlier decision? The Court of Appeal In *Tabet's* case noted:

> *"Intermediate appellate courts are not legally bound by their own earlier decisions, but should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if they are of the view that the decision is "plainly wrong" and, such an error having been identified, there are "compelling reasons" to depart from the earlier decisions"*

The Court of Appeal determined that *Rufo's* case should not be followed as it was "plainly wrong"; in particular, as awarding damages for loss of a chance of a better medical outcome alters the principle of causation as a plaintiff does not need to prove on the balance of probabilities that the damage was caused by the breach of duty.

As the Court of Appeal in Tabet's case noted:

> *"The reasons for not taking that course (and following the decision in Rufo's case), together with an assessment of subsequent events, justify departure from those authorities. In particular:*
>
> *(a) the doctrine not only departs from conventional principles of tort law but forms no part of recognised streams of authority;*
> *(b) a change to the law of torts with respect to proof of causation based on the creation of risk and fair recompense for loss is a matter of policy for the High Court ;*
> *(c) neither case discussed the difficulties and complexities of the application of the doctrine, nor did they place clear limits on the doctrine;*
> *(d) the doctrine can be seen as inconsistent with conventional authority, now reflected in the Civil Liability Acts of the States and Territories, as to the nature of harm required to justify a finding of negligence and the requirement that causation must be established on the balance of probabilities."*

The Court of Appeal in its judgement noted:

> *"Damages should only be awarded if the Court is satisfied on the balance of probabilities that the breach of duty by the*

tortfeasor materially contributed to the harm. If the Court is so satisfied, then the tortfeasor will be held liable for the whole of the harm so caused"

The problems with the concept of damages for loss of a chance of a better outcome are found in the Court of Appeal's comments on the *Rufo* and *Gavalas* cases where it was noted:

> *"To the extent that these authorities suggest that a chance of avoiding or diminishing the severity of a disease or injury is sufficient harm to satisfy the requirements of the tort of negligence, that is a step having potentially far-reaching consequences. For example, in what cases will it apply? Will it limit recovery in cases where the plaintiff establishes a loss to a degree of probability between 50 per cent and, say, 90 per cent? Perhaps because the issues have not previously been fully debated (such a claim was not pleaded in Gavalas, its availability was conceded in Rufo, which was followed without its validity being questioned in Burton) these issues have not been adequately addressed. As the UK courts have all recognised, they involve issues of high policy affecting the scope and operation of the most dominant aspect of tort law. A statement that "[n]o advanced system of law could deny recovery where late diagnosis, in breach of duty to the patient, appreciably reduces the prospects of success of an operation" (Gavalas at [15]) does not provide reasoned support for a major new direction in negligence."*

The end result for Tabet is that she is not entitled to damages as she did not prove that her damage was causally related to negligence.

So we are now left with the position that in NSW the Court of Appeal has determined its previous decision is wrong and a plaintiff cannot be compensated for loss of a chance of a better medical outcome and that damages should only be awarded if the Court is satisfied on the balance of probabilities that the breach of duty by the tortfeasor materially contributed to the harm. If the Court is so satisfied, then the tortfeasor will be held liable for the whole of the harm so caused.

But lets wait and see what the High Court has to say as there seems little doubt this case will take the next step with an appeal to the High Court.

Architects Liability - Liability For Products Used In A Building Project

Slip and fall accidents can result in claims being made against owners and occupiers of premises as well as builders, architects and suppliers. The state of the premises, may give rise to potential liability on the part of an architect involved in the design of premises. The question of whether there has been negligence on the part of the architect will turn on the tasks the architect has agreed to perform.

The leading decision which scoped the liability of an architect was *Voli v Inglewood Shire Council* where the Court noted:

> *"what an architect must do to avoid liability for negligence cannot be more precisely defined than by saying that he must use reasonable care, skill and diligence in the performance of the work he undertakes … neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered."*

It is not the terms of the contract which govern the question of potential negligence claims rather it is the work which the architect has agreed to undertake. Sometimes the scope of that work is limited and at other times it is all encompassing.

Nevertheless it is clear that an architect will not be liable in situations where they have not taken on responsibility for checking that products comply with specifications for a project.

The recent New South Wales Court of Appeal decision in *Drummond and Rosen Pty Limited V Easey & Ors* in is a good example of the application of this principle.

Barry Easey slipped and fell on a tiled ramp giving access to the Millar Shopping Centre. It was raining lightly and he fell on an exposed area where the tiles were wet. He sustained significant injuries. He brought proceedings in the District Court of New South Wales and sued the owner and occupier of the shopping centre. The shopping centre then sued the builder, Grosvenor Constructions Pty Limited alleging the builder was negligent and the builder brought a Cross Claim against the

architect Gammon & Rosen Pty Limited alleging the architect was negligent. The architects had prepared the plans and specifications for the refurbishment of the centre including the re-tiling of the level public area and the full means of entry to the centre including the ramp in question.

The District Court judge who heard the claim awarded in excess of $300,000 to Easey and found that the owners, the builders and the architects had been negligent. The builders claim against the architects was based on an allegation that the architect had selected, specified, supplied and directed the use of the tiles that were laid on the ramp. It was common ground that the tiles did not comply with the relevant Australian standards. The trial judge found that the tiles were inadequate and not suitable for the ramp. The negligence of the architect was found to be a failure to ensure that the tiles selected by (the architects) and laid by (the builder) were adequate and safe. Liability was apportioned 50% to the owners, 30% to the architects and 20% to the builder.

The architects appealed.

The trial judge found that the architects delivered samples of 3 tiles to the project manager however the Court of Appeal noted it was still necessary to determine the reason for delivering of those samples and what the architects might fairly be understood as representing about them. The Court of Appeal noted that the delivery of the tile samples for the approval of the project manager must be seen against the agreed role of the architects which was known to the project manager and the owners.

After considering the terms of the engagement of the architect the Court of Appeal noted the architect gave no express representation or warranty about the technical properties for the samples, and there was no evidence they had them tested, or had made any enquiries about the slip resisting properties.

There was no evidence, apart from the covering letter from the architect which accompanied the samples and the site minutes, of any communication between the architects and the project manager and the builder at the time which could throw light on the purpose for which the samples were delivered or the nature of the approval sought.

The technical requirements of the tiles to be laid on the ramp had been defined in the specification incorporated in the building contract. No further approval from the owners or project manager was required in this respect. The building contract required the builder to submit manufactures published product data prior to the building and expressly provided that the product complied with the specifications.

It was noted by the Court of Appeal that the architects were entitled to assume that the builder would comply with the obligations in the building contract and the project manager would insist on their performance.

The nature of the legal relationship between the project manager and the owners was not explored at the trial but the Court of Appeal accepted it could be inferred that the former acted as the owners' agent during the construction phase and in the administration of the contract. If that was the case the owners were bound by the conduct and knowledge of the project manager in the course of its retainer.

The Court of Appeal concluded that the project manager and builder cannot reasonably have understood that the samples were provided for any purpose other than approval for their colour and finish.

Handley A J A concluded:

> *"In my judgment therefore the architects, by delivering these samples to the project manager, and by their associated conduct at the time, did not represent to the project manager or the owners or the builder that those tiles complied with the technical requirements of the specification or assume any responsibility to them for such compliance. The architects did not undertake the task of selecting tiles which complied with the technical requirements of the specification either by their terms of engagement, or by delivery of the samples there is no foundation for a finding of negligence against them based on the inadequacy of the slip resisting qualities of the tiles as laid."*

The Court of Appeal concluded the architects did not undertake the task of selecting tiles which complied with technical requirements of the specifications either by their terms of engagement or by delivery of the samples and there was no foundation for a finding of negligence against them based on the inadequacies of the slip resistance qualities of the tiles. The Court of Appeal also noted that it had never been suggested that the design of the ramp had been negligent or the framing of

the technical specifications.

At the end of the day the Court determined that liability should be apportioned 50% to the owners and 50% to the builders and there was no liability in negligence on the part of the architect.

Clearly in this case the scope of work which was undertaken by the architect governed the duty owed. The architect provided plans and specifications for the owner and it was the builder's responsibility to source appropriate products which complied with those specifications and the owners obligation through his project manager to ensure that the builder complied with their obligations. The supply of samples by the architect did not put the architect in the position that it had assumed responsibility for ensuring that the samples complied with the specifications.

So it is not the terms of a contract which will govern the duties of the architect but rather the terms of work which the architect agrees to undertake.

When Is An Accident Involving A Motor Vehicle A Work Accident And Not A Motor Accident?

In New South Wales the *Motor Accidents Compensation Act, 1999* governs the damages awarded for personal injury in motor accidents and the *Workers Compensation Act, 1987* governs the damages for personal injury work for accidents. The categorisation of a claim as a "motor accident" will generally result in more significant damages being awarded as damages will include compensation for medical expenses, pain and suffering, the cost of care and economic loss. In a work injury damages claim damages are only awarded for economic loss.

Sometimes an employee is required to use a motor vehicle during the course of their employment and when the owner of the vehicle is the employer, issues arise in the categorisation of the claim. An accident will be a motor accident if it the claim is for an injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle. To be a motor accident it is a requirement that the injury is caused during:

- the driving of the vehicle; or
- a collision or action taken to avoid a collision with the vehicle; or
- the vehicle running out of control; or
- such use or operation by a defect in the vehicle.

However an injury that flows from the driving of a vehicle can fall outside the operation of the *Motor Accidents Compensation Act, 1999* if the fault of the owner when properly characterised did not arise "in" the use or operation of the vehicle.

An example of the application of this approach is found in the recent Court of Appeal decision in *JA & BM Bowden and Sons -v- Doughty.* Doughty was employed as an orchard hand. He was injured when a tractor he was driving in the course of his employment rolled over. The tractor was equipped with a roll bar as protection for the driver if it rolled over. The roll bar could be raised and lowered. The employer had instructed Doughty to keep the roll bar lowered at all times when driving on the property since if raised it knocked too much fruit from the trees. Doherty was instructed to raise the bar only when driving on the public road between properties. Doughty had obeyed these instructions. On one trip across a fairly steep-sloping paddock the tractor rolled over, partly on Doughty. Had the roll bar been raised it would not have rolled on him.

The Court of Appeal noted it is necessary when considering a claim to determine whether or not the injury was caused by the fault of the owner "in" the use or operation of the vehicle. The Court of Appeal noted that it was bound to examine the nature of the negligence and whether or not the negligence gave rise to a motor accident claim turned on the characterisation of the negligence. The question is was the fault "in" the use or operation of the vehicle or "in" the system of work put in place by an employer who is also the vehicle's owner.

Giles JA concluded that:

> *"The actual use or operation of the tractor at the time and place of Doughty's injury was driving it. It was being driven with the roll bar lowered but that was not an element in the way it was being driven (eg at speed, on a slope turning uphill). Nor was it anything to do with how it came to roll over. The tractor was just as stable or unstable on a slope with the roll bar lowered - it was not like defective brakes causing the tractor to run out of control and roll over.*
>
> *The instruction to drive within the property with the roll bar lowered was given when Doughty began his employment… that was the essential fault of the "employer", the fault in implementing a system of work which in that respect was put in place for the commercial consideration that fruit should not be knocked from the trees. Fault continued as the*

system of work was continued, but that did not affect its nature. In characterisation for the purpose of "in the use or operation of a vehicle" the fault was distant from the occasion of driving the tractor, and was a breach of the employer's duty of care owed to Doughty as its employee through negligently instructing how he was to carry out his duty. In my opinion it was not fault in the use or operation of the tractor."

Handley AJA also concluded that the fault was not in the "actual use or operation" of the tractor at the time and accordingly the claim was not a motor accident. Nevertheless, one judge disagreed with that approach and concluded the accident was a motor accident.

Doughty had originally succeeded in his claim in the District Court and had had his damages assessed under the *Motor Accidents Compensation Act, 1999* at $535,198.00. As a consequence of a finding that the accident was a "work accident" and not a "motor accident", the Court of Appeal substituted a verdict of $278,628.00 which reflected the work injury damages assessment.

So at the end of the day, to determine whether or not an accident is a "motor accident" or a "work accident" it is necessary to carefully analyse and characterise the nature of the negligence. The fact that an accident involves the driving of the vehicle is not sufficient. The accident will only be a motor accident and be compensated under the Motor Accidents Compensation Act if the fault of the owner is "in" the use or operation of the vehicle and that question will turn on a proper characterisation of what was the act of negligence.

Workers Compensation Insurers Have Limited Obligations To Provide Particulars In Recovery Proceedings

In New South Wales the Workers Compensation legislation provides that where payments of workers compensation are made those payments can be recovered from another party where that other party has negligently caused the injury to the worker. These are known as section 151Z proceedings as the insurer has a right to bring a claim for indemnity pursuant to section 151Z of the *Workers Compensation Act, 1987* to recover payments made. When assessing a claim for indemnity the Court will be called on to assess the damages which would be payable to the worker if they had sued the negligent party separately and the liability of the negligent party is limited to the assessment of damages.

If the payments made pursuant to the *Workers Compensation Act, 1987* are less than the damages assessed the full amount will be reimbursed. However, if the payments exceed the damages assessed the claim for indemnity will be limited to the damages assessed.

A problem confronts a workers compensation insurer when bringing a claim for indemnity as the insurer will not always have the assistance of the worker who may not be interested in co-operating. Sometimes an insurer will not be able to find the injured worker. Notwithstanding a workers compensation insurer is required to adduce evidence to the Court to permit the theoretical assessment of damages.

In the course of a case a defendant in a claim is entitled to request information from another party to clarify the case which it must meet. A request for information is known as a request for particulars.

The Court Rules identify the material which an injured person must provide to a defendant by way of particulars in a personal injury claim. However, the Court of Appeal in *State of New South Wales (Ambulance Service of NSW) v Todd McKittrick* has recently confirmed that these Rules do not apply to a claim for indemnity such as a claim under section 151Z of the Workers Compensation Act, 1987.

In that case the District Court had ordered the employer to provide particulars to the negligent party which were akin to the particulars which would be provided in a personal injury claim. The Court of Appeal in its judgment set aside that order determining that the employer had no obligation to provide particulars akin to the particulars required in personal injury claims. In particular the Court of Appeal noted that the Rules governing proceedings brought by persons suffering personal injuries do not apply to section 151Z claims.

This means that defendants in recovery claims may be forced to rely on other Court procedures to gain information about the claim from a workers compensation insurer such as discovery (requiring a party to produce all relevant documents) and interrogatories (questions posed to a party). Requesting particulars will be problematic for a defendant in a recovery claim as the usual personal injury particulars cannot be demanded from a workers compensation insurer. Preparing the defence to a claim for recovery by a workers compensation insurer is clearly more difficult where there is an absence of particulars but the workers compensation insurer must still produce evidence at the hearing for the notional assessment of damages.

Workers Compensation Policies Do Not Necessarily Have Unlimited Liability

Employees exposed to asbestos dust during the course of their employment can contract diseases with an onset of symptoms and rapid deterioration which leads to death that does not occur until many years after exposure.

The legislative regime for New South Wales workers compensation has changed over time. In the early stages the scheme provided that workers compensation was compulsory, however, it was not necessary for employers to obtain unlimited cover. In fact the legislation at one stage proscribed that an insurer was required to provide an employer with cover for a minimum of $40,000.00.

Some asbestos claims stem from exposure in the 1960s. An employer faced with an asbestos exposure claim may have difficulties locating its insurance policy to see whether or not it will have the benefit of unlimited cover or the minimum cover prescribed by legislation. So what happens if the policy cannot be found?

This scenario was recently considered by the Court of Appeal in *QBE Insurance (Australia) Limited v Irene Stewart*. Angus Stewart had been employed by Pilkingtons from 1964 to 1967. Much later he was diagnosed as suffering from mesothelioma and he died as a result on 22 October 2007. By then he had commenced proceedings and his wife, Irene Stewart, was substituted as the claimant in the proceedings. Stewart was exposed to asbestos when he wore asbestos gloves for heat protection whilst working with a multi-staged die bending machine.

Pilkington Bros (Australia) Limited was a deregistered company so Stewart sued QBE direct. QBE through a number of acquisitions had assumed the responsibility to meet the liabilities of Eagle Star Insurance which was the employer's indemnity insurer for Pilkington at the relevant time. The minimum statutory cover for the common law extension of an employer's indemnity policy at that time was $40,000.00. QBE denied that Pilkington was entitled to an indemnity pursuant to the policy for greater than the statutory minimum level of cover. Neither QBE or Pilkington could produce a copy of the Eagle Star Insurance policy.

In the original trial the Court determined that QBE's liability to indemnify the employer was unlimited and in particular was not limited to $40,000.00. The Court ruled that as no policy had been produced and no further evidence had been led the insurer bore the onus of establishing that the relevant policy was limited in its cover. Effectively it was held if QBE sought to rely on a limitation in a policy it should prove that the policy was limited.

The Court of Appeal did not agree. The Court of Appeal noted that there was no substance in the contention that by accepting that it was a successor to Eagle Star Insurance Limited's liability that QBE was accepting that the contract of insurance provided unlimited cover. The Court of Appeal noted that in a sense, Stewart was fortunate that the form of the legislation at the relevant time enabled it to be safely concluded that the policy must have contained provision for cover for an amount of at least $40,000.00 in respect of common law liability.

The Court of Appeal noted that the onus is always on the claimant to prove the terms of the policy of insurance and no evidentiary onus arose which altered that situation in this case.

Accordingly, the Court of Appeal overturned the original trial judge's decision and QBE's liability was limited to no more than what it conceded, namely that it had effected a policy with the minimum cover prescribed by the legislation.

As the Court of Appeal noted:

> *"Principles as to the construction and operation of conditions, exclusions and limitations have no application where the question is whether a term is included in a policy. That question is governed by ordinary contractual principles. The party asserting the agreement must prove it. The amount and subject of the cover are essential terms in proof of an insurance contract."*

At the end of the day in the absence of a policy the Court of Appeal could only conclude that the cover arranged was at least the minimum cover specified by the legislation, therefore, the entitlement was limited to $40,000.00.

As Justice Ipp noted:

> *"The true question is not whether the cover was limited, it is rather, what was the amount of the cover? The argument that because the cover was limited to $40,000.00, this constituted an exception is fallacious. There was no proof of*

any agreement to provide unlimited cover. Thus an inferred provision fixing cover at $40,000.00 (because that was the minimum cover the State required the policy to provide) was not an exception to any obligation on the part of QBE but otherwise existed."

At the end of the day QBE's liability was limited. Neither the claimant or the insurer could produce the policy and it was only the fact that a statutory policy with a minimum limit of cover was required to be in place that saved the claimant on part of the claim.

The loss of the policy document in this case had adverse consequences on the injured worker as the employer had been deregistered and there was no recourse available against the employer whereas the problem would usually impact on the employer who would be left without insurance for a part of the plaintiff's damages.

So keep your insurance policy documents, you never know when they may be needed!

Changes To NSW Workers Compensation Premiums Are On The Way

Employers in NSW often complain that workers compensation premiums substantially exceed the cost of claims. But how many employers are prepared to back themselves and pay premiums on the basis of claims costs.

WorkCover intends to offer a Burning Cost Premium Model for workers compensation premium calculation from 30 June 2009 and the model will provide strong financial incentives to reduce the number and cost of workers compensation claims and will encourage employers to assist injured workers to recover and return to work earlier. The burning cost method will expose an employer to the cost of a claim for 5 years which is a longer period than under the conventional Premium Model (currently claims impact for 3 years) and the final premium payable will be based on the ultimate cost of claims. To be eligible to participate in the scheme employers will need to have a basic tariff premium greater than $500,000 and for groups at least one member must have a basic tariff premium greater than $500,000.

A Burning Cost Premium Model allows a premium to be determined by reference to the overall claims experience of the employer. An initial minimum deposit premium is paid and adjustment premiums are paid over an adjustment period. The adjustments are calculated on the basis of the estimated costs of the claims at the time of the adjustments and include amounts paid and payable. WorkCover will periodically adjust the premium over a 5 year period and the final premium will be paid after 5 years.

The final premium payable will be the cost of claims less recoveries multiplied by an Adjustment Factor + Dust Diseases Levy + Mine Safety Fund premium adjustment less premium collections received to via the deposit and adjustment premiums. (The current premium calculation formulae also includes the Dust Diseases Levy and the Mine Safety Fund premium adjustment)

Employers in the scheme will be required to select a claims cap which will specify the maximum amount of a claim which will impact on premium calculation. The claims caps will be $350,000 or $500,000. Currently there is a claims cap of $150,000 on claims and the costs of claims that exceed $150,000 have no impact on premiums.

The selection of the claims cap will determine the Adjustment Factor which will be used in the calculation of the final premium and the adjustment premiums. The Adjustment Factor is different for each year the premium is adjusted and for the final premium the adjustment is 175% for claim capping at $350,000 and 167% for claim capping at $500,000.

Accordingly the final premium payable will be 175% of claims cost or 167% of claims cost depending on the claim cap chosen plus levies (which will be included in premium calculation for non-burning cost premiums).

However no claims will not mean no premium. The Minimum Premium will be calculated in accordance with the following formula:

P= T x (1-S) x year 5 Adjustment Factor (ie:167% or 175%)
Where:
T is the Basic Tariff Premium
The S factor calculation is yet to be determined and is likely to be reviewed regularly. The current formula for S factor calculation in the latest Insurance Premium Orders is below however this formula may change before the implementation of the final burning cost formula:
S = 0.9T/(T+225,000)

The deposit premium which will be paid will be equal to the minimum premium for the policy plus 25%.

To participate an employer will need to be financially secure and have a good current credit rating and will need to provide security in the form of a bank guarantee for the difference between the maximum premium payable (2.5 times basic tariff premium) and the actual premium paid (including any adjustment premiums paid).

Additional eligibility criteria to participate include a satisfactory assessment of the OHS system of the employer against key performance indicators approved by WorkCover.

Large employers will need to carefully determine the possible impact that Burning Cost Premiums could have on their businesses. There are savings to be had and risks that will arise from opting into the scheme.

WorkCover plans to conduct a final round of consultation about the proposed premium formula before 30 June 2009, prior to calling for expressions of interest from employers wishing to participate. Detailed guidelines outlining all the requirements and steps to be followed in the application process will be released by WorkCover shortly. WorkCover will initially restrict the number of participants in burning cost arrangements.

So the option will be there for those with basic tariff premiums that exceed $500,000, and low claims experience can result in a substantial saving on the basic tariff premium. It will be interesting to see which employers opt into the scheme in the initial stages and those who sit back to see how the scheme tracks over the next 5 years.

Workers Compensation Commission - The Latest Statistics

2009 marks the 7th Anniversary of the Workers Compensation Commission. The Commission has recently published its statistics for the 2008 calendar. The statistics reveal a reversal of the trend of the gradual decline of disputed matters. The 7% increase in 2008 for disputed claims confirms that the impact of the November 2006 amendments have now stabilised and any further decline in Applications to the Commission are unlikely. Coupled with the increase in the jobless rate and the historical increase in workers compensation disputes in times of job uncertainty we expect the level of Applications filed in the Commission to continue to increase in 2009.

Reflecting the continued use of Conciliation, more than two-thirds of the matters filed in the Commission are finalised without the need of a written determination. 45% of matters are resolved through a settlement between the parties and a further 24% are either discontinued or otherwise resolved.

Although one third of Applications are still finalised by formal determination, it should be remembered that more than 80% of those Applications only involved a Medical Certificate of Determination issued by the Registrar for a Section 66 entitlement. Only 389 applications out of a total of over 8,000 filed were finalised by a written determination issued by an Arbitrator.

The number of matters being resolved by way of a Commutation settlement have also increased to nearly 150 per annum. This contrasts with just over 100 less than 2 years ago. The increase in Commutation settlement approvals highlights the efforts by the Scheme Agents to finalise some of their long term workers compensation claims. A Commutation settlement is only approved by WorkCover, which amongst less onerous criteria, when a worker's rehabilitation options have been exhausted and they have reached 15% whole person impairment. The Commission provides the final "rubber stamp" to any Commutation settlement.

There has also been a marked increase in the number of common law matters in the Workers Compensation Commission. Common law actions brought against an employer for negligence are referred to as work injury damages claims. Part of the alternative dispute resolution process is for the majority of these matters to be subject to Mediation in the Workers Compensation Commission. The number of Applications for Mediation increased from 413 in 2007 to 598 in 2008. This 45% increase has resulted in the Workers Compensation Commission increasing the number of Mediators on their panel to ensure there are sufficient Mediators to handle these matters as expeditiously as possible.

58% of all Applications for Mediation resulted in a settlement. However when those that did not proceed to mediation are excluded from the data (where the defendant wholly denied liability or the matter is discontinued/struck out) the proportion of matters settled during the period increases to 72%.

Balanced against the increases in most types of dispute, there has been a decline in some areas handled by the Commission.

Since the amendments to the costs provisions in 2006 there has been a sharp decline in the number of the Applications for Assessments of Costs. In 2005 and 2006 the number of lodgement were 666 and 519 respectively. This reduced to just over 245 by 2008.

Appeals, both in relation to arbitrated decisions and medical assessment certificates have also decreased. We would suggest the decrease in the level of appeals is a combination of the stability of the Workers Compensation legislation since 2006, the relatively meagre costs available to the appealing party and the large published database of Deputy President appeal decisions indicating the likely outcome.

One of the key aims of the Workers Compensation Commission is timeliness. 45% of all dispute applications are resolved within 3 months, 85% are resolved within 6 months and 95% are resolved within 9 months. Even when appeals are included, 98% of all matters are resolved within 12 months of filing. On average, it takes 105 days for the Commission to resolve a dispute application This compares with the Compensation Court system which took more than twice as long, even for the most expeditious matters.

Ultimately, we expect there will be a further streamlining of procedures in the Commission in 2009. The increase in the use of electronic filing and the move to a core group of full time Arbitrators, as opposed to the current use of part-time Arbitrators, are examples of this streamlining process. Further decreases in the time taken to finalise disputes and an increase in the consistency of decisions should follow.

OH&S Round Up

Watch That Scaffolding

The NSW Industrial Commission has recently handed down fines totalling $110,000.00 against three defendants, a company, its director and a contractor, for breaches of the Occupational Health & Safety Act arising as a consequence of a fall at a construction site.

Astute Constructions was a builder/principal contractor at a construction site and was building seven townhouses at the site. Astute had two directors, with one of those directors responsible for the overall running of the company and for the contracting of subcontractors. Astute contracted Ogden to undertake metal roofing at the site pursuant to an oral agreement. Astute contracted a scaffolder to supply and install scaffolding onsite. The scaffold was built in rows with boards over the gaps between the units and the boards were not tied down. An employee of Ogden was walking across the scaffold with hand tools when one of the planks gave way. He threw the tools he was carrying and fell and he landed with his elbows on the scaffold which stopped him falling through. The employee suffered a cut to his right elbow as a result of the incident.

The next day the employee was walking across the scaffold to access the ladder to ascend the scaffold and as he walked across from one unit to the next there was a gap and step down between the platforms. He stepped down over the gap onto a metal tube used as a handrail on the side of the lower level platform of the scaffold, the handrail gave way and he fell through the gap to the concrete floor below, a fall of approximately six to seven metres. Immediately following the incident a timber ramp was placed over the gap by an employee who did not hold a Certificate of Competency as a scaffolder. The injured employee was not provided with a Safe Work Method Statement by Ogden and Astute did not have an OHS Management Plan in place. No Toolbox Talks or Safety Talks were conducted at the site in relation to the scaffold installed.

The Court noted that some planks were missing on the scaffold, planks were not tied down and there was no harness provided for working at heights. There was also only one unsecured ladder to be able to be used to access the upper level and therefore employees had to traverse across large gaps. It was noted the scaffolders had been recalled once but the scaffolding continued to be unsafe. It was noted the injury to the employee was not fatal or even substantial but was indicative of the seriousness of the risk.

Whilst there had been some verbal safety warnings provided to the employee, it was noted Astute and the individual defendants did not conduct or document a risk assessment in relation to the safe access and it was also noted, given the original faulty erection of the scaffold there should have been daily inspections of it.

The Court noted that Astute had delegated the day to day running of the site to a foreman and there was no proper supervision of Ogden's employee by that foreman. It was noted there were simple steps available to avoid the risk and ensure the erection and maintenance of safe scaffold.

The maximum penalty faced by the corporation was $550,000.00 and $55,000.00 for each individual. The Court imposed a fine of $80,000.00 on the corporation, $20,000.00 on the director of that corporation and $10,000.00 on Mr Ogden.

Interestingly in this case, the director of the corporation was sued as an individual and in the alternative, pursuant to the deeming provisions that provides that a directors commits an offence by virtue of the company committing an offence.

Employment Roundup

Employee Validly Dismissed Without Notice For Breaching Company Policy

In a recent decision of the Australian Industrial Relations Commission the importance of publishing and informing employees of company policies was emphasised when it was found that an employer had a right to summarily dismiss an employee for wilfully breaching a policy of the company.

In the matter of *Anjel -v- Venture DMG Industries* the employee had been a good employee for 13 years. He had one prior disciplinary issue which had occurred ten years prior to the recent incident. The previous incident which occurred ten years ago was not a factor taken into account by the Commission in its determination.

By way of background, the employer had a no smoking policy at the workplace. The workplace also had flammable materials on site. There had been a number of fires previously at the workplace.

In September 2008, one of the employee's managers discovered the employee was inside a storeroom making a phone call. When the manager entered the storeroom he noted the storeroom smelt of smoke. He also found a cigarette butt on the ground which had only recently been alight. The manager gave evidence the door to the storeroom had been jammed shut by a piece of wood which had been lodged under the door before he entered.

Anjel denied he had been smoking to the manager. The employer suspended Anjel from his duties whilst investigations took place.

Anjel offered to undergo a DNA test to prove his DNA was not on the cigarette butt. The employer did not consider this was reasonable. The employer terminated Anjel's employment without notice as it considered Anjel:

- was aware of the company's no smoking policy; and
- had jammed the door to the storeroom shut so as not to be discovered; and
- wilfully breached the company's no smoking policy.

The worker brought a claim under Section 643 of the *Workplace Relations Act, 1996* alleging that the dismissal was harsh, unjust or unreasonable and that it was unreasonable for the company to refuse to allow him to submit a DNA to prove his innocence given his long-standing employment with the employer.

The Commission was satisfied:

- Anjel had been smoking in the storeroom.
- The evidence of the manager that the storeroom smelt of smoke and a cigarette butt was found next to the employee and was warm was preferred to the denial by the employee.
- The company's policies regarding smoking were well known to the employee.
- The processes associated with the termination were fair and the company was not required to undertake or accept DNA testing on the cigarette butt.
- The company followed appropriate procedures to investigate and determine the actions of the employee and it was reasonable to conclude his actions constituted serious misconduct entitling the employer to terminate Anjel's employment without notice.

This case is an example to employers of the importance of having policies which are communicated to employees, understood by the employees and enforced by the employer. If these procedures are followed by employers in the implementation of the company's policies, employers can use a wilful breach of an important company policy to terminate employees without notice. Employers should be aware that the company policies must be enforced and are not merely "paper policies" which are only used when it suits the employer.

False Expense Claims By Employee Led To A Valid Dismissal For Misconduct

The Australian Industrial Relations Commission in the matter of *Gao -v- Schneider Electric (Australia) Pty Limited* found that an employee was guilty of misconduct and validly dismissed where he claimed reimbursement for accommodation expenses when he had not stayed at the hotel.

Gao was an experienced service technician and had been employed for 16 years. On 11 October 2008 he alleges he attended a hotel in Bathurst and paid for accommodation for the evening. As a result of the hotel being noisy and smelling of alcohol, he drove back to his home that evening. He was involved in a car accident on the way home.

The employer found Gao had not stayed at the hotel and the hotel had supplied Gao with alcohol to the value of the accommodation.

The employer commenced an investigation. Gao was invited to respond and gave differing versions of events at two interviews. The company concluded Gao had intended to claim a living away from home expense from the employer and essentially cash that expense in for the purchase of alcohol from the hotel.

The employer decided to terminate Gao's employment for misconduct.

Gao lodged an application pursuant to Section 643(1) of the *Workplace Relations Act, 1996* alleging his termination was harsh, unjust or unreasonable.

The Commission was satisfied the employer had a valid reason to terminate his employment on the basis of misconduct. Whilst the Commission found Gao was not provided with an opportunity of having a support person of his choice at the first interview, this error in the process did not diminish the fact that Gao's deliberate behaviour was unacceptable and dishonest. The Commission took into account Gao's unblemished record of 16 years, the fact he had a young family and that he had obtained alternative employment on a higher rate of pay within 12 days after his termination.

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