GD News

Gillis Delaney Lawyers

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

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You Need To Rely On More Than Circumstantial Evidence.

Last month in GD News we considered a recent decision of the NSW Court of Appeal where the Court concluded that a breach of duty coupled with an accident of the kind that might thereby be caused by that breach is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission. But it appears that this view is not supported by all judges of the NSW Court of Appeal. The contentious issue stems from the argument that where there are a number of possible scenarios concerning the cause of the accident, claimants must fail in the case if they cannot establish that scenarios where there is negligence are more probable than scenarios where there is no negligence.

The NSW Court of Appeal In *Flounders v Millar* has recently had cause to consider a claim for damages brought by a pedestrian who was injured on a road at night in an isolated industrial area where the circumstances presented by the pedestrian and the driver were at odds and the District Court Judge that had originally determined the claim had dismissed the claim as the claimant had failed to prove negligence on the part of the driver.

Jack Flounders suffered severe injuries when he was struck by a motor vehicle at 9.30 pm. He was a pedestrian and the driver of the vehicle was travelling west along a road which comprised of two lanes heading west and two lanes heading east. The road was divided by a broken white centre line. The southern edge of the kerb-side lane was delineated by an unbroken white line and the road surface continued beyond that line creating an area variously described as a breakdown or bus lane. This lane was 3.2 metres wide.

Flounders' evidence was that at the time of the accident he was hitchhiking and he could remember that he had been standing south of the unbroken white line when he saw the driver bound over the unbroken line to strike him.

Flounders suffered a serious closed head injury. He had little or no recollection of events which had occurred in the period before the accident.

Flounders was a chronic schizophrenic prior to the accident with an anti-social personality disorder. In the 3-1/2 years prior to the accident he had heard voices telling him to kill himself. He believed he was possessed by evil spirits and he had hallucinations and delusional thoughts with irrational and bizarre behaviour. There was evidence before the District Court Judge that Flounders had in the past acted inappropriately in traffic when in a psychotic state sometimes as a response to hallucinations. These incidents included running into the side of a taxi, lying on the road, walking in front of traffic in a catatonic state, wandering on roads and crossing roads against traffic.

The driver gave evidence that his headlights were on he came around a bend and caught a glimpse of something momentarily before he hit Flounders. The driver saw Flounders as no more than a glimpse immediately before impact.

One witness gave evidence that Flounders ran in front of the driver.

The District Court Judge thought there were two possible scenarios. One was that Flounders was

Inside

Page 1 You Need To Rely On More Than Circumstantial Evidence

Page 2 Duty Of Care - Landlords And Tenants

Page 3 Accident Reports- Privileged?

Page 4 Motor Accidents Lifetime Care & Support Scheme

Page 5 Is The Expert's Report Admissible?

Page 6 Weekly Compensation Entitlements Under Enterprise Agreement

Page 6 OH&S and Labour Hire

Page 7 A Few Drinks After Work & A Fight Between Co-Workers. Do You Pay Workers Compensation Benefits

Page 8 Intoxicated And Violent Employee Not Reinstated After Dismissal

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standing within lane 1 as the driver approached and in that situation it could be established that there was negligence as a proper lookout had not been maintained. The other scenario was found to be equally possible in that given the history of Flounders' psychotic states in the past, he could have either walked or ran from a dark area on the footpath into the path of the driver.

The District Court Judge was not persuaded that she could determine which possibility was more likely and on that basis found that Flounders had not proved his case. Flounders appealed.

So what did the Court of Appeal decide?

Interestingly, faced with two possible scenarios, one which was capable of a finding of negligence and one where there may have been no negligence, the Court of Appeal concluded that there was no option but to dismiss the claim.

Justice Ipp, when considering the question of causation, noted:

> *"It remains necessary for a plaintiff, relying on circumstantial evidence, to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstances must do more than give rise to conflicting inferences of an equal degree of probability or plausibility. The choice between conflicting inferences must be more than a matter of conjecture. If the Court is left to speculate about possibilities as to the cause of the injury, the plaintiff must fail."*

Interestingly, Ipp J also made reference to the decision of *Binks - v - North Sydney Council* which was examined in our previous edition of GD News. In that case a motorist affected by alcohol drove his vehicle into a telegraph pole and he claimed damages from a road authority arguing the Council was negligent in relation to road maintenance works in the area and the erection of signage on the road. Ipp J did not agree with the finding in *Binks'* case."

Ipp J stated:

> *"A mechanical application of a rule that the evidential onus shifts once a breach of duty has occurred followed by injury within the area of a foreseeable risk is in conflict with basic principles of common law. In many cases it will simply not be possible for the defendant to discharge such an onus because the defendant was not present when the accident occurred or the injury was caused and has no knowledge of the circumstances that prevailed at the time. A rule in these terms would introduce a form of liability that in many cases would be absolute and, in effect, do away with the requirements of the element of causation. It would be such a radical change to the law that, for it to be recognised, it must be stated unequivocally by the High Court.*

As Flounders did not prove that any one of the possible accident scenarios was more probable than the other, he did not establish the element of causation. Accordingly, his claim failed. This was a majority decision of the Court of Appeal.

It is incumbent on a plaintiff to demonstrate the more probable scenario for an accident where there are a number of possibilities. Two equally reasonable scenarios cannot amount to a plaintiff establishing negligence unless negligence can be inferred in both scenarios.

A plaintiff must still prove their case.

No doubt the defendant in *Binks'* case would take comfort in the comments found in the various judgments of the Court of Appeal in Flounder's case. In *Binks'* case, what will happen? Perhaps the matter will proceed to the High Court. Time will tell. For now, claimants will still be required to prove that it is more probable than not that negligence caused an accident especially where there are possible scenarios that would demonstrate there was no negligence.

Duty Of Care - Landlords And Tenants

What care must a landlord exercise and what action must be taken to protect tenants from injury in rented premises?

The NSW Court of Appeal recently considered a claim by a tenant who fell through a ceiling on the second floor of a house after the tenant had gone into an area of roof space in the leased premises to store a metal pipe. She had entered the roof area, observed a wooden beam or rafter capable of supporting her weight running straight ahead of her across the floor and stepped onto the beam. She ultimately stepped off the beam onto a batten, mistaking it for another beam and went through

the batten and fell through the ceiling.

The original Trial Judge concluded that the landlord had breached its duty of care that it owed the tenant as the roof space was a confined space with poor lighting with clutter which made the roof space hazardous to the average tenant. The Trial Judge found that a simple remedy was available to prevent the accident, namely, locking the door to the roof. The roof was more than 100 years old. The tenant did not have a written agreement to lease the premises and her occupancy was an informal one.

The Court of Appeal did not agree with the Trial Judge. The Court noted that the High Court has held that:

> *"Broadly, the content of the landlord's duty to the tenant will be conterminous with a requirement that the premises be reasonably fit for the purposes for which they are let, namely, habitation as a domestic residence."*

Justice Ipp in his judgement noted:

> *"As there was nothing relevantly unusual about the roof area, it could not be said, on any reasonable basis, that its condition rendered the premises unfit for the purposes for which they were let, namely, a habitation as domestic residence. The risk of traversing a roof area, with a floor comprised of ceiling material, was well known and part of ordinary domestic life. "*

Justice Ipp also cited with favour a well known statement from the High Court that:

> *"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 that it is dangerous or defective. Safety standards imposed by legislation or regulation recognise a need to balance safety with other factors, including convenience, costs and practicality."*

In this case the roof area was no more or less inherently dangerous than any other area or any other dangers in similar domestic premises. There was no doubt the roof could be made safer but that did not mean that it was dangerous or defective. In these circumstances the Court of Appeal determined that the District Court Judge had failed to apply the correct analysis and the tenant's claim should fail.

Landlords do not owe a duty to tenants to make premises totally safe. The duty of care does not require a landlord to commission experts to inspect premises to look for latent defects nor are landlords required to make premises as safe as reasonable care can make them. The duty owed by a landlord is determined by reference to the foreseeable risk of harm and what a reasonable person would do in response to that risk. In this case a reasonable person would not do anything in response to the risk presented by the state of the roof. The roof was not hazardous to the average tenant.

Accident Reports- Privileged?

When a claimant commences legal proceedings, they will try and marshal as much evidence to assist their case as possible. Usually this will include issuing subpoenas to various entities which may include the defendant. This is often a fairly uncontroversial exercise but sometimes an issue will arise in relation to whether or not the claimant can have access to the documents. Sometimes particular material will fall within the scope of the subpoena but is subject to legal professional privilege. In these circumstances the claimant is unable to examine the privileged material which can be crucial to a case. Occasionally an argument will arise as to whether or not legal professional privilege applies to certain documents. This was the case recently in the New South Wales Court of Appeal decision of State of New South Wales v Jackson.

Christopher Jackson was a student at Glendale Technology High School. He was injured in an accident on a trampoline during a PDHPE class. According to the teacher Mr Harman he was "reminded" by " a senior member of staff" to complete an Accident to School Student form, write out a statement and obtain witness statements from a student teacher and another student. Harman submitted all the documents to "the School Executive."

Ultimately Jackson commenced proceedings in the District Court claiming damages for injuries and a subpoena was issued to the School requesting production of the "the complete file." The Court commented that the subpoena was irregular and should not have been used in lieu of discovery but nevertheless the School produced the complete file although opposed inspection of part of the file on the ground of client legal privilege.

Judge Sidis in the District Court upheld the privilege in respect of the Accident to School Student Form and Mr Harman's statement, but rejected the argument in relation to the student teacher and other student. Her Honour found the report and Harman statement to be privileged as a policy document of the New South Wales Department of Education and Training provided that this was the case. The Accident Report also had at the end "For use of the Department's legal advisers in anticipation of legal proceedings." The Harman statement was an addendum to the report.

The State of New South Wales appealed from Her Honour's decision arguing that the additional two statements should also be privileged.

This argument was rejected by the Court of Appeal. The statements were on plain pieces of paper with no comments in relation to confidentiality and appeared to be handwritten by the two witnesses. In these circumstances the statements were not privileged.

Jackson now has access to the witness statements which are likely to assist in the prosecution of the claim. It can be assumed from the fact that the State of New South Wales fought so strongly against the inspection of the statements that they contain material detrimental to the defence of the claim.

In this case there was no way out for the State of New South Wales but it should be remembered that if a factual investigation is requested by lawyers then it is privileged and the claimant will not have the benefit of inspecting the factual.

Motor Accidents Lifetime Care & Support Scheme

The Lifetime Care & Support ("LTCS") Scheme in relation to NSW motor accidents became operative for adults on 1 October 2007. The same scheme for children under the age of 16 previously commenced on 1 October 2006. Through the creation of the Lifetime Care & Support Authority, the scheme will be administered by a membership drawn from the medical profession and disability groups. The LTCS Scheme operates to provide lifetime care for catastrophically injured victims of motor accidents. The important aspect of the scheme is that it is available to all catastrophically injured adults, regardless of who was at fault in the motor accident. The scheme is to be funded through the Lifetime Care & Support Authority Fund with a levy in the vicinity of $40.00 per third party premium. The important aspect to note is that insurers will be relieved of obligations to make payments for future care and treatment in relation to catastrophic injuries.

Eligibility for the scheme, on the face of it, appears to be voluntary. There are three ways to become part of the scheme. Firstly, the injured person can elect to become a participant in the scheme; secondly, the insurer can nominate an injured person for inclusion in the scheme, and finally the Motor Accidents Authority can direct the insurer to nominate the injured person for inclusion in the scheme. However, it is important to note that an application made by an insurer does not require the consent of an injured person. Insurers are likely to nominate all eligible victims to become participants in the scheme given insurers can then transfer liability to pay treatment or care expenses to the scheme.

In terms of eligibility, there are five categories of injuries which qualify for the scheme. These are spinal cord injuries, brain injuries, multiple amputations, blindness or burns. The legislation and guidelines have set out extensive criteria in relation to those five categories of injuries. For example, in relation to burns, a victim must suffer full thickness burns greater than 40% or greater than 30% in children under 16 years. To accurately assess ability, a Functional Independence Measure (FIM) has been created to evaluate the victim. This is an 18 item, 7 level scale to assess the level of catastrophic injury.

Once the victim is included in the scheme, benefits are paid for medical care and treatment together with home and transport modification costs. These benefits are also available to victims who are now living overseas.

Extensive guidelines have been prepared to support the administration of the scheme including the provision for disputes to be dealt with by the Authority. These include disputes about eligibility for the scheme, whether an injury was actually a motor accident and disputes over treatment and care provisions.

It should be remembered that where an injured person becomes a participant in the scheme but can also prove fault, they can still make a CTP claim for heads of damage not covered by the scheme. This would include non economic loss, past and future economic loss and heads of damages that are only partially covered by the scheme, such as the capital costs (as opposed to modification) of accommodation, vehicles and computers.

This scheme obviously presents as an excellent support mechanism for claimants who cannot prove fault in a motor accident

or their damages would be severely reduced due to contributory negligence. It is envisaged approximately 200 claimants per year will take advantage of this scheme but there still remains some concern as to some aspects of the scheme. These include the mandatory participation in the scheme when the claimant is nominated by the insurer, the inability of those who are catastrophically injured to adopt personal responsibility for their own future through the traditional award for a lump sum form for all heads of damages and the prohibition in recovering damages for voluntary domestic assistance.

It should also be noted there is a very limited scope for paid legal representation for disputes within the scheme, no funding for capital costs of accommodation, transport and computers for at fault claimants and limited avenues to appeal decisions of the Lifetime Care & Support Authority. Balanced against this is the fact the LTCS Scheme will provide previously unattainable benefits to those at fault or those who have contributed heavily to the circumstances of their own injury. Even for those participants who can establish fault and would otherwise miss out on recovering a larger lump sum, the LTCS does provide a degree of certainty that their care and treatment needs will be met throughout their life. Obviously, the financial viability of the scheme will need to be closely monitored as experience in other jurisdictions such as New Zealand has proven that inadequate revenue collection for the scheme will result in the significant reduction of benefits over time.

Is The Expert's Report Admissible?

It is commonplace in Court proceedings for one or all parties to rely on expert's reports as part of their evidence. Selecting the right expert and preparing the report properly can be crucial as often a Judge's decision may come down to which expert is preferred. In NSW the Uniform Civil Procedure Rules 2005 which govern Court proceedings in the Local, District and Supreme Courts provide that the author of an expert report must include in their report an acknowledgement that they have read the Code of Conduct contained within the Rules and also agree to be bound by the Code. In essence compliance with the Code means that the expert's opinion will be impartial and the primary duty of the expert is to the Court and not to the party that qualified them. But what happens if an expert does not provide this acknowledgement in their report? Does this mean that the report is not admissible in the Court proceedings?

The Supreme Court of NSW recently considered this issue in the decision of Investment Source v Knox Street Apartments Pty Limited & Ors; Esber v Kimberley Securities Limited & Anor. The proceedings involved a joint venture between Knox Street Apartments ("KSA") and Kimberley for completion of a development project at Knox Street, Chippendale known as Central Park Apartments. One of the issues which eventuated between the parties as a consequence of the project was the price at which Kimberley procured what was in substance a sale of the unsold units in the development to Milton Street Holdings Pty Limited. Cameron Williams, an employee of Colliers Jardine Consultancy and Valuation Pty Ltd ("Colliers") had prepared a report in 2001 providing a valuation. KSA wished to rely on Williams' report in the proceedings to prove the value of the relevant units at the time. The report was served and Kimberley's solicitors indicated that the report would be objected to at the hearing. In what appeared to be a response to this objection KSA served an affidavit of a current valuer at Colliers (Williams had left Colliers employ) who stated that Williams was no longer employed but the valuation was accurate. The Evidence Act permits a business record to be tendered in a case. The report was found to be a business record but it contained expert evidence and the question was could the whole report be relied on in the case?

The William's report was prepared in 2001 prior to the litigation. Not surprisingly the report did not contain the Code of Conduct Acknowledgement required by the Rules. This was a significant issue for the trial judge Justice McDougall who had to consider whether or not the opinions within the report and/or the factual material within the report were admissible in light of this omission. Justice McDougall ultimately concluded that the opinions of Williams contained within his report were not admissible. This was because in Justice McDougall's opinion it was the clear intention of the legislature that expert evidence should not be admitted unless the expert has provided the appropriate acknowledgement. The factual material (limited to the description of the property and sales evidence) was however admissible.

What was the reasoning behind the Judge's decision? His Honour thought it to be of considerable importance that an expert retained to advise a client rather than an expert engaged to give evidence owed their primary duty to the client and not the Court. Further, an expert engaged to give evidence is usually confronted with a conflicting opinion to their own against which they must reconsider their initial opinion.

An interesting decision by the Court and one that creates a real dilemma for parties where they wish to rely on reports have been prepared at a time when Court proceedings were not contemplated. How can this be overcome? Is it enough to locate the "expert" (if possible) and ask them to provide a supplementary report which contains the appropriate acknowledgement? Based on the reasoning of Justice McDougall this does not seem to be the answer, but time will tell. The safer bet would be to engage the expert once again , provide them with a full brief of evidence and ask them first to consider the Code of Conduct

and then having regard to the obligations in the Code prepare a new report addressing the issues in the proceedings that require expert opinion. Just in case ask the expert to explain any difference between the original report and the new report, but remember the answer may not be what you would like to hear. Any difference may be due to the fact that initially the expert simply gave the best paid opinion he could rather than a balance opinion of an independent expert.

Weekly Compensation Entitlements Under Enterprise Agreement

A Presidential appeal in the NSW Workers Compensation Commission recently clarified the calculation of the current weekly wage rate in weekly compensation claims. The current weekly wage rate under Section 42 of the Act is utilised to calculate a worker's weekly compensation benefits when he is totally incapacitated or is partially incapacitated and seeking suitable employment. In the matter of *Jayasingha - v - Tristaff Steering & Suspension (Australia) Pty Limited (2007)* Deputy President Bill Roche examined a certified agreement which was an enterprise agreement which had been approved under the Workplace Relations Act, 1996. The employer had argued that given the agreement was read wholly in conjunction with the Metal Engineering and Associated Industries Award, the current rate of pay in the agreement should be read as referring to the award rate of an employee at the time of the agreement. The Deputy President disagreed.

The Deputy President pointed out that a clause in the agreement noted that where there was any inconsistency between the agreement and the Award, the agreement applied. According to the Deputy President the words "current rate of pay" in the agreement should not be construed as referring to the rates of pay under the Award unless the worker concerned was being paid under the Metal Award at the date the agreement commenced. The Deputy President noted that if the current rate of pay was intended to be a reference to the rate in the Award then it will be reasonable to expect the agreement to say that. Given the inconsistency, the agreement applied over and above the metal Award.

This decision is a timely reminder that simply because some reference is made to an Award in an enterprise agreement or some other industrial instrument, this does not mean the current weekly wage rate should automatically be calculated in reference to the Award. When calculating the current weekly wage rate, parties should pay close attention to the wording of the industrial agreement and the basis of the calculations of the wage rate in that industrial agreement.

OH&S & Labour Hire In The Construction Industry - $80,000 Fine

Linddales Pty Ltd is an employer operating as a labour hire company in the construction industry. It had contracted with Barclay Mowlem Construction Limited for the provision of labour to perform work at a construction site. It supplied its employee, Mark James to do various things including the operation of plant at the site. James was working as an operator of a mobile crane and as James was operating the crane with a kibble filled with concrete suspended by the chain from a jib the crane toppled and Jones suffered a serious injury including a fractured rib, a broken shoulder blade and psychological injury.

Linddales was prosecuted for a breach of the *Occupational Health and Safety Act* for failing to ensure the safety of their employee at work and pleaded guilty.

The crane toppled over because of its positioning across the slope of a ramp with an elevated kibble weighing 1100 kg which transferred the centre of gravity of the crane beyond its lateral tipping axis. The crane was unsafe and did not comply with Australian Standards for Cranes, Hoists and Winches as it did not have a load indicator system to measure and display the mass of the load being lifted, a rate incapacity limiter was not fitted, an angle indicator to indicate the angle of the boom or jib was not fitted and a telescopic boom and indicator to indicate the operating length of the extended boom was not fitted. Graded capacity charts with the crane did not comply with Australian Standards. The charts were in French rather than English. They were not applicable to the crane as it was rigged. The speed at which the crane could travel was not shown on the charts.

The Court noted that the offence involved, not uncommonly, risk to the health and safety of an employee of the labour hire firm in circumstances where he was working at a construction site controlled by the host employer and under the supervision of the host employer. James had been trained and certified to operate the crane but the crane failed comprehensively to meet nationally accepted standards for its safe operation. Linddales knew that Barclay Mowlem had provided James with training to operate the crane and had funded that training. It therefore knew that James was performing duties involving the operation of the crane, however, it did not inspect or arrange for an inspection of the crane, for any purpose, prior to the accident nor did it require Barclay Mowlem to submit a safe work method statement for the work to be undertaken by Linddales employee.

The Court found that although the labour hire company knew that James was operating a crane, it did not know the condition

of the crane or whether it could be used safely and without risk because it did not inspect the crane, it did not supervise James whilst he was operating the crane and did not otherwise know whether the crane was safe when used because Linddales did not require Barclay Mowlem to advise it in that respect. The Court noted that the labour hire company was either disregarding completely its duty to ensure the safety of its employees or it was relying to a significant degree on Barclay Mowlem to ensure that the crane provided was safe and without risk to health. The latter interpretation was accepted, however, in the words of the Court:

> *"The labour hire company cannot escape liability merely because the client to whom an employee is hired out is also under a duty to ensure that persons working at their workplace are not exposed to risks to their health and safety or because of some alleged implied obligation to inform the labour hire company of the work to be performed. In our view a labour hire company is required by the OH&S Act to take positive steps to ensure that premises which its employees are sent to work do not present risks to health and safety. This obligation would, in appropriate circumstances, require it to ensure that its employees are not instructed to and do not carry outwork in a manner which is unsafe."*

In this case the Court found that Linddales' passive approach to safety left James exposed to a serious risk. In those circumstances Linddales was fined $80,000.00, a significant fine for a first offence.

A Few Drinks After Work & A Fight Between Co-Workers. Do You Pay Workers Compensation Benefits?

In NSW workers compensation is not payable under the Workers Compensation Act,1987("Act") Act in respect of an injury unless the employment concerned was a substantial contributing factor. Section 9A of the Act codifies this requirement and the following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury:

- the time and place of the injury,
- the nature of the work performed and the particular tasks of that work,
- the duration of the employment,
- the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
- the worker's state of health before the injury and the existence of any hereditary risks,
- the worker's lifestyle and his or her activities outside the workplace.

However, compensation is also payable in circumstances where employment does not need to be a substantial contributing factor as the Act provides that compensation is payable for journey claims and recess claims and section 9A has no application to these claims.

Compensation is payable for injuries sustained during:

- the daily or other periodic journeys between the worker's place of abode and place of employment,
- the daily or other periodic journeys between the worker's place of abode, or place of employment, and any educational institution which the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to attend,
- a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of obtaining a medical certificate or receiving medical, surgical or hospital advice, attention or treatment or of receiving payment of compensation in connection with any injury for which the worker is entitled to receive compensation,
- a journey between any camp or place:
    - where the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to reside temporarily, or
    - where it is reasonably necessary or convenient that the worker reside temporarily for any purpose of the worker's employment,

  and the worker's place of abode when not so residing,
- a journey between the worker's place of abode and a place of pick-up
- journeying from the worker's place of employment with one employer to the worker's place of employment with another employer, as the worker shall be deemed to be journeying from his or her place of abode to his or her place of employment with that other employer.

A journey from a worker's place of abode commences at, and a journey to a worker's place of abode ends at, the boundary of the land on which the place of abode is situated.

Compensation is also payable where worker on any day on which the worker has attended at the worker's place of employment pursuant to their contract and sustained injuries during a temporarily absence from that place on that day during any ordinary recess or authorised absence, provided they do not during that absence voluntarily subject themself to any abnormal risk of injury.

After work activities where injuries result can give rise to compensation benefits. So what happens where co-workers have a few drinks at work and then a co-workers assaults another worker. These circumstances can give rise to arguments that the worker was not injured on a journey but was injured at work and therefore a worker must prove the employment is a substantial contributing factor. This is a difficult task where there is an assault. These issues were considered in a recent Workers Compensation Commission decision of Phillips - v - Pallet Makers Australia Pty Ltd.

Phillips made a claim for medical expenses arising out of a physical and psychological injury he suffered as a result of an assault by a co-worker after a few drinks at work. Phillips had a drink for 1-1.5 hours and then left the building to go to his car when he was assaulted by a co-worker. The arbitrator found the after work drink was encouraged by the employer. The employer denied liability to pay compensation on the basis Phillip's employment was not a substantial contributing factor to his injuries arguing his journey home had not commenced at he had not left the place of abode of the employer or alternatively that the journey home had commenced before the drinking commenced, the drinking was an interruption to the journey that materially increased the risk of injury and therefore the worker lost his entitlement to compensation pursuant to the journey provisions in the Act.. The Commission found on the facts the injury was suffered on a journey and therefore there was no need to find that employment was a substantial contributing factor. The journey did not begin when the work ended but commenced when the worker left to go to his car to drive home. The relatively short period of drinking did not alter the character of the workplace from being a place of work.

One wonders what would have resulted if the assault on Phillips took place at the lunch table where they were drinking before Phillips had got up to go to his car to drive home. In that situation Phillips would have to have shown that the employment was a substantial contributing factor.

After work drinks expose employers to significant risks. Those risks are amplified when the drinks take place at the workplace. In this case if the drinks had taken place off the worksite it is quite possible that the claim for compensation would fail where the drinking was an interruption to the journey that materially increased the risk of injury and the worker thereby losses his entitlement to compensation.

Intoxicated And Violent Employee Not Reinstated After Dismissal

An employee with a history of drug addiction was summarily dismissed for misconduct. The Industrial Relations Commission, in the matter of Marshall - v - Sydney Water Corporation found there was undisputed evidence of the employee's behaviour at work on 4 June 2006 involving verbal and physical assault to other employees, damage to the employer's property and misconduct towards the police when they arrived to remove the employee from the workplace.

The employee claimed to have had no recollection of his behaviour as a result of a psychotic episode and claimed his actions were involuntary and unlikely to be repeated. The Commission considered the safety and well being of the other employees outweighed the employee's claim for reinstatement.

The employee had over 17 years of service with the employer. However, he admitted to frequent drug use which included occasional use of marijuana at work. He had a history of an extraordinarily high cannabis intake for some years prior to the incident at work. Three or four weeks prior to the incident at work, he decided to cease all intake of marijuana without medical supervision. The employee claimed that as a result of his sudden cessation of marijuana use, he suffered a psychotic episode at work on 4 June 2006 which the employee claimed was involuntary and uncharacteristic.

The employer called a number of witnesses involved in the incident on 4 June 2006. Their evidence was to the effect that the dismissed employee was verbally abusive towards them, had cut himself and sprayed blood over one of the other employees and had threatened the police when they arrived at the employer's premises.

Although the employee had been employed for over 17 years, he was summarily dismissed by the employer. The employee

brought an application for reinstatement and compensation alleging he had been unfairly dismissed.

Commissioner Murphy considered the employee's credit suffered badly during cross-examination. The Commissioner considered the employee's credibility was crucial as to his explanation of the incident and his subsequent ability to stay drug free. The employer's expert evidence that the employee's psychotic episode was more likely caused by intoxication was preferred.

The Commissioner refused the employee's application for reinstatement. The Commissioner considered the risk of the employee re-offending when it comes to the use of marijuana was too much of a gamble for his employer and fellow employees to undertake if he was re-engaged by the employer.

Clearly, employers have a duty to their employees to protect their employees from other employees who may pose a threat or danger to the health and safety of the other employees. The applicant in this case had a known drug problem, admitted to using drugs at work, voluntarily subjected himself to withdrawing from a significant marijuana addiction without medical supervision and had been extremely physically and verbally violent towards other employees.

Employers can be comforted by this decision as summarily dismissing an employee, even with over 17 years of service with the same employer was warranted where the safety of other employees was at risk.

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.

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