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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 the employment and insurance market in Australia. We can be contacted at any time for more information on any of our articles.

High Court- No Bad Faith By CGU

The issue of whether or not an insurer has failed to act in good faith continues to be an important one. Last month our leading article on the Garcia decision discussed how the NSW Court of Appeal rejected the notion of the novel tort of bad faith in the situation where a worker's compensation insurer allegedly acted in bad faith when dealing with and declining a claim. In that case it was also determined that there was no implied duty of utmost good faith in a workers compensation insurance contract, as the Insurance Contracts Act does not apply to workers compensation insurance schemes. However, other types of insurance contracts are affected by the Insurance Contracts Act and section 13 of that Act implies a provision in the contract that each party to a contract must act towards the other party with the utmost good faith. The High Court has recently entered the arena and in a significant decision for insurers has ultimately found that CGU did not act in bad faith where there was a long delay in denying indemnity *(CGU Insurance Limited v AMP Financial Planning Pty Ltd).*

In 1999, AMP entered into a professional risks insurance contract with CGU. CGU agreed to provide insurance to AMP in respect of claims for civil liability. Also in 1999, two representatives of AMP were found to have invested $3.4 million of clients' funds in a company already in deep financial trouble and the investors lost their money. On becoming aware of the large losses, AMP notified its insurer CGU and sought indemnity under the policy. AMP drew up a protocol for handling the claims whereby AMP would notify CGU of each claim and prepare a liability report and CGU would decide within 14 days whether to defend or settle the claim. CGU agreed to the protocol in principle, but held off deciding whether or not it would indemnify AMP and repeatedly told AMP to act as a "prudent uninsured." AMP was under pressure from ASIC to resolve the claims and after repeated requests to CGU for a determination of AMP's liability with no response, paid out more than $3.24 million for 47 claims. CGU represented to AMP that it would not rely on a clause prohibiting AMP from admitting liability or settling claims but advised AMP to act as a prudent uninsured. The settlements were paid at a time when CGU had not confirmed it would indemnify AMP. CGU ultimately denied indemnity and AMP commenced proceedings in the Federal Court against CGU alleging that CGU was in breach of its duty to act with utmost good faith required by section 13 of the Insurance Contracts Act.

Part II of the Insurance Contracts Act imposes upon both parties to a contract of insurance a duty of utmost good faith. Section 12 provides that the provisions of Part II may not be read down and section 13 provides that the parties may not rely on the terms of a contract of insurance except in the utmost good faith.

Justice Heerey in the Federal Court dismissed the application as in His Honour's opinion AMP had no belief that CGU had accepted liability and AMP had paid the settlement amounts because it was in AMP's best interests to do so. AMP had also not shown that the settlements were reasonable. An appeal to the Full Court of the Federal Court by AMP was successful. CGU therefore appealed to the High Court.

The High Court found that AMP was not entitled to be indemnified by CGU for the payments as AMP did not establish by appropriate evidence that the payments were reasonable.

A significant issue for the High Court was the issue of good faith and whether or not CGU had acted in good faith.

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Callinan and Heydon JJ in their judgment stated:

> *"At the outset we should say that we agree with the Chief Justice and Crennan J that a lack of utmost good faith is not to be equated with dishonesty only. The analogy may not be taken too far, but the sort of conduct that might constitute an absence of utmost good faith may have elements in common with an absence of clean hands according to equitable doctrine which requires that a plaintiff seeking relief not himself be guilty of tainted relevant conduct. We have referred to the doctrine of clean hands because, as with another equitable doctrine, that he who seeks equity must do equity, it invokes notions of reciprocity which are of relevance here. That is not to say that conduct falling short of actual impropriety might not constitute an absence of utmost good faith of the kind which the Insurance Act demands. Something less than that might well do so. Utmost good faith will usually require something more than passivity: it will usually require affirmative or positive action on the part of a person owing a duty of it. It is not necessary, however for the purposes of this case, to attempt any comprehensive definition of the duty, or to canvass the ranges of conduct which might fall within, or outside s 13 of the Insurance Act "*

Callinan and Heydon JJ were of the opinion that there was neither a satisfactory explanation nor justification for CGU's denial of indemnity but something more was need to find that CGU had failed in their duty of utmost good faith.

Further there was not such a degree of reciprocal good faith on the part of AMP to entitle AMP to relief against CGU on this basis. AMP had not invoked the "senior counsel clause" in the policies that provided that an advice could be obtained from senior counsel to determine indemnity and there was no explanation for this and AMP settled the claims quickly for its own reasons.

Why was the issue of good faith so significant and why did AMP not simply seek to prove the claims were reasonable and fell within the policy?

Interestingly Gleeson CJ and Creenan J noted:

> *"payment of the settlement amounts was not within the terms of the cover provided by the contract of insurance. Under the insuring clause, CGU agreed to provide cover for "Claims for Civil Liability" arising from the conduct of AMP's "Insured Professional Business Practice" made while the policy was in force. "Civil Liability" was defined to mean liability for damages, costs and expenses which a civil court ordered the insured to pay on a claim. "Claim" was defined (so far as presently relevant) to mean any originating process in a legal proceeding or arbitration. None of the investors to whom settlement amounts were paid made a claim, as defined. In the events that occurred, there were no claims for civil liability within the meaning of the contract of insurance. That was not fatal to AMP's right to be indemnified in respect of the settlement amounts. Nevertheless, it is part of the context in which the conduct of CGU is to be evaluated, especially in considering arguments based on estoppel, or failure to comply with the statutory requirement to act with the utmost good faith imposed by s 13 of the Insurance Contracts Act 1984 (Cth) ("the Act"). Criticism of CGU for delay in either accepting or denying liability to indemnify AMP needs to be tempered by the reminder that, at the time the settlement amounts were paid, it could not have been suggested that the event against which cover was provided had occurred. "*
>
> *For its own sound commercial reasons (including the need to protect its relations with the Australian Securities and Investments Commission ("ASIC"), its licence, and its goodwill) AMP adopted a procedure for dealing with investors which was designed to ensure, as far as possible, that claims for civil liability, within the meaning of the policy, were not made. There are difficulties with the idea that good faith requires an insurer to inform the insured, before the insured event has occurred, whether the insurer will accept liability if and when it occurs……*
>
> *Secondly, at the time it paid the settlement amounts, AMP was concerned not to put CGU in a position where it might decide to exercise its contractual right to take over and defend any claim in the name of AMP……*
>
> *Thirdly, most of the settlement amounts were paid during October and November 2001, and all settlement amounts were paid at a time when it was plain to AMP that CGU was not committing itself to accepting liability to indemnify AMP……. On the contrary, they were made at a time when CGU was questioning whether AMP was under any liability to the investors."*

The case before the High Court was not run on issues of contractual coverage but rather on assertions that CGU's conduct was such that it attracted liability for the claims and the issues included:

- whether AMP was induced by CGU's conduct to assume that, if it settled [an investor's] demand on reasonable terms, it would not be required to establish by admissible evidence that it was legally liable to that investor in order to be reimbursed by CGU for the amount paid pursuant to such settlement;
- if so, whether AMP settled that demand in reliance upon that assumption;
- whether, in the light of the answers to those questions, CGU was estopped from asserting that, or it would be a want

of utmost good faith for CGU to assert that, AMP is required to establish by admissible evidence that it was legally liable to that investor;

- whether AMP settled that demand on reasonable terms.

Guidance is found in the joint judgements of Gleeson CJ and Creenan J on the conduct expected of insurers and the extent of the duty of utmost of good faith as they noted:

> *"In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.*
>
> *However, the Act does not empower a court to make a finding of liability against an insurer as a punitive sanction for not acting in good faith. If there is found to be a breach of the requirements of s 13 of the Act, there remains the question how that is to form part of some principled process of reasoning leading to a conclusion that the insurer is liable to indemnify the insured under the contract of insurance into which the parties have entered. Let it be assumed, for example, that CGU's failure throughout substantially the whole of the year 2002 to admit or deny liability was a failure to act with the utmost good faith. What follows from that? Most of the settlement amounts were paid during 2001. Again, even if it be said that CGU should have made up its mind about liability before October 2001 (a difficult assertion to sustain having regard to what was said at the meeting of 5 October 2001), what follows? Between a premise that CGU's delay constituted a failure to act with the utmost good faith, and a conclusion that CGU is liable to indemnify AMP in respect of the settlement amounts, there must be at least one other premise. What it might be has never been clearly articulated.*
>
> *As the questions posed by the Full Court for reconsideration by Heerey J reveal, it is not any delay on the part of CGU that is said to be the relevant form of want of good faith; it is the possibility that it is unconscientious of CGU to assert in this litigation (as it has from before the commencement of the hearing before Heerey J) that AMP must show, by admissible evidence, that it was liable to the individual recipients of the settlement amounts.*
>
> *The hypothesis of the first three questions posed for reconsideration by Heerey J is that AMP did not establish by admissible evidence that it was legally liable to the investors. It was accepted in argument in this Court that (it)… is not intended to give AMP an opportunity to reopen its case, and adduce further evidence."*

If AMP, at the trial in the Federal Court had established by admissible evidence that it was legally liable to the investors, then the issue of CGU's conduct would not arise.

In the circumstances the High Court confirmed there was no breach of the duty of utmost good faith by CGU. AMP's conduct in settling claims was in its own interests and the settlements were not reasonable settlements of liability covered by the policies of insurance.

The case serves as a reminder that the duty of utmost good faith is a two edged sword cutting both ways and parties who come to Courts relying on alleged wrongful conduct will have their own conduct under the microscope. An insurer's obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured and such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity. Nevertheless the nature of the cover provided and the nature of the claims made cannot be ignored when insurers are forced to grapple with complex claims and issues of indemnity.

High Court Determines RTA Has No Liability for a Jump Off a Bridge

The High Court has recently found that the Roads and Traffic Authority ("RTA") did not breach its duty of care owed to 14 year old Philip Dederer who became a partial paraplegic after diving off the Forster/Tuncurry Bridge.

On 31 December 1998 Dederer dived from the bridge across the Wollomba River, struck a submerged sandbank and suffered severe spinal injury. There were pictorial signs prohibiting diving and written signs prohibiting climbing on the bridge. Dederer had holidayed in the area since he was a small boy and was aware of the sandbar from boating trips. Dederer had also seen people of various ages jumping off the bridge.

Dederer commenced proceedings in the Supreme Court of NSW against Great Lakes Shire Council and the RTA. As we have discussed in previous issues, the trial judge, Dunford J in the Supreme Court, found that both the Council and the RTA were

negligent. In Dunford J's opinion a modification could have been made to the fence and warning signs rather than prohibition signs should have been placed on the bridge. Dederer's damages were reduced by 25% for his own negligence.

Both the Council and the RTA appealed. The Council was successful in the appeal but the RTA was not. This was because the Council was afforded protection by the provisions of the Civil Liability Act 2002. The Court of Appeal in essence found that the injury to Dederer was the materialisation of an obvious risk of a dangerous recreational activity. Warning sign issues were therefore not relevant to the claim against the Council.

The RTA was not so lucky. As the claim against the RTA had been commenced earlier the RTA did not have the benefit of the Civil Liability Act provisions.

The leading decision of the Court of Appeal was delivered by Justice Ipp. In Justice Ipp's opinion, the erection of the pictographs was not a reasonable response as it was evident that these signs were not serving their purpose and were not having a noticeable effect on persons jumping and diving off the bridge.

The RTA could not argue that resources were not available as the cost of replacing the signs with other signs would have been minimal.

In addition, Dederer argued that the existing flat top handrail on the bridge did not comply with the Road Bridge Design Code. Dederer argued that pool type fencing should have been installed on the bridge.

The Court of Appeal agreed. Justice Ipp held that in circumstances where the RTA had created the structure and maintained the structure, an argument that there were practical difficulties to prevent the RTA from taking steps to minimise the risk was not persuasive. Reasonable remedial measures were relatively inexpensive. The funds to make the modifications were available after the RTA was sued.

Justice Ipp concluded that had all the steps been taken by the RTA then Dederer probably would have not dived off the bridge.

The assessment of Dederer's contributory negligence was increased to 50%.

The RTA appealed and the appeal to the High Court was successful by a majority of 3 to 2.

In essence the majority of the High Court determined that a duty of care imposes an obligation to take reasonable care, not a duty to prevent potentially harmful conduct. The extent of the obligation that was owed by the RTA is that of a roads authority exercising reasonable care to see that the road is safe for users exercising reasonable care for their own safety. In this particular situation the risk did not arise from the state of the bridge but from the risk of jumping into shallow waters and shifting sands that were not under the RTA's control. The magnitude of the risk and any probability of injury had to be balanced against the expense, difficulty and inconvenience of any alleviating action. In this case the cost of new fencing was estimated at $150,000 and the cost of a triangular handrail at $108,072, but this would not necessarily stop people from jumping from the bridge. The majority of the High Court held that the existing signs were a reasonable response to the risk and the RTA had not breached their duty of care.

Gummow J who was in the majority stated:

> *"Although the existence of a duty of care owed by the RTA to Mr Dederer was not in dispute, two points must be made about the nature and extent of that obligation. First, duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a stringent or more onerous burden."*

Gummow J continued:

> *"The error in that approach lies in confusing the question of whether the RTA failed to prevent the risk-taking conduct with the separate question of whether it exercised reasonable care. If the RTA exercised reasonable care, it would not be liable even if the risk taking conduct continued. If the contrary were true, then defendants would be liable in any case in which a plaintiff ignored a warning or prohibition sign and engaged in the conduct the subject of the warning. Whether or not other persons engaged in that conduct, such a defendant would ipso facto have failed to prevent at least the plaintiff from engaging in it. If this quasi-automatic form of liability represented the true state of the law, it would be startlingly at odds with the general proposition that liability in tort depends upon proof of fault through the intentional and negligent infliction of harm. More particularly, it would be at odds with the decision in Montgomery that roads authorities owe only a*

duty to take reasonable care, and do not owe a more stringent or non-delegable duty."

Callinan J in his judgment stated:

"A defendant is not an insurer. Defendants are not under absolute duties to prevent injury, or indeed even to take all such measures as might make it less likely to occur. They are obliged only to make such responses as can be seen to be reasonable in the circumstances. A proper balancing exercise which takes all of the relevant circumstances into account leads inescapably to the conclusion that the appellant, in responding to a risk that had not been realized for 40 years, by erecting the pictograph signs, acted reasonably and adequately."

Gleeson CJ and Kirby J disagreed. In Gleeson CJ's opinion a conclusion such as the one reached by Dunford J that a differently designed bridge or different warning sign may have deterred Dederer was the type of judgment routinely made in negligence actions and should not be disturbed. Kirby J was of the opinion that the approach of the majority of the Court of Appeal demonstrated no error of legal analysis or factual conclusion.

Dederer faced the prospect of 9 judges determining the issue of reasonableness, one in the Supreme Court, three in the Court of Appeal and 5 in the High Court. Overall 5 judges concluded the RTA did not act reasonably but the downfall for Dederer was the majority of the High Court. The case serves as a reminder that the question of what is a reasonable response to a risk is not clear cut and turns on an assessment by a Judge. What is clear is that reasonable care is sufficient to absolve a defendant from liability and there is not an overriding obligation to prevent harm to persons.

Damages and Deemed Workers

In NSW damages payable to injured workers are restricted by the provisions of the Worker's Compensation Act 1987 and in order to bring a claim for work injury damages an injured worker must have sustained at least a 15% whole person impairment. The legislation also contains what are known as deeming provisions, which deem certain persons to be workers for the purposes of the legislation. The effect of these deeming provisions is in essence to extend the benefits of statutory rights of compensation to persons who would not, under general law, be considered employees of a particular employer. Since its enactment the deeming provisions have allowed for numerous occupations such as contractors, timber getters, salesmen, share farmers and jockeys to be treated as workers for the purpose of entitlement to statutory compensation. But do these deeming provisions mean that those persons deemed to be workers are subject to the same constraints on their damages as an injured worker?

This was the issue the Court of Appeal had to consider in the recent decision of *Ebb v Fast Fix Steel Fixing Pty Ltd*. Was a person deemed to be a "worker" for the purposes of the workers compensation legislation, but who was an independent contractor under general law principles, subject to the constraints on recovery of common law damages within that legislation?

At trial Martin Ebb argued unsuccessfully that his damages ought not to be subject to the same constraints as damages for an injured worker. This argument was unsuccessful and Ebb appealed.

The Court of Appeal agreed with the trial judge and found that the constraints on common law damages did apply to the assessment of a deemed worker's damages.

Justice Basten who delivered the leading judgment stated:

" it is significant that the definition of deemed employment is now, and always has been, found in a definition section which operates with respect to the whole of the Act and not in relation to any particular Part or Parts. Accordingly, when new provisions were introduced using defined terminology, it must be assumed that the drafter understood and intended that those general definitions would apply, unless expressly varied, in circumstances where there was no clear contrary intention which would impliedly exclude their operation. On that analysis of the legislation, the appeal must fail."

The Court of Appeal therefore concluded that the assessment of damages of a deemed worker are subject to the same restrictions as the assessment of damages of a worker. A decision that has been a long time coming.

The workers compensation legislation in NSW does not codify the principles that govern the assessment of the duty of care owed by an employer or the duty of care owed by a person or entity that engages a "deemed worker". The assessment of whether or not a person owes a duty of care to an employee or deemed worker will still turn on an analysis of the facts of the case and the relationship of the parties, however the damages awarded to an injured person will be the same whether or not they are an employee (at common law) or a deemed worker (as defined in the workers compensation legislation in NSW).

A sensible decision by the Court of Appeal. While no doubt Ebb (and other deemed workers) are unhappy with the result, it would be a strange situation if the concept of "deemed worker" which results in delivering statutory workers compensation benefits to persons injured did not also modify the damages entitlements of deemed workers.

We wonder whether there will be a closer examination by defendants of the circumstances surrounding the engagement of contractors to see if they fall within the deemed workers provisions in the NSW workers compensation legislation to attempt to move the claim to the workers compensation policy and also attract the modified damages regime in the NSW workers compensation legislation. After all the legislation provides that "Where a contract to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name) is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor."

Motorists Affected By Alcohol. The Duty Of Care Of Councils

The NSW Court of Appeal in *North Sydney Council - v - Binks* has recently considered the liability of a local council responsible for road maintenance where a person was injured when he was driving a motor vehicle whilst intoxicated when he struck a telegraph pole. The driver had allegedly been misled into thinking that the Council's road works had closed off the lane in which he was driving preparatory to turning.

Mr Binks was driving his Mercedes in Alfred Street, Milsons Point, a route he did not normally use. As he approached road works his vehicle veered to the right and mounted the western kerb and collided with a telegraph pole. A blood alcohol sample taken approximately 1 hour after the accident showed a blood alcohol concentration of .133. Based on a careful review of expert evidence and a number of independent witnesses, the original Trial Judge concluded:

"I am of the opinion that to a driver travelling south in Alfred Street at approximately 12.55 am on 20 July 1995, the road works would have given an impression that the southbound lane was entirely blocked and that this impression would not have been corrected until the driver was very close, that is, within 25 metres from the commencement of the intersection."

The swerve into the pole was allegedly the result of the determination by the driver that the left lane was ending.

The original Trial Judge found the Council had been negligent although reduced the driver's damages by 65% for contributory negligence. The Council appealed, not so much challenging the assessment of contributory negligence but arguing that its actions did not cause the accident.

It was necessary for the Court of Appeal to determine the scope of the duty of care, the steps the Council should reasonably have taken in the exercise of the duty of care, and whether the failure to take those steps contributed in a material sense to the occurrence of the accident.

The Court of Appeal confirmed that the duty of care of a road authority is not confined to careful road users but extends to all foreseeable users of the road including bad and inattentive drivers and drivers affected by alcohol. A driver suffering from intoxication is not precluded by that act alone from recovering damages by reason of a road authority's negligence.

It will always be a question of degree as to whether the effect of alcohol has grossly affected the driver's capacity to control his vehicle and whether the road authority's negligence makes no material contribution to the injury.

In this case the Court held that the signage in relation to the road was inadequate and placed too close to the road works giving the misleading suggestion that the lane was closed. The Court held there was no error in the Trial Judge's finding that the road works were confusing and that the Council should have provided further signage to give clear guidance as to the route to be taken along the street during road works.

The Court also confirmed that in order to establish a causal connection between a breach of duty and the injury, the injury must lie within the foreseeable area of risk that adherence to the duty would have avoided or alleviated. The Court accepted that it was open to the Trial Judge to conclude that causation had been sufficiently made out.

The Court concluded that:

> *"If the breach of duty were only one of a number of plausible explanations for the accident, it is necessary to ask whether the law requires that it be more probable than not that it contributed to the accident."*

The Court noted there is authority for the proper conclusion that where there is a duty to warn in relation to a risk of injury and

it is that risk which materialises, causation may be accepted.

It was also noted that the High Court has stated in Chappell - v - Hart:

> *"Once a plaintiff demonstrates that a breach of duty has occurred which is closely followed by damage, a prima facie casual connection will have been established."*

The nature of the damage falling upon a breach of duty must be sufficiently related to the nature of the duty itself in order to have a causal connection.

The Court confirmed that a breach of duty coupled with an accident of the kind that might thereby be caused 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 amounting to the breach of duty by the Council.

The end result was that the Court of Appeal determined that Binks' actions were not the sole cause of his accident and the failure to properly warn the driver was in part a cause of the accident.

Watch Out Recruitment Agencies - You Will Be Liable

Can a recruitment agency be liable for damages caused by an employee that has been placed by the recruitment agency? Perhaps they can.

The NSW Court of Appeal in *Monie - v - The Commonwealth of Australia* has recently considered a claim by an employer who was injured by an employee who was referred to him by the Commonwealth Employment Service.

Mr Monie was a farmer and grazier in northern NSW. He sought the assistance of the Inverell office of the CES to fill a job vacancy on his family farm. The farm was operated by a partnership consisting of himself, a family company, his wife and his son. The family resided in the homestead on the farm.

The CES referred Winsor, a person who was interested in the job and had seen the job advertised at the CES. The CES referred Winsor for an interview and Winsor was hired and invited to move into a cottage on the property. Approximately 3 months after gaining employment on the farm, Winsor had been released from prison after serving approximately 9-1/2 months for offences including assault occasioning actual bodily harm. In the period of somewhat less than 4 years leading up to his release, Winsor had spent 1 week short of 2 years in custody. Winsor's criminal history included 41 convictions for offences ranging from breaking, entering and stealing to obtaining benefit by deception. The CES was aware that Winsor was an ex-offender. The CES did not seek Winsor's consent to inform Monie about Winsor's criminal history nor did the CES reveal Winsor's criminal history to Monie.

Approximately 3 months after commencing work on the farm, whilst Monie was alone in the homestead, Winsor who was outside the homestead, shot Monie four times. Monie sustained extensive injuries. The shooting caused injury to Mr Monie, psychiatric injuries to his wife and son and impacted on the family business.

Monie brought a personal injury claim for damages against the CES alleging negligence on the part of the CES. In addition, his wife and son brought damages claims for the psychiatric injuries they suffered.

The original claim before the Trial Judge failed as the Trial Judge found that Winsor had advised one of the family that he had been in gaol 2 weeks before the shooting. The Trial Judge found that the Monies had voluntarily assumed any risk consequent upon Winsor's violent propensity that Winsor might repeat his violent criminal activity and occasion the loss and damage caused.

The Monies appealed. Ultimately that appeal was successful.

The Court held that the CES, having knowledge of the prior convictions relevant to the proposed employment, and the circumstances of that employment, owed a duty of care not to refer Winsor as suitable for interview or to refer Winsor only after informing the Monies with Winsor's consent of Winsor's criminal history.

The Court of Appeal confirmed that voluntary assumption of risk involves consenting to a particular thing being done which would involve the risk and mere knowledge that a risk exists is not the same as consenting to the risk.

Before a defence of voluntary assumption of risk applies, a defendant must establish that the plaintiff perceived the existence

of the danger, fully appreciated it and voluntarily accepted that risk.

The Court of Appeal noted that the Monies did no more than consent to having a man who had been in gaol (which they found out 2 weeks before the shooting) work and live on the property. Monie did not consent to the risk of being shot.

The case serves as a reminder to recruitment agencies that they can not simply refer workers for interview but must consider whether or not a potential applicant is appropriate for the position. This is particularly so where a potential applicant has a past criminal record that may impact on the duties that the applicant would be required to perform.

The Monies will receive compensation for their loss and damage, however, once again, the Court has confirmed that a third party can be held liable for the criminal actions of another party where the third party has failed to exercise reasonable care.

Hearing Loss Claims - What Evidence Is Required?

The recent decision of *Combined Civil Pty Limited - v - Rikaloski [2007] WCC PD 181* has reinforced the necessity for workers to obtain appropriate expert evidence in substantiating a claim for hearing loss. Rikaloski had been employed for four hours daily with the same employer for seven years up until 2001. This was his final employment before obtaining a disability pension. Rikaloski relied upon the medical opinion of an ear, nose and throat specialist who assessed a 9.2% binaural hearing loss. The doctor attributed the hearing loss to exposure of the noise of construction site machinery without hearing protection. However, the doctor failed to obtain a history of the average duration of noise exposure on a daily or weekly basis. Accompanying the medical evidence was a statutory declaration prepared by Rikaloski that he was exposed to the noise of truck engines and traffic movements.

Deputy President Bill Roche noted that the bald assertion that the worker was exposed to the noise of construction site machinery was of no assistance. Much more was needed in order to establish that the employment caused boilermaker's deafness. It was noted that it was not merely the level of noise to which the worker is exposed but also the length of exposure. These issues must be the subject of relevant specialist evidence. There was no evidence in the expert report provided by Rikaloski as to the noise level to which he was exposed, the period of exposure and whether these two factors were sufficient to result in his employment being noisy. It was noted that specifically there was no evidence that Rikaloski's employment exposed him to a noise level of greater than 85 decibels.

It has often been cited that the Commission is an expert tribunal and this is taken to include a number of medical issues and matters such as wage rates in the general labour market. However, Deputy President Roche noted that this expertise does not extend to determining the issues of injury and causation in the absence of appropriate expert evidence. Deputy President Roche reminded the parties that this case made it clear that the prime duty of experts in giving opinion evidence is to furnish the trier of fact with criteria enabling the evaluation of the validity of the expert's conclusions. Without that expert evidence, the expert's opinion will be a bare conclusion. The expert should provide a comprehensive history in his report. If this history does not accord precisely with the other evidence in the case, the question then to be determined by the judicial officer will be whether the history recorded provided a fair climate for the acceptance of the expert's opinion.

This decision has important ramifications for hearing loss claims. In examining duly made claims by workers for hearing loss, attention should be drawn to a number of factors to ensure the expert evidence is sufficient to establish noisy employment. These factors would include evidence of the noise level (i.e. greater than 85 decibels) and the period to which the worker was exposed to that noise. Whilst an ear, nose and throat doctor who is qualified to provide an assessment of hearing loss may be able to accurately record a history relating to the duration of the noise exposure, this decision suggests that for a worker to be guaranteed success in a hearing loss claim perhaps an acoustic or sound engineer is needed to provide expert evidence as to the exact noise level. Obviously this will add significantly to the cost of any hearing loss claim.

Without evidence from the worker of the noise level and duration, the claim cannot be accepted at face value as shown in Rikaloski's case. If the evidence is inconclusive, a statement should be obtained from the employer as to the likely noise levels and the duration of exposure to excessive noise before determining liability. If the employer's information reveals that there was minimal exposure to noise a medical expert can comment on the probability that the hearing loss was caused by that noise.

An assessed hearing loss does not result in a valid compensation claim without the involvement of a noisy employer that has caused the loss. Scheme Agents will need to ensure that there has been noisy employment causing the hearing loss before a claim is accepted. A challenge to a hearing loss claim on the basis that the hearing loss was not caused by a noisy employer must be made before any referral to an Approved Medical Specialist and will be dealt with by an arbitrator before the worker is referred to an AMS to determine the extent of the loss.

Workers Compensation - Choosing the Right Doctor

Parties to a dispute on medical issues, whether it be treatment expenses or assessment of whole person impairment, must obtain evidence from appropriately qualified and experienced medical practitioners. The value of any medical evidence will be easily discounted if:

- the medical practitioner is not appropriately trained in the use of the WorkCover Guidelines;
- the medical practitioner is not appropriately qualified or experienced.

In the recent decision of Fine Meats (Boners PM) Pty Limited - v - Hart, the worker's solicitors were allowed to rely on a medical report from a consultant physician as opposed to an orthopaedic surgeon in a claim for fractures to the worker's right foot, knee and lower back.

The Deputy President noted that whilst Dr Lawson was not a qualified orthopaedic surgeon, his resume, which was attached to his report, demonstrated he did have, in the Deputy President's opinion, the relevant experience in his hospital training and practice, to assess orthopaedic injuries.

The claim for whole person impairment was based on a report of Dr Lawson, a consultant physician. The Employer argued Dr Lawson was not a WorkCover-trained assessor of permanent impairment in the relevant area of speciality being assessed, ie. orthopaedics. The argument was unsuccessful.

The WorkCover Guides for the Evaluation of Permanent Impairment issued by WorkCover state:

> *"An assessment of permanent impairment must be made in accordance with the Guides. Only medical specialists trained in the use of the WorkCover Guides are to assess a degree of permanent impairment. More importantly, an assessor must be a registered medical practitioner with qualifications in the relevant medical speciality who has undertaken the requisite training in the use of the WorkCover Guides."*

A list of trained assessors can be found on the WorkCover Web site.

The WorkCover Guides do not dictate when a particular medical speciality should be qualified for any particular injury. Does that mean a hand specialist is qualified to assess a fracture to the foot? Apparently so. Even though it accords with good practice and common sense, each case has to be assessed according to its particular circumstances.

The WorkCover Guides are to assist suitably qualified and experienced medical practitioners to assess levels of permanent impairment. The approach taken by the Commission in this matter is that Dr Lawson's assessment is merely a piece of evidence relied upon by the worker's solicitors in support of the worker's claim. As there is a medical dispute, the Commission will refer the dispute to an Approved Medical Specialist.

Consequently, parties to a medical dispute should ensure any medical expert retained has been trained in the use of the WorkCover Guides and has the requisite experience to make an assessment of the injuries and disabilities that are the subject of the dispute. There is a significant risk that if a party retains a medical expert without the relevant training and experience, there may be grounds, especially on behalf of the worker, for the other party to seek to have the matter struck out as not revealing a genuine dispute.

OH&S ROUNDUP

$180,000.00 Fine - Crane Topples

Dubell Pty Limited, a construction company, was recently prosecuted for breaches of the Occupational Health & Safety Act following an incident when an 82 tonne mobile crane, which was being used to lift an elevated work platform, became unstable and toppled over causing minor injuries to the driver who was trapped in the crushed cabin of the crane for in excess of 1 hour before being freed.

The crane toppled into the intake channel of a dam and also exposed the dogman to a risk of injury. The dogman was not an employee and avoided injury from the falling objects.

The construction company was prosecuted for a breach of the OH&S Act for endangering its employees and persons not in their employment. The company pleaded guilty.

A proper risk assessment in respect of the work of lifting the elevated platform into the intake channel was not conducted in breach of the OHS regulations and the documented OHS management plan. There was no safe work method procedure formulated subsequent to a proper risk assessment being conducted. The lift was conducted without the load to be lifted being accurately determined to be within the capacity of the crane. The Court also determined that the company failed to provide information, training, instruction and supervision in relation to the work of lifting the elevated work platform.

The Court noted the risk of a crane overbalancing if the weight of the load was not properly assessed was obvious and gave rise to a serious risk of injury to the crane driver and the workers on the ground. The crane in question had its own inbuilt load indication system but those who used the crane did not have any experience in the use of the system. An identification plate on the elevated work platform (EWP) that revealed the gross weight of the platform was not examined.

The Court held that clearly if the workers had been properly instructed and trained they could have identified the correct weight of the EWP. The Court noted the lack of training highlighted the failure of the company. It was noted that although there was an occupational health and safety plan which stipulated requirements in relation to work, there was a significant breakdown in the system and no proper risk assessment was done.

The case serves to remind all employers that it is not only important to have a system in place but the system must be followed. The company is no longer operating in the construction industry although it employs some casual and administrative staff. This was not the first offence for the company and therefore it faced a maximum penalty of $825,000.00 for each of the two offences. In determining the penalties, the Court ultimately assessed the penalty for each offence at $150,000 which would aggregate to $300,000. However, as the offences arose out of the same incident, the fines were moderated to an amount of $180,000.00 overall.

A significant penalty where training could have easily removed the risk which ultimately manifested in an accident.

Secure Your Site Or Be Convicted For An Injury To A Trespasser

In our February edition of GDNews we highlighted the potential cost to a construction company that failed to properly secure its site.

Kyle Ralphs, a young boy, fell some 2.5 metres at a building site at The Entrance where Ocean Parade Pty Limited was constructing a 14 storey apartment building. Ocean Parade was charged with an offence under the Occupational Health and Safety Act as were two directors of the company. WorkCover argued that the site was inadequately secured against the entry to the site by non-authorised persons and there was a risk of persons falling 2.5 metres through an open penetration on level 14 of the building under construction. The open penetration was not securely covered or protected so as to prevent persons falling through.

Prior to 28 February 2004 a 2 metre high metal fence had been erected on the northern and western boundaries of the site which were street frontages. On the southern boundary of the site was a block of residential units and the boundary between the site and the apartments consisted primarily of a timber paling fence, a section of which had fallen over or had been pushed over.

Three youths gained access to the site via the boundary through the paling fence. They made their way to the 14th floor and Ralphs fell through the penetration. Neither the injured person or the other youths were authorised to be on the site. The case was ultimately defended but the defence was unsuccessful with the Court finding there was a general risk of injury to non-employees which arose from a lack of a secured perimeter at the site and a lack of a secured cover over the open penetration.

The company was fined $82,500.00 and the directors received penalties of $8,250.00 and $6,600.00. The Court noted that the attraction which building sites have to children is generally well known and must be especially so for builders. That attraction has no doubt existed as long as there have been youngsters and building work to excite their curiosity. The Court noted that the Occupational Health and Safety Act would require builders to ensure the safety of children by making sure that they are not able to trespass onto dangerous building sites and can be of no surprise in society in 2007.

The Court noted that the difference in penalties between the directors reflected the involvement of the directors in the occupational health and safety system and their role in the specific incident. The director who received the greater penalty was the one who was aware that the perimeter fence was not complete and the penetration on the top floor of the building was not secured. It was he who failed to take the necessary steps to rectify the departures from the corporate defendant's safety systems before he left the site. It was therefore he who received the larger penalty.

$45,000.00 Fine For A Company And $5,000.00 For A Director Where There Was Inadequate Fall Protection

A company and its director, recently pleaded guilty to an offence under the Occupational Health and Safety Act for failing to ensure the safety at work of their employees. An employee whilst he was in the process of laying and securing plyboard sheeting on an upper level of the building works, stepped onto an unsecured sheet of plyboard near the edge of the building. The plyboard sheet tilted under Mr Hall's weight and resulted in him falling off the edge of the building and landing on concrete steps below. He fell approximately 5 metres.

At the time of the incident there was no fall prevention equipment in place on the front of the building where Mr Hall was working. He was not wearing a harness or other personal fall prevention equipment. An incomplete scaffold was erected around the part of the building perimeters, however this did not include the area where he fell.

The company was charged with failing to install adequate fall protection, failing to ensure the system of work for installing flooring was safe and failing to provide a safe work method statement entailing details of accessed activities, associated safety risks and the control measures in particular for the work at heights.

This was the first offence for the company. The Court noted it appeared that the director did not have any formal system of work in place prior to the incident that encompassed any kind of risk assessment of the work to be carried out. There were no safe work method statements in place. It was self-evident that the director should have ensured scaffolding surrounded the entire perimeter.

Financial statements demonstrated that the company's profits were only $44,000. The company had not inconsiderable liability. The Court noted the company did not appear to have large reserves to draw upon to meet any fine and in reality it was probably necessary to raise a loan to pay the penalty imposed. The Court described the defendants as of modest means and whilst the Court accepted that the imposition of heavy fines would be a burden on the defendant and its financial resources and that consideration should be given appropriate weight on the question of penalty, it did not necessarily result in the Court not imposing a heavy penalty.

A number of testimonies were tendered on behalf of the corporate defendant and director and taking into account the financial circumstances of the company, a fine of $45,000.00 was imposed on the company and $5,000.00 on the director.

Director Escapes Penalty

Dasco Construction Pty Limited was a principal contractor on a building site and one of its two managing directors was Daniel Nicholas. Dasco contracted with the United Admin Pty Limited to provide project management services for the development. A company was engaged as a sub-contract bricklayer. A brick wall was being erected which collapsed. At the time of the incident the wall was 21 metres in length and 2.6 metres high and strong winds contributed to the topple of the wall.

Dasco Construction were fined $35,000.00. United Admin Pty Limited was fined $45,500.00 and the director Nicholas was found to have committed an offence but a conviction was not recorded and there was no penalty but Nicholas was required to enter into a bond to be of good behaviour for a period of 18 months.

The Court accepted that Nicholas was one of two directors and he had put in place a comprehensive occupational health and safety plan for the project site. He proceeded to appoint persons, namely a Mr Fiora via United Admin and Mr Avramov via FAV NSW Pty Limited to be wholly responsible inter alia for all aspects of safety on site. Mr Fiora acknowledged as much when he stated that as part of the overall arrangement with Dasco and Mr Nicholas he personally accepted full responsibility for all safety matters on the site. Likewise, in relation to Mr Avramov, his role as site foreman, as asserted by Mr Nicholas, was to monitor sub-contractors, the quality of their work and safety. That assertion was not challenged on the evidence.

Mr Avramov was not charged with any offence under the OH&S Act. The prosecution withdrew the charge against Mr Fiora which was originally brought. The Court noted that given those circumstances Mr Nicholas might feel a sense of injustice. Having regard to these facts the Court thought it was appropriate to exercise its discretion and record a conviction without a fine effectively bringing into play the provisions in the Crimes Act which permit the Court to discharge a defendant without conviction or penalty on the condition that they enter into a good behaviour bond.

No doubt WorkCover's attitude to the other individual defendants played a substantial role in the ultimate consideration by the Court. Nevertheless the Court determined in this case that the offence had been proven against the director although no fine was imposed.

Bankrupts Do Not Escape OH&S Fines

Two directors, Ibrahim and Soliman were recently prosecuted for breaches of the Occupational Health and Safety Act arising out of a workplace injury on a construction site. Proceedings were commenced against two companies involved in the incident and a director of each of those companies. The companies were ultimately placed in external administration and WorkCover elected not to proceed with the charges against the companies. Nevertheless, the charges against the directors were pursued.

The evidence of the directors concentrated on their financial circumstances. Mr Ibrahim was a declared bankrupt and had not been in contact with his trustee in bankruptcy for some time and had no information to place before the Court as to when he might be discharged. Soliman prior to the prosecution had been presented with a bankruptcy notice and had many judgment debts although had not become a bankrupt.

The Court noted that an interpretation of Section 6 of the Fines Act 1996 provides that a fine is not to be oppressive or crushing in its effect but at the same time must result in a penalty that ultimately reflects the objective seriousness of the offence. The section in the Fines Act requires the Court to exercise its discretion to fix an amount for a fine taking into account the financial circumstances of a defendant.

Notwithstanding the fact that Mr Ibrahim was an undischarged bankrupt, the Court imposed a fine of $10,000.00. Soliman also received a $10,000.00 fine.

The relatively dire financial circumstances of the two defendants, did not prevent the imposition of fines which no doubt will have a real impact on the former directors.

Exclusion Of Casual Employees From Unlawful Termination Protection

A casual employee, engaged for a short period, is prohibited from making an application that the termination of their employment is harsh, unjust or unreasonable. A casual employee is taken to be engaged for short periods unless the employee can demonstrate they were engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment of at least 12 months and would, but for the decision by the employer to terminate the employment, have had a reasonable expectation of continuing the employment with the employer.

In the matter of *Vidler - v - Brisbane City Council*, the employee commenced employment on 7 November 2005. His employment was terminated on 24 November 2006. Consequently he was employed for just over a year.

However, the employee worked casual hours between 9 November 2005 and 2 June 2006. After 2 June 2006 he was not rostered to work pending the outcome of an internal investigation. From 2 June 2006 the employee received an amount of remuneration each week based on the average hours he had previously worked until the time of the termination of his employment on 24 November 2006. The employer stated the reason for payment as such was to ensure the employee was not disadvantaged whilst the investigation was occurring.

In determining whether the employee had been engaged on a regular and systematic basis for a period of at least 12 months, the Commission noted the number of hours worked each week varied considerably. The hours did not recur at periodic or fixed times. Consequently, based on the hours worked for the weeks the employee actually worked, it did not represent a regular and systemic sequence of periods of employment.

Further, whilst the employee's employment was suspended, the Commission determined that he was not "engaged" in work. Engaged is used to mean "in work or actually carrying out work". As the employee was not "engaged" in work during the period of investigation, the employee's overall employment period was less than 12 months.

Consequently, the employee was a casual employee for a period of less than 12 months and as such was not entitled to apply to the Commission for a determination that his employment had been terminated unlawfully.

Termination For Genuine Operational Reasons Reviewed

What are Genuine Operational Reasons? The Full Bench of the Australian Industrial Relations Commission has determined an appeal in the matter of *Cruickshank & Priceline Pty Limited* where Commissioner Eames had determined the employee's employment was terminated for genuine operational reasons or reasons that included genuine operational reasons. The Full Bench have referred the matter back to the Commission be re-heard.

The employee was employed by Priceline as a space planner under a contract of employment dated 10 March 2005. The employer requested its shares be halted from trading on the Australian Stock Exchange in July 2006 as it had discovered significant financial discrepancies in its accounts. A new CEO was appointed in August 2006. The employer announced a financial discrepancy of approximately $17.2 million which reduced the employer's profit by that amount.

In October 2006 the new CEO instituted an immediate review of the employer's structure and operations. Thirty two (32) positions were taken out of the business structure. This included the number of space planner positions being reduced from four to two. As two of the space planners were earning considerably more than the other two, the employer claimed it could make significant cost savings by terminating the two employees who were earning more. This included the employee.

The Commissioner, at first instance, was satisfied the employee's termination resulted from the employer's financial difficulties. He found the termination was, at least in part, for operational reasons.

The Full Bench considered there were a number of issues which arose for consideration as to whether or not the employee's employment was terminated for genuine operational reasons. Those issues included:

- despite the employee's termination, the position of a space planner remained after the restructure.
- the position was advertised internally shortly after the termination;
- the job description in the advertisement matched the description of the job the employee had been performing;
- when the employee made an enquiry about the restructured position he was eventually told by a member of the human resources department that his skill set was too low;
- subsequently the same position was advertised on the internet by a recruitment consultant in November 2006, indicating it would be a senior position with an excellent salary; and
- the position was advertised again by the consultant in January 2007 and an annual salary up to $75,000.00 was specified.

The Full Bench reviewed the evidence of the employee's supervisor that the employee's position as a space planner was a different one after restructure and that it was at a lower level.

The Full Bench concluded that it was open to the Commissioner to accept the evidence of the employee's supervisor. However, the Full Bench considered the Commissioner did not give adequate reasons for his decision. The Commissioner, whilst making some findings, made no intermediate findings. He moved directly to the overall conclusion that the termination of employment was not a sham and the employee was not targeted inappropriately. The Full Bench determined that whilst the Commissioner accepted the supervisor's evidence, despite contrary evidence being offered by the employee, the employee was entitled to know why the supervisor's evidence was preferred.

The Full Bench were not satisfied the Commissioner approached the test as set out in *Village Cinemas Australia Pty Limited - v - Carter* appropriately. The operational reasons for termination must be "genuine". The reasons advanced for the termination as a result of operational reasons must be genuinely held and must be capable of withstanding reasonable scrutiny. It was not sufficient that an employer had a sincere belief that the termination was for operational reasons unless it can be shown that the reasons were "genuine" in the sense that they were real, true or authentic and not counterfeit.

The employee offered evidence that he was unfairly targeted by his supervisor in the decision to terminate his employment. The reason given to the employee was that his position was being made redundant. Evidence was adduced by the employee that both before and after his termination, his position was advertised both internally and externally. Whilst the description of the position and salary varied somewhat in the advertisements, it appears the issues raised by the employee surrounding his alleged redundancy and the advertising of a similar position was not adequately dealt with by the Commissioner when he determined that his position had been terminated for genuine operational reasons.

Employers should be aware that if they wish to rely on the defence that a termination was for genuine operational reasons, the reasons must be "genuine". The elements that have caused the employer in the *Priceline case* significant difficulties are that the reasons given for the termination, ie. redundancy, may not be capable of being maintained.

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