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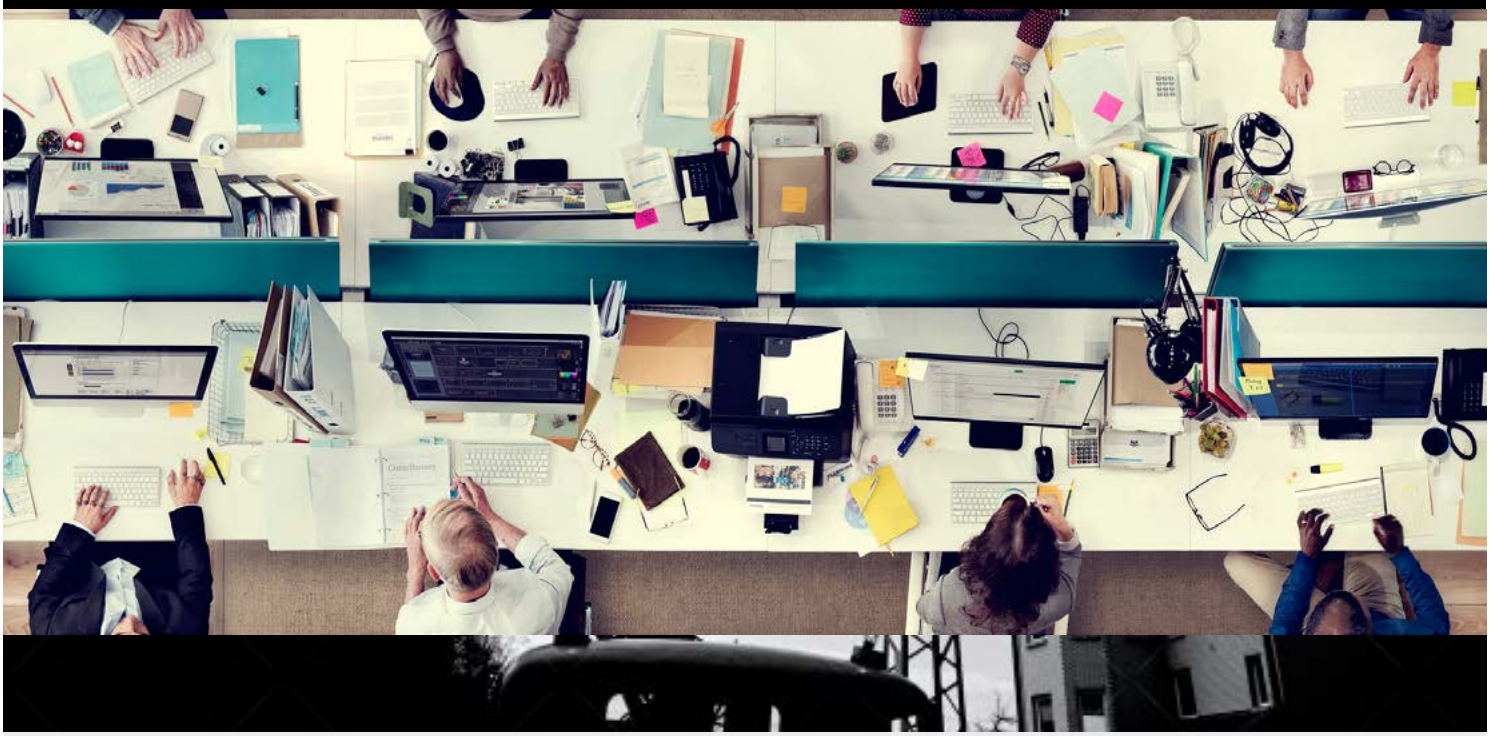

RECENT DEVELOPMENTS

The new world of claims management…icare's transition to a new model

RECENT DECISIONS

- **Claims for Psychological injury - all relevant statements essential**
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RECENT DEVELOPMENTS

The new world of claims management… icare's transition to a new model...Statement by *John Nagle, icare Group Executive, Workers Insurance.*

In a major step forward to improve customer service and build a more transparent and supported claims experience for NSW Workers and Employers, most claims in the NSW workers compensation system previously held with exisiting agents have successfully transferred to GIO and EML.

Click here to read the full statement

RECENT DECISIONS

Claims for Psychological injury - all relevant statements essential

Harris v Australian Plastics Profiles Pty Ltd [2017] NSWWCC 273 (20 November 2017)

Link to decision

Summary

This decision of an Arbitrator in the Workers Compensation Commission highlights the importance of obtaining all relevant witness statements when disputing psychological injury claims. The decision also puts the use of clinical notes in context.

During the investigation of a claim, it is essential that insurers obtain statements from all relevant witnesses. If those statements are not forthcoming, it will be difficult to defend a claim in the Commission. As a first step, insurers should review all aspects of a factual investigation, particularly the worker's statement, to determine whether all relevant witnesses have been interviewed.

The decision also reinforces that, when defending claims under section 11A of the *Workers Compensation Act 1987*, it is essential to have medical evidence to support the argument that the injury was wholly or predominantly caused by the action of the employer as defined by the section rather than any other workplace events.

The fact that clinical notes make little reference to the injury is not necessarily significant in the determination of the claim.

Background

The worker suffered a physical injury in 2010 and as a result, performed light duties until 22 August 2013. During this period he alleges he was subjected to bullying and harassment. His alleges that he was sworn at and threatened with losing his job if he didn't perform tasks, which he considered were outside his duties. The worker alleged that a number of employees were involved in the bullying.

The worker made a claim for compensation on 13 September 2013 which the insurer declined on 23 October 2013 disputing injury.

The worker made a claim for lump sum compensation and medical expenses on 14 May 2017. The insurer issued a further dispute notice adding section 11A as a matter in dispute.

During the investigation of the claim, one witness refused to give a statement, while a statement was simply not obtained from another witness.

Decision

The Arbitrator noted a lack of any specific complaints in the GP's clinical notes until after the worker ceased work. However, relying on the NSW Court of Appeal decisions (*Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34, *Nominal Defendant v Clancy* [2007] NSWCA 349, *King v*

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Collins [2007]NSWCA 122 and *Mastronardi v State of New South Wales* [2009] NSWCA 270) he did not place too much weight on the clinical notes "given their primary concern was treatment".

The worker alleged that he was forced to work outside his restrictions by Mr Revell and 'Louie' and when he complained, he was threatened with losing his job. The worker also alleged that Mr Revell was abusive towards him and Mr Hills swore at him. Based on this, the worker claimed that he was subjected to bullying and harassment.

While Mr Revell denied the allegations, the Arbitrator found in favour of the worker for two major reasons:

1. The worker's allegations were supported by two other workers.

2. There were no statements by 'Louie' and Mr Hills tendered in evidence.

The insurer also defended the matter based on the reasonable action provisions under section 11A. These arguments failed primarily because the insurer did not have sufficient medical evidence to support the argument that the injury was wholly or predominantly caused by such action.

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RECENT DECISIONS

Sticks and Stones: Worker's claim for bullying and harassment dismissed

Robinson v Lorna Jane Pty Ltd [2017] QDC 266 (3 November 2017)

Link to decision

Summary

The worker's allegations that she was treated inappropriately (bullied) by her employer and that this had resulted in her suffering psychiatric illness were dismissed by the Queensland District Court.

The worker claimed that she was subjected to bullying and harassment by the employer's learning and development manager to whom she reported, that caused her psychiatric illness and triggered a pre-existing mixed personality disorder.

The worker failed on all points of her claim, with the Court finding her to be a "most unreliable witness" with her evidence described as "misleading and exaggerated".

Interestingly, the Court was required to consider allegations of bullying and harassment through social media platforms, which are an ever-increasing feature of the workplace.

Psychological Claim

The worker sought to establish a liability against the employer on the basis that:

1. the employer was directly liable for failing to act on information indicating that a co-employee was acting inappropriately;
2. the employer was vicariously liable for the acts or omissions undertaken by the co-employee during the course of her employment;
3. the employer breached its duty of care by not warning and counselling the co-employee about her behaviour towards the worker;
4. the worker suffered psychiatric illness and her pre-existing personality disorder was triggered due to the learning and development manager's wrongful acts or omissions and the employer's breach of duty; and
5. if the learning and development manager had received appropriate workplace warnings and counselling, her inappropriate behaviour would have ceased and the worker would not have suffered the psychiatric illness or had her personality disorder triggered.

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Direct Liability

In order to establish a direct liability on the part of the employer, the worker needed to show that the employer was on notice of the bullying and harassment in the workplace.

The worker sought to rely upon an email that had been sent by a former co-worker and a meeting with the national sales manager to show that the employer was on notice.

On reviewing the evidence, the Court did not accept that the employer was on notice. The email sent by the former co-worker lacked any contextual background and did not specify any alleged bullying and harassment that had occurred.

Furthermore, his Honour did not accept the worker's version of events concerning the meeting held with the national sales manager, given that the evidence provided by the manager was impressive and credible, the actions undertaken following the meeting appeared to support the manager's version of events and the worker was considered to be a 'most unreliable witness'.

Accordingly, the employer was found not to have been on notice and therefore not directly liable for any alleged bullying and harassment by the employer's learning and development manager.

Vicarious Liability

The worker sought to rely upon a number of events to establish that the employer was vicariously liable for bullying and harassment by the learning and development manager, including:

1. name calling, by being called "Cheap";
2. name calling by being called a "Generator";
3. being dismissive; and
4. inappropriate 'Facebook' posts.

However, the Court did not accept that the any of the alleged name calling or dismissive behaviour had occurred or that the employer should be vicariously liable for any Facebook posts by the learning and development manager.

Firstly, the evidence before the court indicated that any alleged name-calling had not been reliably witnessed or specifically directed at the worker.

Secondly, there was no evidence to suggest that the learning and development manager's Facebook posts targeted the worker, were seen as a personal attack by others, that the learning and development manager deliberately disregarded the employer's social media policy, or that the employer had not taken appropriate steps, once it had become aware of the posts.

His Honour found that:

1. the posts were personal in nature, and were not made with the employer's permission;
2. the employer had not known that the posts were made at all;
3. the actions were entirely unconnected with the learning and development manager's employment;
4. ostensible performance of the employer's work did not occasion the acts.

As such, it was held that the employer was not vicariously liable for the Facebook posts by the learning and development manager. The Court also observed that no authority was cited that would create a vicarious liability only because (a) the employer had a policy against doing the wrongful act, (b) the offending employee knew of the policy, and (c) disregarded the policy and did the wrongful act anyway.

Finally, in addressing the allegation of being 'dismissive', his Honour emphasised the requirement for specific context and factual background to the alleged conduct. He noted that managerial styles vary with many factors being relevant, "giving rise to the misinterpretation of certain actions".

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The worker failed to adequately identify the context and factual background of the alleged conduct, and failed on her claim.

Ultimately, the Court disposed of the worker's claim for psychological injury as the employer was found to be neither directly or vicariously liable for any alleged bullying and harassment.

Foreseeability and remedial action

Notwithstanding these findings, the Court went on to consider whether the risk of psychological injury was foreseeable and not insignificant, and if there was any remedial action that ought to have been taken by the employer to avoid such a risk.

On reviewing the evidence, the Court concluded that the risk was not foreseeable, given the absence of complaints or any warnings of potential psychiatric injury by the worker. Furthermore, the medical evidence indicated that the worker's level of functioning may "deteriorate at any time", and that any remedial action by the employer would not have prevented her from developing a psychological condition.

Conclusion

Although the decision is based on Queensland legislation, it serves as a reminder that credibility and context are vital to the defence of any claim for psychological injury.

The case also illustrates that the use of 'Facebook' and other sources of social media cannot be relied upon to fix a liability against an employer unless there is some element of permission or approval or the actions arose ostensibly in the performance of the employer's work or was otherwise connected to the employment duties of the perpetrator.

The decision underscores the importance for employers of implementing a social media policy that can be relied upon if an employee's actions are deliberately contrary to the policy.

As the use of social media becomes more pervasive in the context of employment, employers should be wary of any wayward use that might propagate bullying and harassment. In instances where these activities might be seen as being potentially connected to the perpetrator's role at the workplace, urgent remedial action should be taken by the employer to avoid any potential injury to employees.

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RECENT DECISIONS

Gazing through the Celtic Mist

Cobie and Alan Moore v Richard McKiernan [2017] NSW SC 1520 (8 September 2017)

Link to decision

Summary

Joining an insurer as a defendant provides claimants with some comfort in the knowledge that any judgment is more likely to be satisfied rather than having to pursue an impoverished defendant.

In our June newsletter we noted that the *Civil Liability (Third Party Claims Against Insurers) Act* commenced on 1 June 2017. This legislation repealed section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* and replaced it with a mechanism by which claimants can recover directly from insurers in certain circumstances.

The Supreme Court recently considered an application under both pieces of legislation that provides some insight into the approach that will be taken.

Background

The plaintiff was a young woman, 27 years of age, who attended a family Christmas function at a house on a rural property (known as 'Celtic Mist'). The property was owned by her uncle, the defendant.

At about 5pm on the day in question (20 December 2011), an incident occurred by which the plaintiff fell from a balcony and suffered injury by which she was rendered paraplegic.

The accident occurred while the family group was gathered for a photograph on the balcony. The defendant began wrestling with his 15 year old stepson which led to them pushing into and dislodging a hand rail on the balcony. This caused the plaintiff and two of her sisters to fall two metres to the garden below.

The plaintiff sued the defendant claiming damages alleging that his negligence had caused her injury.

The defendant had entered a policy insurance that was underwritten by CGU. The policy included a schedule listing domestic buildings that covered two properties owned by the plaintiff (to which an exclusion clause applied), however, did not include Celtic Mist.

The plaintiff's application to the Court was for an order pursuant to sections 4 and 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* seeking leave to commence proceedings directly against CGU or alternatively, an order pursuant to section 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* for leave to commence proceedings directly against CGU.

Consideration

Associate Justice Harrison of the NSW Supreme Court noted that there were three main issues that arose for determination being firstly, which legislation was to apply, then, if the earlier legislation, what test should be applied in the exercise of the discretion to grant leave to join the insurer and thirdly, whether the test had been satisfied in order for the Court to exercise the discretion.

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On the first point, her Honour had regard to the date of assent of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (1 June 2017) noting that the effect of section 6 of the previous legislation was preserved for existing proceedings.

The plaintiff's original notice of motion seeking leave to join the insurer was filed on 22 May 2017 being prior to the commencement date so her Honour found that the application should be determined under section 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946*.

The common law test to be applied was set out by Hammerschlag J in *Eastern Creek Holdings Pty Ltd v Axis Speciality Europe Limited* [2010] NSWSC 840. In that case, it was held that before leave can be granted pursuant to section 6(4) the plaintiff must show that:

1. there is an arguable case on the liability of the insured;
2. there is an arguable case that the policy responds to;
3. there is a real possibility that if judgment is obtained, the insured would not be able to meet it.

Further, leave will not be granted if the insurer can establish that it is entitled to disclaim liability under the contract of insurance. The onus is on the insurer to establish that right.

In the present case, the insurer submitted that the insurance policy did not respond to the defendant's liability due to the operation of an exception clause that would respond to his liability as an owner or occupier of domestic buildings to which the policy applied.

Justice Harrison observed that the plaintiff's claim was not confined to the defendant's liability solely arising from him being the owner or occupier and that the accident did not occur at one of the domestic buildings referred to in the schedule to which the exception clause applied.

The policy otherwise extended to cover liability arising from accidents that occurred anywhere in Australia other than where the claim is based on the defendant being the owner or occupier. In the present case, her Honour determined that the plaintiff's claim was reliant upon the defendant being neither the owner nor the occupier but rather arose from his forceful conduct of wrestling with his stepson which caused the rail to dislodge and the plaintiff to fall and suffer injury.

Her Honour concluded that the plaintiff had sufficiently satisfied the evidentiary burden of proving that there was an arguable case and that the policy responds while the insurer had not sufficiently discharged the burden of proving that it was entitled to disclaim liability on the basis of the exception clause.

Based on the evidence, it appeared that there was a real possibility that the defendant would be unable to satisfy the judgment debt if the plaintiff was successful in her action with the damages estimated in a range of between $7 million to $11 million.

Her Honour accordingly granted leave to the plaintiff to commence proceedings directly against CGU.

Implications

The decision provides a useful analysis of the elements that must be satisfied in order for a party to directly sue an insurer or to join the insurer as a party to proceedings.

This may extend to compensation recovery actions against third parties where there are real concerns as to the financial viability of the third party, for example, where a defendant has gone into liquidation.

The *Law Reform (Miscellaneous Provisions) Act* operated to create a statutory charge in favour of the insured for money which the insured was liable to pay under an insurance contract following the occurrence of an event that gave rise to a claim for damages. In practical terms, the provision created significant conceptual difficulties and was the subject of some criticism.

Section 6 of the *Law Reform (Miscellaneous Provisions) Act* was repealed on 1 June 2017 and replaced by sections 4 and 5 of the *Civil Liability (third party claims against insurers) Act* that operated to give a claimant a statutory cause of action directly against the insurer to cover the amount of the insured's liability under an insurance contract.

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