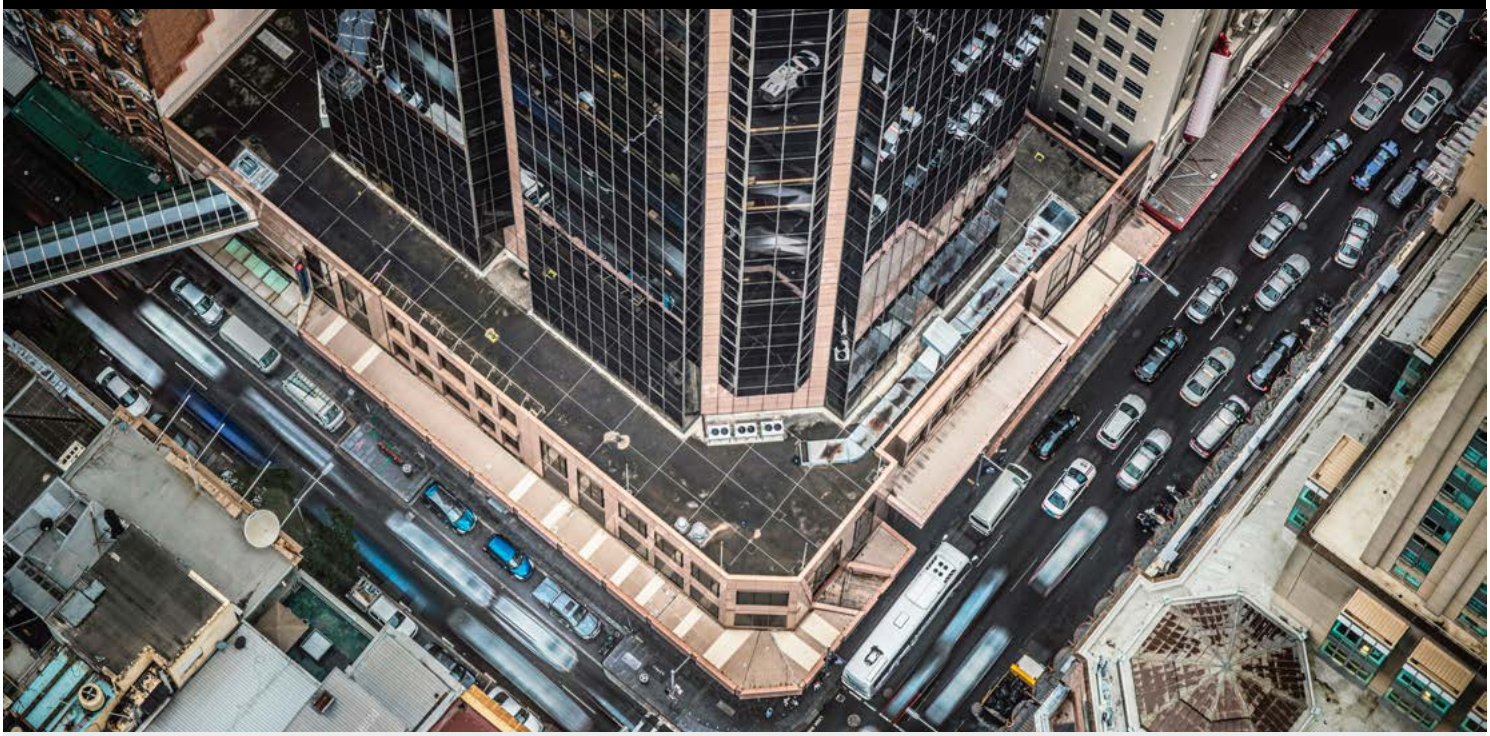
Turks LEGAL

INSURANCE ▪ COMMERCIAL ▪ BANKING



LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

RECENT DECISIONS

- **Employer to pay both death benefits and permanent impairment compensation**
  Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger [2017] NSWSC 1587 (22 November 2017)
- **When the carer can no longer care…**
  Raines v Amaca Pty Ltd and Seltsam Pty Limited [2017] NSWDDT 16 (18 December 2017)
- **Section 151Z: Worker succeeds in damages claim against occupier**
  Benton v Historic Houses Trust of NSW [2017] NSWDC 324 (17 November 2017)

RECENT DECISIONS

Employer to pay both death benefits and permanent impairment compensation

Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger [2017] NSWSC 1587 (22 November 2017)

Link to decision

Summary

On 22 November 2017, Justice Schmidt of the Supreme Court of NSW found that an employer was liable to pay both death benefits and permanent impairment under the *Workers Compensation Act 1987* (NSW) ('1987 Act') in respect of fatal injuries sustained by a worker.

Background

The late worker was employed by Hunter Quarries Pty Limited (Hunter Quarries) as a machine operator.

On 9 September 2014, the worker died at his workplace from injuries to his chest sustained while he was operating a 40 tonne excavator, which tipped over and crushed the cabin in which he was working. Soon after, the worker was pronounced life extinct.

Hunter Quarries accepted liability for death benefits and funeral expenses under sections 25 and 26 of the 1987 Act, respectively.

The late worker's estate then made a claim under section 66 of the 1987 Act for whole person impairment. The claim was referred to Dr Phillipa Harvey-Sutton ('the AMS') who found that the worker's injuries were such that death was inevitable, within a very short timeframe. The worker's permanent impairment was initially assessed to be 100% though, on reconsideration, the AMS assessed it to be 0%.

The Appeal Panel disagreed with the above assessment, finding the worker's permanent impairment to be 100%.

On appeal, Hunter Quarries submitted that it could not have been the intention of the legislature to afford double compensation for the one injury. Further, Hunter Quarries contended that the term "permanent impairment" does not encompass impairment so serious that death will inevitably follow, within a short time frame.

Decision

Her Honour did not accept the submission of Hunter Quarries. She noted that Hunter Quarries did not contend that the term "permanent impairment" excluded all impairments which inevitably lead to a worker's death, only those where death followed "shortly after injury". Her Honour found that such a construction of the term would only serve to introduce uncertainties which do not presently exist. For example, issues would then arise as to how long after an injury which causes permanent impairment which proves to be fatal an injured worker would have to survive before an entitlement to compensation for permanent impairment arose.

Her Honour referred to *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 which observed at [40] that "the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament, because alternating the language of the provision in such a case may be 'too far-reaching'". She opined that the uncertainties which

back to top

would follow from the adoption of the limitations on interpretation which Hunter Quarries was proposing would advance into the 'too far reaching territory'.

In any event, her Honour found at [100-101]:

> *"In my view, had the Parliament intended that in such an event that death results shortly after the injury, the injured worker has not suffered a "permanent impairment", Parliament would have expressly provided for that result.*
>
> *That these concepts are not only not to be found in this statutory scheme, but do not have an obvious or fixed meaning, precludes their adoption on the construction of the statutory term. It is not for the Court to legislate for such exceptions to the obligations which the Parliament has imposed upon employers when it enacted sections 9, 25 and 66 in their current forms."*

Therefore, her Honour found that, had the intention of the legislation been to avoid any overlap between sections 9, 25 and 66 of the 1987 Act, it would be expressly stated. Instead, in this instance, each of these relevant sections operates in unison.

Her Honour ultimately accepted the Appeal Panel's finding that the late worker's permanent impairment was permanent, there being no suggestion that he could recover from it. She found that the assessment of 100% permanent impairment reflected that it had later resulted in the worker's death.

Her Honour dismissed the proceedings with an order for costs in favour of the Estate.

Implications

This decision illustrates that there is 'permanent impairment' for the purposes of section 66 of the 1987 Act when a worker suffers injury so serious that he or she cannot recover from it, even with treatment. Therefore, in circumstances such as these, it is open to an Estate to claim both death benefits and permanent impairment compensation under the 1987 Act in respect of a fatal injury sustained by a worker.

For more information, please contact:

Craig Bell
Partner
T: 02 8257 5737
M: 0418 673 112
craig.bell@turkslegal.com.au

Sean Patterson
Lawyer

back to top

RECENT DECISIONS

When the carer can no longer care…

Raines v Amaca Pty Ltd and Seltsam Pty Limited [2017] NSWDDT 16
(18 December 2017)

Link to decision

Summary

This case considers the circumstances in which damages may be awarded under section 15B(2) of the *Civil Liability Act 2002* (CLA) which permits, in certain circumstances, the award of damages for the plaintiff's loss of ability to provide gratuitous domestic services to a dependant of the plaintiff.

Background

Mr Raines suffered mesothelioma as a consequence of exposure to asbestos in circumstances in which the defendants were liable to pay damages.

The plaintiff's wife suffered incapacity as the consequence of a motor accident in 1981 and also other disabling medical conditions. One of the plaintiff's sons suffered serious brain and other injuries as the consequence of a motor accident in 1996.

Prior to diagnosis, the plaintiff was providing gratuitous domestic services to both his wife and his son. The son's accident occurred in circumstances which entitled him to benefits under the *Workers Compensation Act 1987*.

Section 15B of the CLA relevantly provides:

(2) Damages may be awarded to a claimant for any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, but only if the court is satisfied that:

(a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of dependants in subsection (1) – the claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose, and

(b) the claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity; and

(c) there is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant's dependant:

(i) for at least six hours per week; and

(ii) for a period of at least six consecutive months, and

(d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

…

(6) the claimant (or the legal personal representative of a deceased claimant) may not be awarded damages for any loss of the claimant's capacity to provide gratuitous domestic services to any dependant of the claimant if the dependant has previously recovered damages in respect of that loss of capacity.

back to top

The defendant submitted that the plaintiff's provision of domestic services to the son was not 'reasonable' within the meaning of subsection (2)(d) because the son was entitled to have the cost of full time domestic care paid for by the workers' compensation insurer.

Decision

The Tribunal found that the arrangement which had been in place for the plaintiff to provide full time care to his son was not unreasonable in the circumstances. It was an arrangement which had been in place for many years in a loving, caring family relationship in which the plaintiff was doing his best to ensure that his son was well cared for.

It was unreasonable for the defendants to expect the plaintiff to call upon the son's workers' compensation insurer to provide the care which he was not longer able to provide in substitution for a helpful family arrangement that had existed and been beneficial for a long time.

The son's worker's compensation claim had been the subject of litigation in the Court of Appeal which determined in favour of the son, granting him the entitlement to workers' compensation benefits. The defendant argued that as a consequence of the Court of Appeal decision the son had previously recovered damages within the meaning of subsection (6).

The trial judge rejected this argument on the basis that an entitlement to workers' compensation payments did not constitute 'damages' within the meaning of the CLA. In addition, the judge found that the plaintiff's claim was for his loss of capacity to provide the gratuitous care as distinct from his son's entitlement to be paid for such care by the workers' compensation insurer.

His Honour also noted that subsection (9) excludes the award of section 15B damages in motor accident cases. As there is no similar provision for worker's compensation cases, he concluded that section 15B damages are not excluded in cases where there is an entitlement to workers' compensation benefits.

The plaintiff's wife had also received damages in respect of the injuries she suffered in her motor accident. His Honour dealt with this by taking account of the fact that the care being provided to the plaintiff's wife was in respect of a multitude of medical conditions, not attributable to the motor accident. Accordingly, she had not received damages in respect of those other conditions and the plaintiff was entitled to compensation in respect of the care which he provided to his wife.

In assessing the damages, his Honour took into account the fact that the plaintiff's wife contributed to the care of the son. The judge allowed eight hours per week for the plaintiff's care of his wife and 73 hours per week for his care to his son for a period of nine years into the future, the plaintiff being 78 years of age at the time of judgment. He allowed a discount of 10% for vicissitudes of life.

Implications

The decision provides a useful analysis of the circumstances in which a plaintiff will be entitled to damages for the loss of ability to provide care to members of the plaintiff's family in circumstances where the family member has an independent entitlement to payment for domestic care. It is not unreasonable for a loving family member to choose to provide domestic care to an incapacitated relative, rather than requiring the care to be provided by an unfamiliar third party.

For more information, please contact:

Doug Vorbach
Special Counsel
T: 02 8257 5722
M: 0419 013 617
doug.vorbach@turkslegal.com.au

back to top

RECENT DECISIONS

Section 151Z: Worker succeeds in damages claim against occupier

Benton v Historic Houses Trust of NSW [2017] NSWDC 324 (17 November 2017)

Link to decision

Summary

The worker was injured when she fell into a ravine on the property premises surrounding Vaucluse House ('the premises') in the course of her employment as a venue manager.

The worker brought a claim for damages against Historic Houses Trust ('HHT') as the occupier of the premises alleging that it had failed to take reasonable steps to ensure that she wasn't exposed to a foreseeable risk of injury.

The Court was required to consider whether HTT owed any duty of care to the worker as occupier, the nature of any such duty, and whether there was any breach.

The Court found that HHT owed a duty of care that it breached in the circumstances of the worker's injury entitling her to an award in the order of $1,125,000.

Background

The worker had mistaken a bricked drainage culvert leading into the ravine for a walking footpath that led to her falling several metres below to the embankment sustaining injury.

The worker was travelling in darkness, using a path that she was not familiar with and was relying upon a co-worker who she lost sight of.

The worker commenced proceedings against HHT alleging negligence due to:

(1) Failure to warn of the danger of falling down the embankment;

(2) Failure to ensure, including by inspection for safety purposes, that there was adequate lighting of pathways at night in the immediate vicinity of the embankment;

(3) Failure to provide and maintain, including by inspection for safety purposes, a safe and adequately illuminated walkway within the grounds and in the immediate vicinity of the embankment;

(4) Failure to provide sufficient edge protection to the embankment, including by the provision and the maintenance of sufficiently dense "soft barrier" plantings;

(5) Failure to develop and implement an appropriate risk management process.

back to top

Findings

His Honour Judge Levy held that HHT owed a duty of care to take reasonable care to avoid foreseeable risk of harm to lawful entrants onto the property.

He considered that upon reasonable contemplation by HHT, there was an identifiable risk of harm to persons walking near the creek embankment.

His Honour noted that HHT did not supervise or implement access controls for the premises after hours, did not illuminate the area in question, did not place signs or barriers that would have prohibited or restricted walking access to areas that posed a risk of falling into the ravine.

Judge Levy decided that HHT had breached its duty of care in relation to the premises and was negligent in the circumstances that resulted in the worker's fall.

His Honour found the employer to be 20% responsible for the accident taking account of the non-delegable duty of care that it owed to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury.

Conclusion

The workers compensation payments made to and on behalf of the worker will be required to be repaid to the employer. Given that the employer was 20% responsible for the accident, the worker's damages were also reduced by the same amount as the worker was not entitled to any contribution from the employer (by not having a WPI assessment of 15% or greater), pursuant to the provisions found in section 151Z of the *Workers Compensation Act 1987* (the '1987 Act').

However, a full recovery is still available to the employer as the worker did not overcome the 15% WPI threshold and as such there was no liability for damages which would have otherwise reduced the recovery.

Workers often sustain injuries in the course of their employment while on third party premises, sites and venues. The location of the injury should be noted on any claim in order to determine whether the injury may have been due to the culpability of a third party that may attract a potential right of recovery under section 151Z of the 1987 Act.

For more information, please contact:

Dominic Maait
Partner
T: 02 8257 5726
M: 0417 021 026
dominic.maait@turkslegal.com.au

Shawn Finnerty
Lawyer

back to top