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LEGISLATIVE DEVELOPMENTS

Motor Accident Injuries Act 2017

SHORT SHOTS

Brief case notes of interest, read more

RECENT DECISIONS

- **Rodeo rider was not an entertainer engaged for fee or reward**
  Australian Bushman's Campdraft and Rodeo Association v Gajkowski [2017] NSWWCCPD 54
- **Court of Appeal's restrictive approach to recoveries involving employer negligence**
  South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 (7 December 2017)

LEGISLATIVE DEVELOPMENTS

The *Motor Accident Injuries Act 2017* ('the Act') commenced on 1 December 2017 introducing a hybrid model that provides access to statutory no-fault benefits for claimants who sustain 'minor injury' and modified damages where there is an at fault driver subject to certain restrictions – see our earlier article here.

SHORT SHOTS

Allegation of injury to additional body part prior to AMS referral

Radic v Sydney Projects (Australia) Pty Ltd

LINK TO DECISION

Worker injured while repairing plaster on a scaffold when a lift descended striking him on the upper body; respondent accepted liability for injury to the right and left shoulders but disputed the applicant's allegation that he also suffered injury to his neck.

Arbitrator Read had regard to a diagram drawn immediately after the injury; the applicant's complaints of neck pain made to a chiropractor two weeks after the incident; finding that the worker had suffered injury to the cervical spine as alleged; matter remitted to the Registrar for referral to an AMS.

Decision Number: [2017] NSWWCC 286
Decision Date: 30 November 2017
Matter/Number: 004455/17
Decision Maker: Nicholas Read

Further allegation of injury to additional body part prior to AMS referral

Palise v Australia and New Zealand Banking Group Limited

LINK TO DECISION

Worker suffered injury to her left shoulder and wrist when she fell heavily after slipping; brought a claim alleging additional injury to her cervical spine; no record of complaints relating to cervical spine in clinical notes; worker referred for CT scan of cervical spine three weeks post injury.

Arbitrator Batchelor held that the worker had not satisfied the evidentiary onus to show that she had suffered injury to the cervical spine; referred for CT scan for the purpose of investigating other injuries; matter not referred to an AMS as the remaining injuries did not meet the 10% threshold required to be entitled to a lump sum pursuant to s66.

Decision Number: [2017] NSWWCC 288
Decision Date: 4 December 2017
Matter/Number: 004330/17
Decision Maker: Brett Batchelor

Journeys End

Smith v Woolworths Ltd

LINK TO DECISION

Applicant was employed in a supermarket within shopping centre complex; had parked her car in an area on the premises referred to as "staff parking" and was walking to the main entry to the shopping mall when she was attacked by a pee wee and suffered injuries to her right eye.

Respondent contended that *Green v Secretary, Department of Education & Communities* was wrongly decided by reference to where a journey ends and where the course of employment commenced.

Arbitrator Harris followed *Green*, that decision being consistent with longstanding authority; applicant was within the course of her employment; parking within the staff park was "incidental to the employment contract"; held that incident arose out of employment because the applicant was brought to that spot by reason of her employment.

Smith v Australian Woollen Mills Ltd per Starke J applied; discussion of various factors in s9A(2) and application of *Badawi v Nexon Asia Pacific Pty Ltd*; held that employment was a substantial contributing factor to the injury; award for the applicant for weekly compensation and medical expenses.

Decision Number: [2017] NSWWCC 290
Decision Date: 5 December 2017
Matter/Number: 004876/17
Decision Maker: John Harris

Employment did not materially contribute to psychiatric condition

Hawkins v State of New South Wales

LINK TO DECISION

Psychiatric injury; Post-Traumatic Stress Disorder, Major Depressive Disorder and Alcohol Use Disorder; worker employed as a police officer; dispute as to whether her psychological condition was caused by her employment including multiple suicides, road accident fatalities and investigation of the disappearance of Kiesha Abrahams; reported problems arose from family difficulties with no mention of issues at work; excessive alcohol consumption; applicant taken into custody, refused breath analysis; subsequently charged with DUI.

Applicant made no complaint of work difficulties prior to that time; consider weight to be given to the applicant's evidence; applicant's evidence about the effect of her work upon her psychological condition inconsistent with contemporaneous evidence; statements by respondents' lay witnesses.

Arbitrator Sweeney not persuaded that applicant had made out a case that employment materially contributed to her psychiatric condition.

Decision Number: [2017] NSWWCC 291
Decision Date: 6 December 2017
Matter/Number: 003607/17
Decision Maker: Paul Sweeney

Professional jockey engaged in dangerous recreational activity

Goode v Angland

LINK TO DECISION

Negligence - recreational activity - appellant was a professional jockey who suffered serious injuries when his horse fell during a race at Queanbeyan Racecourse; respondent was riding a horse in the same race; appellant sued respondent in negligence or breach of duty; by riding in such a manner as to interfere with appellant and his horse, causing the fall in which he suffered injuries.

Primary issues on appeal were:

(i) Whether s5L of the *Civil Liability Act 2002 (NSW)* provided a complete defence on the basis that the fall was a manifestation of an obvious risk of a dangerous recreational activity.

Held: S5L is properly regarded as a defence and should be dealt with at the outset.

The definition of "recreational activity" in s5K does not draw any distinction between sports participated in for recreational purposes and those participated in for professional purposes. Accordingly, horse-racing is a sport which engages the first limb of the definition of "recreational activity" in s5K, and s5L applied (so that the respondent was not liable in negligence for the harm suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity).

(ii) Whether the primary judge erred in impermissibly using his own interpretation of the photographic and video evidence.

Held: the primary judge's stated approach to the evidence was consistent with authority and his Honour's findings did not disclose an impermissible use of that evidence.

(iii) Whether the primary judge erred in failing to find that the respondent changed direction or veered when it was unsafe for him to do so in a way that was unreasonable.

Held: The appellant did not establish that the respondent had intentionally moved his horse into the path of the appellant's horse or that the respondent's horse had moved laterally at the relevant time other than in the ordinary course of the race. It was open to the primary judge to find that the respondent did not change direction or veer when it was unsafe for him to do so, or in a way that was unreasonable.

Decision Number: [2017] NSWCA 311
Decision Date: 7 December 2017
Matter/Number: 2016/235877
Decision Maker: NSW Court of Appeal of New South Wales Beazley P; Meagher & Leeming JJA

RECENT DECISIONS

Rodeo rider was not an entertainer engaged for fee or reward

Australian Bushman's Campdraft and Rodeo Association v Gajkowski [2017] NSWWCCPD 54

Link to decision

Summary

On 15 December 2017, President Judge Keating of the Workers Compensation Commission (WCC) revoked the Arbitrator's decision (31 May 2017) by which it was found that a young rodeo rider was a deemed worker and thereby entitled to receive workers compensation benefits.

Background

The applicant was employed full time as an apprentice butcher but on weekends actively participated in rodeos at various locations around NSW.

On 4 April 2014, he was taking part in a bull riding event at the Camden Showground when his head forcefully struck the head of the bull that he was riding causing a severe head injury that resulted in permanent brain damage.

The applicant brought proceedings in the WCC that were heard and determined by an Arbitrator on 31 May 2017. The Arbitrator found that the applicant was a deemed worker in accordance with Cl 15(1) of Schedule 1 of the *Workplace Injury Management and Workers Compensation Act 1998* as a person engaged for fee or reward to take part as an entertainer in a public performance in a public place to which the public is admitted on payment of a fee or charge.

This finding then allowed the applicant to recover compensation benefits in respect of his injuries. The Arbitrator also found that both the Australian Bushman's Campdraft and Rodeo Association Ltd (ABCRA) and the Camden Show Society (CSS) were equally liable for the claim.

Both respondents appealed separately from the decision with the key issue being the arbitrator's interpretation of Cl 15 Sch 1 and specifically how the applicant came within the definition of 'entertainer' such that compensation was payable.

ABCRA's grounds for appeal were that the Arbitrator had erred in finding that:

1. the applicant is taken to be a worker pursuant to cl 15(1)(c) of Sch 1 by misconstruing the terms 'engaged', 'for fee or reward', and 'entertainer in any public performance',
2. ABCRA is a person who conducted or held a public performance, and
3. ABCRA and CSS are liable equally for the payment of the compensation awarded.

Decision

Ground 3 (apportionment of liability)

In terms of the apportionment of liability, ABCRA submitted that by finding that liability should be

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shared equally, this overlooked the 'far greater role that CSS played in organising and conducting the event'; ABCRA submitted that their involvement was purely administrative. His Honour accepted these submissions and determined that CSS should be 100% liable for any compensation payable.

Ground 2 (conduct of the public performance)

ABCRA submitted that the finding that it was "a person conducting or holding the ... public ... performance" was both a legal and factual error and was not open to be made on the evidence. The alleged errors were; firstly, that the Arbitrator misconstrued the term "performance". Secondly, if the event was a performance ABCRA was not conducting or holding it.

CSS submitted that ABCRA's submissions on this ground of appeal, misconceived the relationship between the applicant, ABCRA and CSS.

His Honour ultimately determined that ABCRA did not have an active role in bringing the rodeo about, and that its role was administrative and facilitative in nature; he concluded that ABCRA did not hold or conduct the rodeo.

Ground 1 (interpretation of deeming provisions)

In submitting that the Arbitrator had misconstrued the term 'engaged', ABCRA submitted that the Arbitrator had erred by failing to consider whether there was a legally enforceable contract between the applicant and either ABCRA or CSS, or both, that required him to ride a bull; as to apply Cl 15 requires a legally enforceable contract between the person claiming to be a deemed worker and the person alleged to be the deemed employer (this point was conceded by the applicant's legal representatives at the oral hearing).

His Honour found that the worker's agreement to participate in the rodeo was not an agreement for valuable consideration and the Arbitrator had therefore erred in his interpretation of 'engaged'.

ABCRA submitted that the Arbitrator had accepted the term 'for fee or reward' in a sense that was more flexible than a guarantee of monetary payment for the worker's involvement in the rodeo.

His Honour stated that Cl 15 is an infrequently utilised provision with limited case authority on its application, however, the term 'for fee or reward' were also applicable to Cl 9 which included deemed worker provisions for jockeys and harness racing drivers for which there was some authority on the point. He then cited the decision of *Morris v Moonbi All Heights Racing Club* [1937] WCR (NSW) 113 which involved a harness racing driver who had an agreement with the owner of the horse that he would receive 10 shillings if the horse won a race, and nothing if it lost; the driver was thrown from his horse and killed during a race. It was subsequently held that the agreement did not amount to an engagement for fee or reward.

His Honour ultimately determined that the applicant was not engaged 'for fee or reward' in this case.

Finally, in arguing that the Arbitrator had erred in his interpretation of the term 'entertainer', ABCRA submitted that the term is to be used in its ordinary meaning which includes that of a singer or dancer and does not extend to a sporting competition. His Honour agreed with this submission.

Outcome

His Honour found that the applicant was not a deemed worker under Cl 15 Schedule 1 by stating:

> *"At the time of his unfortunate accident, Mr Gajkowski was not a person engaged for fee or reward to take part as an entertainer in any public performance in a place of public entertainment to which the public is admitted on payment of a fee or charge. Consequently, he is not, for the purposes of cl 15(1) of Sch 1 to the 1998 Act, taken to be a worker employed by the person conducting or holding the rodeo contest in which he was competing."*

Outcome

The decision takes the status of 'entertainers' under Cl 15 back to its ordinary meaning being in the nature of a singer or dancer, and rejects the fairly strained interpretation of agreement to participate for fee or reward that had purported to extend the definition to include participants in a sporting competition.

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His Honour's consideration of the meaning of 'fee or reward', with reference to the broader scope of Sch 1 indicates that there must be a more stable guarantee of monetary payment rather than a prospect of receiving a fee or reward. Presumably, if there had been a valid contract entered between the applicant and ABCRA and/or the CSS, so that he was paid a fixed amount for each ride, the outcome may have been quite different.

For more information, please contact:

Jock Spence
Lawyer

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

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RECENT DECISIONS

Court of Appeal's restrictive approach to recoveries involving employer negligence

South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 (7 December 2017)

Link to extract of decision

Extract of decision re s151Z

The NSW Court of Appeal recently delivered judgment in proceedings involving a number of claims and cross-claims following a helicopter crash in February 2006 that resulted in the deaths of three men.

The decision of Mr Justice Basten in one of the proceedings (at paras 164 to 185), is significant so far as it relates to an employer's right to recover payments of compensation from another negligent third party (or 'stranger') and the approach which departs from what has generally been the accepted practice in pursuing recovery claims for a number of years.

Background

In 2006, Parkes Shire Council engaged South West Helicopters ('South West') to provide a helicopter and pilot to fly two council employees for the purpose of conducting an aerial noxious weed survey.

On 2 February 2006, the helicopter was seen flying low above the main road between Parkes and Orange through a wooded area known as "the dungeons". Approximately 1 kilometre into the dungeons, the helicopter struck a power line owned by Essential Energy and crashed, killing all three men. The helicopter was destroyed by fire.

The accident led to a number of claims and cross-claims being brought in the Supreme Court by the families of the deceased workers in negligence for nervous shock and pursuant to the *Compensation to Relatives Act 1897*.

The Council brought proceedings against South West seeking to recover compensation payments made to the families of its employees. South West cross-claimed against Essential Energy, and both Essential Energy and South West cross-claimed against the Council.

A three week trial was held before Mr Justice Bellew in the NSW Supreme Court in 2013 that resulted in four judgments being handed down in which final orders were made in August 2016.

A number of appeals then followed. The appeal that was relevant to the question of recovery concerned whether the Council who had paid workers compensation to the families of the deceased employees was entitled to recoup the payments pursuant to s151Z of the *Workers Compensation Act 1987* ('the Act').

Decision on the application of s151Z

At the outset, Justice Basten observed that the claim under s151Z was successfully pursued at trial despite the fact that the trial judge had found that the Council was itself liable in negligence for the death of its two employees.

This finding (in terms of the Council's negligence) was challenged on appeal but rejected by the Court.

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The case was then addressed by the Court of Appeal on the basis that negligence was established on the part of both the Council and South West.

His Honour referred to two provisions of the Act that were potentially relevant to the recovery by the Council that needed to be considered separately.

Firstly, s151Z(1) applies where the injury for which compensation is payable is caused under circumstances creating a liability in **some person other than the worker's employer** to pay damages in respect of the injury.

Section 151Z(1)(d) provides that if a worker has recovered compensation, the person by whom the compensation was paid is entitled to be indemnified by the person liable to pay damages. To that extent, the provision creates a statutory right of indemnity that forms the basis for recovery actions where the section applies.

His Honour then stated [at para 170] that the Council's claim could not succeed under this provision as its equivalent under the earlier legislation (being s64(1)(b) of the *Workers Compensation Act 1926*) had been held by the High Court not to confer a right of indemnity in circumstances where the employer is a tortfeasor, but only in circumstances where the third party is the only relevant tortfeasor.

The decision of the High Court to which his Honour referred was *Public Transport Commission of NSW v J Murray-More (NSW) Pty Ltd*[1].

His Honour observed that the trial judge did not apply this decision and had referred to the judgment of *Campbell JA in J Blackwood & Son Limited v Skilled Engineering Limited*[2] in which he said:

"Further, that prima facie right of the employer under s151Z(1)(d) is one that the employer has whether or not the employer is itself a tortfeasor who has caused the injury to the worker with respect to which the compensation has been paid."

Justice Basten stated that "with respect, that statement was wrong" and that it was not a necessary part of the reasoning of Campbell JA found in the decisions of the other presiding judges.

It was noted that this statement had been followed by another judge in the Supreme Court. The statement in J Blackwood & Son has formed the basis for numerous recovery actions brought by employers for many years where the employer itself was partly negligent in the circumstances of the worker's injury.

Justice Basten went on to note that the trial judge had also dismissed a statement of law to the effect that s151Z(1) does not apply where the employer is liable to the worker for damages at common law (see *CSR Timber Products Pty Ltd v Weathertex Pty Ltd*). That conclusion was also accepted by the Court of Appeal in *Endeavour Energy v Precision Helicopters Pty Ltd* (No.2)[3].

Support for the approach taken by the trial judge had previously been drawn from the decision of Justice Giles in *I & J Foods Pty Limited v Bergzam Pty Limited*[4] in which he identified a contrary view to the effect that the amendment to WCA s151 to introduce s151Z(2)(e) changed the position which existed previously such that "*the limitation declared in Public Transport Commission v J Murray-More (NSW) Pty Ltd should be deemed out of existence so as to permit partial indemnity*".

The trial judge took the view that an employer was able to recover compensation under s151Z(1)(d) pursuant to s151Z(2)(e) with which Justice Basten agreed as correct however, he found that the trial judge had not addressed the precise requirements of s151Z(2)(e) and what needed to be satisfied in order for it to apply.

Section 151Z(2) applies where a worker's injury is caused by the negligence of the employer and a third party. The sub sections describe the pre-conditions for it to apply, namely:

(a) the worker takes or is entitled to take proceedings independently of this Act to recover damages from a person other than the worker's employer; and

(b) the worker also takes or is entitled to take proceedings independently of this Act to recover damages from that employer.

Section 151Z(2)(e) then qualifies the employer's right of recovery under s151Z(1)(d) to operate only in cases where the worker does not take proceedings against the

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employer or does not accept satisfaction of the judgment against that employer.

His Honour found that in the present case, the worker's dependants were entitled to take proceedings against South West and were also entitled to (and did) bring proceedings against Parkes Shire Council so that the requirements of paragraphs (a) and (b) were satisfied.

The next step in order for the Council to obtain indemnity under s151Z(1)(d) was to satisfy the preconditions under par (2)(e) as to which, the fact that Mrs Stephenson did take proceedings against the Council meant that the first limb was not satisfied, and the fact that she had also obtained satisfaction of the judgment against the Council meant that the second limb was not satisfied.

As such, his Honour determined that the Council was not entitled to recover payments of compensation from another tortfeasor and that the proceedings should have been dismissed.

Implications

Recovery actions brought on behalf of employers against third parties where the employer itself has been negligent will need to be reviewed in light of his Honour's decision to confirm that they satisfy the pre-conditions for the operation of s151Z(2)(e) and can be properly maintained.

Recovery actions will need to be carefully framed to specifically plead the facts to engage the provisions of s151Z(2) and to also plead that provision as applying to any s151Z recovery where the employer, as well as a stranger, is a tortfeasor.

In cases where an employer is unable to rely upon s151Z(1)(d) to recover compensation from a third party, the approach endorsed by Justice Basten suggests a mechanism by which the employer will retain the amount of compensation that the worker is required to repay from the damages recovered from the employer under s151A (in effect receiving a credit for that sum) and to claim contribution from the other tortfeasor towards the damages payable [pursuant to s5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946*].

One immediate concern is that s151A(1)(b) provides that the amount of any weekly payments of compensation already paid is to be deducted from the damages (and paid to the person who paid the compensation) that will then restrict employers to only a partial recovery as the section makes no allowance to deduct any other compensation that may have been paid in the nature of medical and treatment expenses, permanent impairment compensation (other than where the worker recovers motor accidents damages from the employer) or other compensation.

The Council is considering an appeal in which case, employer recoveries and the interplay of the provisions of the Act may come under further consideration by the High Court.

[1] [1975] 132 CLR 336 [1975] HCA 28
[2] [2008] NSWCA 142
[3] [2015] NSWCA 357
[4] (1997) 14 NSWCCR at 486

For more information, please contact:

John Hick
Partner
T: 02 8257 5720
M: 0417 264 707
john.hick@turkslegal.com.au

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