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RECENT DEVELOPMENTS

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SHORT SHOTS

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RECENT DEVELOPMENTS

On 7 June 2018, the NSW state government announced that it would invest $55m as part of an initiative to improve mental health in the workplace. The NSW Mentally healthy workplaces strategy 2018-2022 sets out a long-term vision to create mentally healthy workplaces across NSW.

It represents the most substantial investment in workplace mental health in Australia's history and will see collaboration between key government agencies including icare, SafeWork NSW and the State Insurance Regulatory Authority (SIRA) to deliver a range of evidence-informed interventions.

The strategy includes manager training and recovery at work programs, research projects to help inform ongoing strategies, a media campaign and online resources to raise awareness, as well as assessment and mentoring tools to better support business.

For more information: www.safework.nsw.gov.au and https://dominicperrottet.com.au/nsw-budget-record-investment-workplace-mental-health/

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SHORT SHOTS

Appeal from Arbitrator's determination - insufficient evidence to find injury in the course of employment – failure to consider relevant evidence

Carroll v S L Hill and Associates Pty Limited

LINK TO DECISION

On 16 June 2010, the worker was fatally attacked by her de facto partner who was subsequently found not guilty of murder by reason of mental illness.

When the worker's 16 year old son had left for school earlier that morning at 7:30am, the worker was in bed nursing her baby. She was later found by her son at 3:45pm lying in the bedroom ensuite in her pyjamas and was unresponsive.

The worker's home was also her place of employment with an office set up downstairs. The worker's son gave evidence that in the months preceding her death, his mother had been working from her bedroom and in other areas of the house usually between 7:30am and 9pm while caring for her small baby.

At the initial hearing, an arbitrator concluded that there was insufficient evidence to find that the worker was in the course of employment at the time that she died because the time of death was too ambiguous.

On appeal, the President revoked the arbitrator's decision, observing that while the time of death was clearly an important issue, it was not determinative of the issue, namely whether there was a sufficient temporal connection between the deceased's employment and her death to establish she was in the course of her employment when she was attacked…' He referred to evidence which indicated that; the deceased's injuries were sustained between 7:30am and 4pm; the deceased was essentially 'on call' at the time of her death; work documents were scattered about the house; that she performed work between 7:30am and 9pm; and that she performed work in the bedroom.

The President concluded that there was a failure by the arbitrator to properly consider all of the relevant material relating to the time and location of the worker's death which constituted an error in the process of fact finding that amounted to an error of law.

He determined that the matter should be remitted for re-determination by another Arbitrator.

Even if the new Arbitrator finds that the worker was in the course of employment when she was attacked, there will still be a significant issue as to whether her employment was a substantial contributing factor to her injuries as required under section 9A of the WCA 1987.

Decision Number: [2018] NSWWCCPD 17
Decision Date: 7 May 2018
Decision Maker: President Judge Keating, Workers Compensation Commission

Police officer fails to establish any breach of duty of care

Melanie Sills v State of New South Wales

LINK TO DECISION

The plaintiff claimed that she was exposed to numerous traumatic incidents during her service with the NSW Police Force from 2003 -2012 as a result of which she suffered a psychological or psychiatric injury. Alleged breach of duty of care by the defendant in failing to institute and maintain a system that would identify officers at risk, to ensure that they received appropriate treatment and support, to ensure that they were not required to perform duties likely to aggravate, exacerbate or perpetuate such injury without appropriate safeguards and to discharge such officers pursuant to s72 of the Police Act 1990 if safeguards were unable to be implemented and maintained with respect to performance of duties.

Issues for determination [366]:
- The scope and content of the defendant's duty of care;
- Whether duty of care breached by the defendant;
- Whether such breach caused plaintiff's psychological injury.

Competing expert medical opinion, statement of legal principles [368], the scope of the duty of care must be formulated prospectively per *State of NSW v Briggs*, consideration of the particular role of police officers and the nature of their statutory duties.

Per *Briggs*, 'there could be no doubt that police work involved a risk of psychiatric injury to police officers. The inquiry that was then to be undertaken was "what a reasonable man would do by way of response to the risk". The focus must fall upon how police officers should have been instructed to perform their work, not upon what steps the Police Service should have taken to provide support for officers who had been exposed to traumatic incidents.'

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Scope and content of duty of care found to have been properly articulated, system of work employed by the police service was not in issue, whether risk of psychiatric injury perceptible and if a response to a perceived risk is reasonably necessary to ameliorate that risk, intervention by employer into private lives of employees.

Failure to implement recommendations of police psychiatrist considered in light of plaintiff's failure to make candid disclosure as to extent of her psychological problems and absence of any report of psychological problems after 2006. Plaintiff was aware of support services available but did not seek out those services. When identified as an officier at risk advised she was seeking counselling outside work and following her transfer to the Exhibits Office, she was no longer required to attend traumatic accidents.

Finding: Having regard to the history, it was a reasonable response for the defendant to do nothing (during the relevant period) to implement the recommendations of the Police Medical Officer ('PMO') and police psychologist so that the plaintiff failed to establish a breach of the duty of care owed to her. Evidence established personal problems outside work and for supervising officers to intervene this could give rise to difficulties of intrusion and invasion of privacy.

Verdict for the defendant

Decision Number: [2018] NSWDC 119
Decision Date: 10 May 2018
Matter No: 2016/151328
Decision Maker: Mahony DCJ, District Court of NSW

Civil liability claims and section 151Z recoveries: Worker succeeds in action against third party; employer not negligent

Tsoromokos v Australian Native Landscapes Pty Ltd

LINK TO DECISION

On 17 September 2007, the worker (an independent contractor) was carrying out repairs on a Volvo loader owned and operated by the Australian Native Landscapes Pty Ltd ('ANL').

While he was attempting to remove a 200 kg metal bash plate from the underside of the loader to gain access to the fuel tank, the plate fell onto the worker's right arm, causing serious injury.

The loader was previously repaired in April 2007, when the bash plate was re-aligned and secured using bolts that were unsuitable and a temporary tack weld. ANL informed the worker at the time that this work would be rectified shortly, however, this never took place.

The worker brought proceedings against ANL in the Supreme Court of NSW claiming damages in respect of his injury. The worker's allegations of negligence included a failure to provide a safe place of work, failure to provide the relevant service manual, and failure to provide suitable plant and equipment to enable the bash plate to be safely removed.

The worker did not sue the employer, however, ANL filed a cross-claim alleging a number of breaches of the employer's non-delegable duty of care.

The employer filed a cross-claim against ANL seeking indemnity in respect of compensation paid to and on behalf of the worker pursuant to section 151Z of the *Workers Compensation Act 1987*.

Justice Latham considered the provisions of the *Civil Liability Act 2002* before finding that ANL had breached the duty of care that it owed to the worker, given that a 'reasonable person in the defendant's position would have ensured that the weld was rectified and appropriate bolts inserted after re-alignment of the plate within a short time after the weld was carried out.' It followed that the worker suffered serious harm as a result of this breach.

On the issue of contributory negligence, the Court held that a failure to carry out a proper visual inspection of both sides of the loader before commencing work was 'objectively unreasonable' and that the worker had exercised his judgment in deciding to work in circumstances that were unsafe by lying underneath the loader without any support for the bash plate. The Court assessed the worker's contributory negligence at 40%.

As the employer was not in a position to know the risks that occur or are likely to occur, the cross-claim against it was dismissed. Conversely, the employer succeeded on the cross-claim seeking indemnity pursuant to section 151Z as ANL was found liable for the worker's injuries thereby satisfying the pre-condition for recovery.

The decision confirms that an employer's non-delegable duty of care is not absolute with the court approving *Shoalhaven City Council v Humphries* [2013] NSWCA 390, where it was held that an employer must be in a position to know the risks that are occurring or are likely to occur in order to be found liable in negligence.

Decision Number: [2018] NSWSC 321
Decision Date: 15 March 2018
Decision Maker: Latham J Supreme Court of NSW

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