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Insurance Update

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Maybe crime can pay

The controversial topic of injuries sustained in the course of criminal activities has had another airing in the NSW Court of Appeal, although the outcome was somewhat uncertain.

In the early hours of 23 June 2003, Clinton Brilley and three others broke into the Earlwood Bardwell Park Sports Club with the intention of stealing cash from the club's gambling room. However, unknown to Brilley and his accomplices, David Bingle, a security guard, was in the club. Shortly after they entered the club, Bingle fired a Magnum revolver and wounded Brilley. He then fired at the accomplices, who promptly fled.

According to Brilley, Bingle then pointed the gun at Brilley's head and chest and to press the trigger repeatedly; but the chamber was empty. Bingle attempted to reload the gun and while he was doing so, Brilley ran out of the club and jumped into the 'getaway' car in the parking area. As the car drove away, Mr Bingle fired at it, causing the rear window of the vehicle to shatter.

Bingle was the managing director and sole employee of Presidential Security Services, and was guarding the premises in the course of his employment.

Brilley sued for damages for personal injuries from Presidential only (not Bingle personally). He relied on both negligence and "assault and/or battery ... on the part of the defendant through its servants, agents and/or sub-contractors".

In the District Court, the claim in negligence was dismissed; but the claim based on assault and battery was upheld and Brilley was awarded damages totalling some \$185,000; including both aggravated damages and exemplary damages.

Presidential appealed to the Court of Appeal, arguing (among other things) that the trial judge failed properly to consider and apply the provisions of Pt 7 of the Civil Liability Act 2002.

Pt 7 of the Act (headed "Self-defence and recovery by criminals") contained three relevant provisions relied on by Presidential – sections 52, 53 and 54. In essence, s.54(1) provides that damages are not to be awarded where the plaintiff (in this case, Brilley) was injured at the time of committing a "serious offence". There was no doubt that Brilley's actions in breaking into the club amounted to a "serious offence". Section 54(2) however provides that the exclusion of liability did not apply where the defendant's (Presidential's) conduct amounted to an offence.

Section 52 provides that civil liability does not attach for acts committed in self-defence (including defence of property against unlawful acts) where the act was a "reasonable response" to the circumstances. Section 53 goes on to say that if the only reason s.52 does not apply is because the act of the defendant was not a "reasonable response", then

damages are still not to be awarded unless the circumstances of the case are "exceptional" and it would be "harsh and unjust" not to award damages.

Presidential initially argued that the exception in s.54(2) could not apply because, as it was a company, it could not (as a matter of law) be liable for the offence of assault alleged by Brilley. That argument however was rejected after a thorough analysis of the relevant legislation.

It also challenged the trial judge's factual findings, and in that regard, had more success. Justice Ipp found that the trial judge's conclusions contained several inconsistencies, which affected the ultimate outcome.

More importantly, the trial judge had not "engaged with" the defence of Presidential. In particular, the trial judge had not properly considered the defence of self-defence. That was significant because, not only did it activate s.52 if proved, it also meant that Presidential was not guilty of an "offence" within the meaning of s.54(2). That in turn would mean that s.54(1) would then operate in relation to Brilley's claim.

In the result, the appeal was allowed but (with notable reluctance) the matter was remitted to the District Court for a rehearing.

Presidential Security Services of Australia Pty Ltd v Brilley
[2008] NSWCA 204

Parental responsibility

The limits on claims by children against their parents have been exemplified by a recent decision of the NSW Supreme Court.

The plaintiff, Carly Howarth was two years old when she fell into a pond on a subdivision at Cabarita in 1998. She sued the



Tweed Shire Council, alleging that the pond was formed by stormwater run-off routed to the property by the Council, and that it had a duty to fence the resulting hazard.



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At the time of the incident, the plaintiff was with her father and grandfather who were laying turf on the property (the block was also owned by the father). The Council sought leave to join the father as a party to the proceeding on the basis that he owed a duty of care for the plaintiff's safety.

Acting Justice Smart noted the High Court's decision in *Hahn v Conley* in which Chief Justice Barwick stated:

"Further, I think that the predominant judicial view... is that whilst in particular situations and because of their nature or elements, there will be a duty on the person into whose care the child has been placed and accepted to take reasonable care to protect the child against foreseeable danger, there is no general duty of care in that respect imposed by the law upon a parent simply because of the blood relationship. Also parents, like strangers, may become liable to the child if the child is led into danger by their actions. ... In the case of the parent, as in the case of a stranger, it seems to me that the duty of care springs out of the particular situation: the extent and nature of the steps which it may be necessary to take to discharge the duty may well be influenced by the fact of parenthood, though parenthood is not itself the source of the duty."

In this particular case, there was no evidence that the plaintiff had been "led into danger" by her father. At the highest, there was a suggestion of momentary inattention. That was insufficient to found a duty of care on him, and accordingly the Council's application was dismissed.

Howarth v Tweed Shire Council [2008] NSWSC 901

Go to the principal's office

Head contractors (or principal contractors, as they're sometimes known) sometimes take on more than just responsibility for delivering a building. Occasionally, they have to take on liability for injuries, even when they're not sustained by their own employees.

In November 2001, Dean Tolhurst was working as a plant operator for Cleary Bros (Bombo) Pty Ltd. That company provided earthmoving services at a colliery operated by Endeavour Cola. Tolhurst was using a front-end loader to take coal from a stockpile prior to it being loaded into trucks. As he was doing so, the face of the stockpile "collapsed", forcing the loader backwards. He was thrown around in the cabin and suffered injuries to his chest and neck.

He sued both Cleary and Endeavour in the District Court, where both companies were found liable for his injuries. Liability between the two was split equally.

Following that judgment, all the parties launched appeals to the Court of Appeal. Endeavour appealed against the findings that it was liable to Tolhurst and that he had not been contributorily negligent. Cleary did not appeal on liability, but appealed against the contributory negligence



Finding. Tolhurst appealed on quantum.

Endeavour's argument on liability centred on whether it owed a duty of care to Tolhurst at all. It contended that the stockpile was under Cleary's control, that Tolhurst took all his work instructions from Cleary's supervisor and that as it had contracted the work to "a skilled organisation", it owed no duty of care to Cleary's employees.

Delivering the court's judgment on that point, Justice Giles found that Endeavour did owe Tolhurst a duty of care. He pointed to the High Court's 1985 decision in *Stevens v Brodribb Sawmilling Co Pty Ltd*, which confirmed that a duty of care could be owed to an independent contractor and its employees.

Justice Giles noted that Endeavour had to take care that there was a safe system of work in the exercise of its overall control of the operations. The need to take care might be found in "the selection of competent contractors, in retaining a power to control their activities, in co-ordinating their activities or in other ways, including in relation to the conditions in which the contractors must do their work".

He also found that, contrary to Endeavour's argument, engaging an independent contractor was not a "passport to freedom from a duty of care owed to the contractor". In addition, such an engagement did not automatically negate a duty of care owed to the contractor's employee, although the contractor's responsibility for its own work will be material in deciding what may be required in discharging such a duty of care.

In the result, Endeavour's appeal on the finding of liability against it was dismissed unanimously; although the court ordered a new hearing on the quantum aspects of the case.

Tolhurst v Cleary Bros (Bombo) Pty Ltd & Anor [2008] NSWCA 181

No child's play

Many public authorities around the country operate parks and playgrounds. They also face the prospect of vandalism and other outside actions. How should they respond to such actions in a legal sense? Some guidance can be found in a



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recent decision from the ACT.

The plaintiff, Todd Lemmon was a 14-year-old schoolboy when he was injured in 2002. He and his brother were visiting Gungahlin Town Park, also referred to as Yerrabi Pond Park. Playground equipment was installed at the park including what was known as a giraffe swing.

The structure consisted of a set of steps leading to a chain with a small rubber seat. The chain was covered with a section of plastic piping, but on the day of the incident, the piping had been cut in four places. The whole structure was bounded by a safety fence.

Lemmon used the swing in its intended fashion by carrying the seat up the steps to the top step, and then jumping off the step so that he would swing forward and back. As he jumped he was holding the grip with both hands, but his fingers became caught in one of the breaks in the piping. This caused him to let go of the piping with his left hand, which threw him off course. He collided with the metal safety fence, suffering serious facial injuries.

He sued the ACT as the occupier of the park, essentially alleging that it failed to inspect the equipment sufficiently frequently.

Master Harper in the ACT Supreme Court referred to the well-known “calculus” in *Wyong Shire Council v Shirt* and noted that the question to be considered was “what should be the response of a reasonable person in the position of the defendant once a risk of injury has been identified”.

It was also noted that even where there is a foreseeable risk of injury, and someone was later injured, that was not enough to entitle a plaintiff to succeed. It was also not permissible to use the benefit of hindsight.

Master Harper however found that the case was one where there was not merely a risk of injury that now appeared foreseeable with the benefit of hindsight, but one that the ACT appreciated at the time was a risk. It had instituted a system of inspection of parks (including the park in question) precisely to guard against the injury arising from damaged or vandalised equipment.

The system was that an inspector inspected the park once a week, and in addition, went out if there was a public complaint of damage between the weekly inspections. The ACT was however aware that the swing had been vandalised in this way at least once a fortnight, and that at least once a month there would be a report of damage following the last inspection which would require a visit to the park to repair the damage earlier in the week.

The question then was whether that was a proper system of inspection. While recognising that the ACT did not have “limitless” resources, there was evidence that an inspector was in the area every weekday, and that he had time to depart from his normal order of inspections and go to

Yerrabi Ponds to replace broken plastic piping. The Master was satisfied that it “would not have been too demanding” for the ACT to have had the inspector inspect the giraffe swing more frequently than once a week, and found that an inspection every two days would have been reasonable.

Indeed, the Australian Standard called for a visual inspection every day or two for obvious hazards and damage from vandalism. If that had been adopted, there was a strong likelihood that the injury to would have been avoided.

In those circumstances, the ACT was found liable for the injury.

Lemmon v Australian Capital Territory [2008] ACTSC 70



Workplace relations

The interactions between workers’ compensation laws and public liability insurance can be so confusing, even judges can come unstuck.

On 21 October 2004, Antonio Leite was working on a building site in Ashfield. At that time, he was employed by SS Formworking Pty Ltd. The site was under the control of building contractors, M & L Tarabay. Tarabay had contracted with SS Formworking to complete formwork on the project.

Leite was carrying a sheet of plywood and fell through an aperture in the floor of a car park level and suffered severe injuries. He sued Tarabay in the District Court and was successful; although his damages were reduced by 30% for contributory negligence.

Tarabay appealed against the decision. While Tarabay conceded that it was liable, it sought to challenge the trial judge’s failure to reduce the damages according to the statutory formula in s.151Z of the *Workers Compensation Act*. That formula in effect provides that if a plaintiff had been entitled to take proceedings against their employer and had not done so, there nonetheless had to be an apportionment of responsibility for the accident as between the appellants and the employer.



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Leite conceded that the trial judge had erred in not making the apportionment, but the question remained as to what apportionment was appropriate in the circumstances. Leite cross-appealed on the issue of contributory negligence and quantum.

In the Court of Appeal, the three members of the court agreed that the trial judge's initial finding on liability could not stand. The trial judge had made what was described as a "notional" assessment of liability of 67% to the employer (SS Formworking) and 33% to Tarabay.

After analysing the judgment however, Justice Basten noted that the trial judge might have intended that the balance of responsibility be the opposite of what he had stated, and that he intended to find Tarabay primarily responsible for the accident.

In the circumstances, there was no suggestion that SS Formworking had primary responsibility for the safety of the site or that it had any particular reason to inspect the site at which the plaintiff was working.

The Court of Appeal therefore found that the degree of culpability should be reversed so that Tarabay bore 67% of the responsibility for the accident and SS Formworking 33%.

The Court however also found that the evidence did not support the trial judge's factual finding on contributory negligence; namely that Leite's vision was obscured because he was carrying the plywood in front of his face. Since the factual basis for the finding of contributory negligence was insupportable, that finding was also set aside.

Tarabay v Leite [2008] NSWCA 259

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