

News

June 2007

Litigation Newsletter

In this issue, we will outline the following topics:

- Liability for negligent misstatement made in 1965
- Hotelier's liability
- Bullying, discrimination and harassment in the workplace
- Personal liability of directors and managers under OHS Act

Liability for negligent misstatement made in 1965

The Court of Appeal of the Australian Capital Territory recently held that a negligent misstatement made in 1965 was not statute barred.

In 1965, Mr Cornwell was a spray painter employed on a temporary basis at a bus depot. In July of that year, he requested a meeting with the Manager of the Transport Section of the Department and a senior officer in charge of the bus depot to discuss his eligibility to join the Commonwealth Superannuation Fund. Mr Cornwell was told that he was not eligible to join the Fund because he was not a permanent employee as required by the legislation but that Mr Simpson, the Manager of the Transport Section, would "*see what [he] could do*". Mr Cornwell never received any further advice from Mr Simpson and assumed that, because he had heard nothing further, Mr Simpson's original assertion that he could not join the Fund because of his employment status was correct.

Mr Cornwell joined the Fund when his position was reclassified as permanent. Before his retirement in 1994, Mr Cornwell inspected his personnel file which revealed that in 1965 Mr Simpson had taken preliminary steps to determine whether Mr Cornwell was eligible to join the fund but that Mr Simpson has not concluded his enquiries.

MAKINSON & d'APICE
— LAWYERS —

Level 12 135 King Street Sydney NSW 2000 • GPO Box 495 Sydney 2001 • DX 296 Sydney
Telephone 02 9233 7788 • Facsimile 02 9233 1550 • Email mail@makdap.com.au • www.makdap.com.au

News

June 2007

In 1999, Mr Cornwell commenced proceedings alleging that, as a consequence of Mr Simpson's negligent misstatement, he was kept out of the fund for many years – so that upon his retirement his entitlement to a retirement benefit was significantly smaller than would have been if he had become a member of the Fund in the mid 1960s.

The Commonwealth pleaded that Mr Cornwell's claim was statute barred pursuant to section 11 of the *Limitation Act* 1985 (ACT) which provided for a limitation period of 6 years.

The Court of Appeal upheld the decision of Higgins CJ at first instance and said that Mr Cornwell's actual loss accrued upon his retirement in 1994. Until that time, any loss which flowed from the misrepresentation that kept him out of the Fund between 1965 and 1987 was contingent and not actual.

At retirement, his loss crystallised and was no longer contingent. Mr Cornwell's claim was therefore not statute barred at the time proceedings were commenced in 1999.

In reaching its conclusion, the Court noted that the relevant legislation at the time made provision for the exercise of discretion to allow temporary employees to join the Fund and in fact guidelines were developed within the Commonwealth as long ago as 1942 as to when that discretion ought to be exercised.

According to the Court of Appeal, Mr Cornwell should have been told that he could apply to join the Fund if certain criteria were satisfied and the Court found that it was likely that Mr Cornwell would have been accepted into the Fund in 1965 if he had applied then. Mr Simpson's statement that Mr Cornwell was not eligible because he was not a permanent employee was wrong. The Commonwealth had taken steps to inform its various agencies of the superannuation entitlements of employees and it was negligent of Mr Simpson, on behalf of the Commonwealth, to have given such misleading advice upon which Mr Cornwell relied.

As causes of action in relation to similar claims relating to retirement benefits may not accrue to plaintiffs until such time as they retire, cases alleging negligence may be extremely hard to defend given that the advice may have been given many years previously.

Accordingly, employers, lawyers, financial advisers and accountants who give advice on superannuation structures and fund eligibility ought to retain their files and records for as long as possible given that such claims may be brought decades after the advice was given.

MAKINSON & d'APICE
LAWYERS

News

June 2007

Hotelier's liability

It is clear from the common law of negligence in relation to occupiers' liability and the obligations imposed by the *Liquor Act 1982* (NSW) that a duty of care is owed by hoteliers to patrons.

Historically, injury sustained by patrons resulting from excessive consumption of alcohol and injury sustained as a result of the conduct of other patrons, are circumstances which can give rise to a finding of breach of duty on the part of a hotelier.

However, the decision of the High Court of Australia in *Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 217 CLR 469 and Part 6 of the *Civil Liability Act 2002* (NSW) (Intoxication) would appear to effectively preclude recovery by a patron for the effects of self-induced intoxication.

The facts of *Cole* briefly are that at 10.00 am the plaintiff attended the licensed club and was "very drunk" by 3.00 pm. She remained at the club until about 5.30 pm at which time she was told to leave. At about 6.20 pm, when crossing the road about 100 metres from the club, she was hit by a four-wheel-drive and sustained serious injuries. It was estimated that the plaintiff would have consumed 16 standard drinks to achieve her recorded blood alcohol concentration of 0.238 grams of alcohol per 100 ml of blood.

The High Court decided that there had been no breach of duty by the club in continuing to supply the plaintiff with alcohol over a lengthy period, resulting in her becoming so intoxicated as to be at risk as a pedestrian.

His Honour Chief Justice Gleeson agreed with the conclusions of the Supreme Court of New South Wales (Court of Appeal) that the defendant club ceased to provide the plaintiff with alcohol after it became apparent that she was severely intoxicated and that by offering her the use of a courtesy bus and a taxi were all that could reasonably be expected in the circumstances.

His Honour Justice Callinan (who was one of the majority judges) held at paragraph 121 of the reasons for judgment that:

"... Except for extraordinary cases, the law should not recognise a duty of care to protect persons from harm caused by intoxication following a deliberate and voluntary decision on their part to drink to excess. The

MAKINSON & d'APICE
— LAWYERS —

News

June 2007

voluntary act of drinking until intoxicated should be regarded as a deliberate act taken by a person exercising autonomy for which that person should carry personal responsibility in law. The respondent owed the appellant only the ordinary general duty of care owed by an occupier to a lawful entrant"

Two recent judgments relating to hoteliers' liability were delivered by the Supreme Court of New South Wales (Court of Appeal) in *Wagstaff v Haslam & Anor* [2007] NSWCA 28 and *Spedding v Nobles; Spedding v McNally* [2007] NSWCA 29. These cases involved the issue of hoteliers' liability in the situation where an altercation occurred between patrons on hotel premises resulting in personal injury being sustained.

The case of *Wagstaff* involved an altercation between Mr Wagstaff and another patron which occurred at the Greenhouse Tavern, Coffs Harbour, on 3 May 2000. Mrs Wagstaff intervened to assist her husband and suffered injuries as a result. Mrs Wagstaff claimed damages as a result of the negligence of Mr Haslam, the licensee of the tavern and D&D Haslam Pty Limited who was the occupier of the premises.

The District Court of New South Wales gave judgment in favour of Mrs Wagstaff, however, she appealed against the assessment of damages. The defendants filed a cross-appeal challenging the finding of liability.

The defendants were successful on appeal and the orders of the trial judge were set aside.

With respect to the question of whether the duty of care owed by an occupier of land to a person lawfully upon the land extends to protection against the deliberate wrongdoing of a third party, Justice Basten held that the basis of the duty must be found in the level of control exercised by the occupier over those on the premises and the occupier's knowledge, or ability to know about, the condition of persons on the premises where liquor is being sold.

His Honour remarked:

"The mere fact of a degree of intoxication will not give rise to a duty to take immediate steps to remove the affected person, in order to protect other patrons. An additional element is required. That element is knowledge, either actual or constructive, of the aggressive character of the person, when intoxicated, based either on known characteristics or conduct on the occasion in question."

The issue of the adequacy of security personnel was not specifically dealt with. The trial judge commented in his reasons for judgment that no evidence was placed before the Court as to the security measures that ought reasonably to

MAKINSON & d'APICE
LAWYERS

News

June 2007

be expected in the hotel at the relevant time. Justice Basten stated that in the absence of any evidence called by the plaintiff to establish unreasonableness according to current industry practice, the trial judge's conclusion should not be disturbed.

In *Spedding* the licensee of the Bald Faced Stag Hotel at Leichhardt, Mr Spedding, appealed against a decision of the District Court which found him liable in negligence for injuries caused to Ms Nobles and Ms McNally as a result of an incident at the hotel on 18 October 1998.

Ms McNally had been assaulted and robbed of her watch just outside the hotel by a patron and sought assistance from a hotel employee, Mr Spears. Mr Spears declined to help and Ms Nobles and Ms McNally suffered injuries in a further incident at the hotel which took place when they sought to retrieve the watch.

The trial judge inferred that Mr Spears was made aware of the theft of the watch. The Court of Appeal was of the view that it was open to the trial judge to do so. Mr Spears knew that the assailant was in the hotel following the theft but chose not to assist Ms Nobles and Ms McNally. The further incident then occurred.

The Court of Appeal dismissed Mr Spedding's appeal with costs.

These decisions serve to highlight the difficulty in bringing successful claims against hoteliers under the current state of law in New South Wales.

Bullying, discrimination and harassment in the workplace

Naidu v Group 4 Securities Pty Ltd

Mr Naidu was employed as a security guard by Group 4 Securities Pty Limited (**Group 4**). He was assigned to work at a Nationwide News worksite. He reported to and was under the supervision of Nationwide News.

Between 1992 and 1996 Mr Naidu's manager subjected him to violent and financial threats, racial and sexual abuse, excessive and unpaid working hours, and directing Mr Naidu to perform personal tasks at the manager's home. Mr Naidu developed severe depression and post-traumatic stress disorder. This resulted in him being unable to work and his marriage disintegrated.

MAKINSON & d'APICE
LAWYERS

News

June 2007

The court held that over a period of almost five years Mr Naidu was subjected to a level of bullying that amounted to "*brutal, demeaning abuse*".

In finding that Group 4 had breached its contractual obligations and its duty of care, the Court made the following findings:

- The discrimination and harassment policy of Group 4 formed a term of Mr Naidu's employment contract. The Court held that it was implied that, as far as reasonably practicable, the employer would not subject Mr Naidu to the conduct prohibited by the policy.
- Even without the policy, a non-delegable duty is implied into all employment contracts that employers will protect employees from workplace vilification, threats of physical violence, and subjection to demeaning and abusive conduct.
- Although Mr Naidu did not report the bullying, the presence of other Group 4 employees at the Nationwide News site, combined with their failure to report the bullying, meant knowledge of the abuse could be imputed to Group 4.
- The Nationwide News supervisor was an agent, or constructive employee, of Group 4, and his bullying in the course of employment could be imputed to Group 4.

In relation to Nationwide News, the court found:

- although the manager's behaviour was expressly prohibited by Nationwide News, the bullying occurred in the course of the manager's employment (with the exception of the sexual abuse and directions that Mr Naidu work at the manager's home, for which Nationwide News was not liable). As such Nationwide News was vicariously liable for the manager's behaviour; and
- Nationwide News had knowledge of the manager's bullying, as the behaviour had been reported to the manager's supervisor.

The court awarded \$1.9 million in damages against Nationwide News, the bulk of which was compensation for Mr Naidu's past and future medical expenses and income lost from his inability to work. The court also awarded exemplary damages of \$150,000 against Nationwide News, given they had direct knowledge of the bullying and failed to act.

MAKINSON & d'APICE
LAWYERS

News

June 2007

In order to minimise exposure to liability for bullying, employers ought to take the following steps to protect themselves from liability and their employees from bullying. These include:

- implementing policies specifically prohibiting bullying;
- ensuring these policies are communicated to all employees, including the consequences of failure to comply with such policies. These policies should also require employees to report incidences of workplace bullying;
- ensuring management is aware of its responsibility to monitor and enforce the policies;
- responding quickly and effectively when complaints about bullying are made or bullying behaviour is otherwise drawn to the employer's attention.

Hollingdale v North Coast Area Health Service

The Federal Magistrates Court considered a complaint from Ms Hollingdale alleging that she had been subject to less favourable treatment on account of her disabilities, namely, bipolar disorder and keratoconus, which is an eye problem.

Ms Hollingdale had been employed as a clinical psychologist by North Coast Area Health Service (**the Health Service**). From about May to July 2001, Ms Hollingdale was observed to be hostile and aggressive towards a number of employees at the Health Service. The Health Service sought to have her medically assessed to determine whether the behaviours exhibited were a manifestation of a disability or simply inappropriate behaviour.

Ms Hollingdale did not cooperate with that process. Ms Hollingdale was subsequently placed into alternative duties as a project officer. She then complained that she could not perform the work on account of her visual disability. Her employment was terminated in 2002 on account of a refusal to return to work.

The complaint of discrimination was dismissed in its entirety.

The Federal Magistrates Court held that:

- Ms Hollingdale had not been discriminated against in respect of how the Health Service dealt with her alleged inappropriate behaviour between May and August 2001;
- Ms Hollingdale had not been discriminated against in relation to her suspension from her substantive position;

MAKINSON & d'APICE
LAWYERS

News

June 2007

- there had been no discrimination in the disciplinary and complaints processes pursued by the Health Service leading to Ms Hollingdale performing alternative duties as a project officer and the apparent failure to make adequate provision for her visual disability. It was accepted by the court that disciplinary action was only pursued after medical evidence established that she was fit for duty notwithstanding the bipolar disorder. The disciplinary action was not because of the disorder and, in the absence of medical explanation, it was properly a matter of discipline;
- Ms Hollingdale had not been dismissed on a discriminatory ground. Ms Hollingdale was dismissed because of her refusal to attend work.

Accordingly, employers need to:

- balance the health and safety concerns of everyone in the workplace (ie the employee, co-workers, clients and visitors);
- distinguish what is behaviour stemming from a disability from what is simply inappropriate conduct and, therefore, the importance of medical evidence; and
- assess when and where it is not appropriate to pursue a disciplinary process.

Personal liability of directors and managers under OHS Act

The recent decision in *Inspector Kumar v Ritchie* decided by the Industrial Court of New South Wales illustrates the far-reaching effect of the personal liability provisions under the OHS Act.

In the above case, the depot manager at a tank washing facility operated by Owens Container Services Australia Pty Limited (**Company**) was fatally injured in an explosion. The Company was charged with a breach of section 8 of the OHS Act which provides that an employer must ensure that the safety and welfare of employees at the workplace are paramount.

However, the Company's Divisional General Manager, Mr Rose, and the CEO of the Company, Mr Ritchie, were also charged under section 26. The Company and the General Manager pleaded guilty. The CEO pleaded not guilty.

MAKINSON & d'APICE
LAWYERS

News

June 2007

The CEO submitted to the Court that he was too far removed from the day-to-day operations to influence the conduct of the Company in relation to the breach. He submitted that as CEO of the parent company, he relied on middle management to deal with occupational health and safety obligations. Accordingly, he submitted to the Court that he was not in a position to influence the running of the Company and therefore should not be found guilty under section 26 of the Act.

He also submitted that he applied all necessary due diligence to prevent the contravention of the Act by the Company. He said that he relied on reports by middle management to keep him informed of safety matters; regularly reviewed specific reports on OH&S matters; visited sites and expected middle management to raise OH&S concerns with him if necessary.

The Court rejected both defences and found the CEO guilty and fined him \$22,000.00. The Court did not accept that he was too far removed from the day-to-day operations of the Company to influence its conduct and found that he could actually influence the conduct of the Company in relation to the breach but elected not to do so because he wished to concentrate on other matters.

The Court further stated that a narrow interpretation of the defence was required given the purpose of the OHS Act in promoting safety. In response to the CEO's submission that he used all due diligence, the Court found that he had been unnecessarily ignorant of several key contributing factors to the incident. The Court concluded that he did not focus on the risks of his operation and that he had not developed systems to make himself aware of risks in order to take the necessary steps to address them.

The director of the Company, Mr Owens, was fined \$160,000.00 whilst the Divisional General Manager, Mr Rose, was also fined \$18,500.00.

The case is a timely reminder of the stringent nature of the duties of directors and others concerned in the management of corporations under the OHS Act. In summary, the Act requires directors and others concerned in the management of the corporation to demonstrate effective management and governance of OHS issues.

MAKINSON & d'APICE
LAWYERS

News

June 2007

Assistance

If we are able to assist you in any of these areas, or other litigation or industrial matters, please contact one of our Litigation Practice Group Team:

- Alex Kohn - 9233 9036 or akohn@makdap.com.au
- Stewart Roberts - 9233 9041 or sroberts@makdap.com.au
- John Baxter - 9233 9037 or jbaxter@makdap.com.au
- Richard d'Apice - 9233 9011 or rdapice@makdap.com.au
- Indran Sinnadurai - 9233 9040 or isinnadurai@makdap.com.au
- Diane Barker - 9233 9034 or dbarker@makdap.com.au
- Brian Trist - 9233 9053 or btrist@makdap.com.au
- Olympia Samolis - 9233 9032 or osamolis@makdap.com.au
- Peter Baxter - 9233 9007 or pbaxter@makdap.com.au
- Helen Woods - 9233 9039 or hwoods@makdap.com.au

Disclaimer

This newsletter is a non-comprehensive general outline of the law as at 31 May 2007. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

This newsletter and other publications are available from our website www.makdap.com.au. If you would like to receive future issues of this newsletter by email or you wish to unsubscribe, please email mail@makdap.com.au or contact our privacy officer on (02) 9233 7788.

MAKINSON & d'APICE
— L A W Y E R S —