

News

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Litigation Newsletter

In this issue, we will outline the following topics:

- Managing sick leave
- Kangaroo shooting – a dangerous recreational activity?
- Letters to auditors not privileged
- Signatory not liable on company cheque

Managing sick leave

Sick leave provisions are a standard entitlement for permanent employees, regardless of the instrument by which they are employed – an enterprise agreement, an award, an AWA or a common law contract.

Under Workchoices, the application of sick leave entitlement extends to 'personal' or 'carer's' leave, which allows employees to use their sick leave entitlements to care for a member of their household who is ill.

Sick leave can be open to abuse and needs careful management to ensure any such abuse is minimised so the business impact is limited.

Paid sick leave may be treated as a defined pool of resources that should be granted only in cases of genuine illness or injury. In extraordinary circumstances, such as a very serious illness or injury, an employer may, out of compassion, decide to keep paying loyal and effective employees even after their paid sick leave entitlement runs out. This often sends a very strong and positive message to other staff members about the employer.

However, an employer's capacity to act in this way could be compromised if other employees are abusing sick leave, thus limiting the funds available for special and deserving cases.

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Whilst many absences are supported by documentary evidence such as a medical certificate or statutory declaration, often the documentary evidence is itself unsatisfactory from an employer's viewpoint.

For example in the case of a medical certificate, it may:

- not specify the reason for the illness beyond 'medical condition';
- simply restate what the medical practitioner has been told by the employee/patient without any proper diagnosis eg 'Mr X has presented himself indicating he has a sore back';
- be dated retrospectively.

Often when asked to supply more information, the employee responds that 'it is against privacy laws'. The same response will usually be forthcoming from the medical practitioner if asked.

However, it is not a breach of privacy laws to ask the employee to provide evidence as to the nature of the illness or injury which caused the employee to be absent from work.

For example, the Clerical And Administrative Employees (State) Consolidated Award at clause 22(ii)(a) provides that an employee shall, wherever practicable, before the commencement of absence, inform the employer of such employee's inability to attend for duty and, as far as possible, *state the nature of the injury or illness and the estimated duration of the absence* (emphasis added).

It may be worth reminding employees that employers have important obligations pursuant to the NSW *Occupational Health and Safety Act 2000* to promote a safe and healthy work environment for people at work that protects them against risks to health or safety.

So from an employer's viewpoint, the information is necessary for legitimate operational reasons. For example an employee with a contagious illness such as influenza who returns to work prematurely could pose a risk to others. The employer may need to take precautions to minimise the risk of others being exposed to situations where they could contract the illness.

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It would be appropriate to include a standard provision in employment contracts specifying that an employee may be required to give the employer a doctor's certificate, or other reasonably acceptable evidence, about the nature and approximate duration of the illness. Terminology such as 'medical condition' or similar wording, if nominated as the reason for the illness, would fall short of this requirement.

Personnel handbooks should also reflect this policy.

Potential sensitivities in relation to female employees can be overcome by allowing a female employee to submit documentation such as a medical certificate in a sealed envelope, to be opened and read only by another female (trusted) employee, who can then confirm that the reason for the absence was genuine.

Kangaroo shooting – a dangerous recreational activity?

The *Civil Liability Act 2002* introduced a new regime of liability in relation to negligence actions. One of the changes was to introduce the concept of "*dangerous recreational activity*" in an attempt to limit the circumstances under which a defendant might be liable for negligence.

Section 5L of the Act provides that a defendant is not liable in negligence for harm suffered by the plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

The NSW Court of Appeal recently considered the meaning of the expression "*dangerous recreational activity*" when dealing with the facts in *Fallas v Mourlas* [2006] NSWCA 32. In that case, four men went out one night in a motor vehicle into the bush to shoot kangaroos. They did this with the aid of a large spotlight. Fallas was the driver of the vehicle. Mourlas agreed to hold the spotlight and shine it out of the window while the other men searched for and shot kangaroos. After about 10 minutes of driving, two of the men got out of the vehicle and began walking in front while the vehicle slowly followed them. A short while later, the vehicle stopped and Fallas climbed out of the vehicle with a handgun to join the other men. Mourlas continued to hold the spotlight.

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Fallas returned to the vehicle still holding the handgun. Mourlas asked him not to come into the vehicle with a loaded gun. Fallas gave repeated assurances that the gun was not loaded and that it was safe for him to enter the vehicle. Once Fallas was inside the vehicle, Mourlas again asked him not to bring the gun inside the vehicle and to point it outside. Fallas began "*clocking [the gun] back and forward*" in an effort to un-jam it. As Fallas was doing this, he pointed the gun towards Mourlas. There was an accidental discharge of the gun resulting in Mourlas being shot in the leg.

The trial judge found in favour of Mourlas and awarded him a verdict in the sum of \$98,467.00. Fallas appealed and the primary issue before the NSW Court of Appeal was the interpretation of section 5L of the Act and the definition of "dangerous recreational activity" in section 5K of the Act which states that it "... *means a recreational activity that involves a significant risk of physical harm*".

The majority of the Court of Appeal held that kangaroo hunting was a dangerous recreational activity in that it carries with it a significant risk of physical harm. Their Honours held that there was a significant risk that one or other of the men, inexperienced and under the effects of alcohol, while leaving or entering or being in the vehicle as Mourlas was operating the spotlight, might handle a loaded firearm in a negligent manner and cause someone in the vehicle to be injured.

However, the Court of Appeal upheld the decision of the trial judge on the basis that Fallas's conduct, comprising groundless reassurances and persistent failures to take steps to ensure that there would be no accident caused by the handgun, all in the face of Mourlas's earnest requests to be careful, constituted gross negligence on his part. Accordingly, the verdict in favour of Mourlas was upheld.

The case is one of the few thus far which has considered the concept of "*dangerous recreational activity*". Once an activity is categorised as such, a defendant is not liable in negligence for harm suffered by a plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity. This may, in the medium-long term, have a downward impact on insurance premiums if parties are able to avoid liability on this basis. It remains to be seen whether other activities such as abseiling, canoeing, horse riding, playing football and other similar activities might be categorised as "*dangerous recreational activities*" in the future.

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Letters to auditors not privileged

The High Court of Australia refused leave to appeal the decision of the NSW Court of Appeal in *Westpac Banking Corporation v 789TEN Pty Ltd* [2005] NSWCA 321 (***Westpac Banking***).

The Court of Appeal in *Westpac Banking* held that letters between a company's solicitors and its external auditors were not privileged because those documents were not created for the dominant purpose of providing legal advice or services to the company. The Court of Appeal was of the view that the legal services were rather provided to the auditors, who were exercising an independent statutory function. Both sections 118 and 119 of the *Evidence Act* 1995 (NSW) provide that client legal privilege only attaches when a client's lawyers are providing the relevant legal advice or services to the client. As a result, advice from Westpac's solicitors to its auditors regarding the reasonableness of the directors' estimate of liability for the proceedings at hand was not privileged even though that advice would inevitably have included at least some analysis about the prospects of success in the proceedings.

The effect of the decision is that parties in litigation with companies will now be able to subpoena that company's auditor for production of these solicitor representation letters. To overcome the production of these letters, it would be necessary for the auditors themselves to retain solicitors to advise about the relevant proceedings so that the auditors will have the benefit of privilege. Such a situation, however, is unlikely to be commercially feasible. Alternatively, auditors ought only be given documents that have already been created for a privileged purpose and rely upon the exception to waiver principle in section 122(2)(a) of the *Evidence Act* 1995 (NSW).

The case means that there is now tension between the auditors' desire to independently verify directors' estimates and a company's desire to keep sensitive information privileged and confidential which can only be overcome by legislative intervention.

Clients are reminded that it is only documents brought into existence for the dominant purpose of obtaining legal advice or services which attract legal professional privilege. Documents falling outside this description are susceptible to be produced under subpoena or an order for discovery.

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Signatory not liable on company cheque

In *Valamios v Demarco* [2005] NSWCA 98, the New South Wales Court of Appeal considered the liability of a signatory on a company cheque.

At all material times, Efstratios Valamios and Constantina Valamios traded under the business name V&P Produce as providores at Flemington Markets. Patrick Demarco, the respondent, agreed to sell to V&P Produce a large quantity of onions.

V&P Produce failed to pay for the onions. Over a four month period, George Valamios signed 16 cheques drawn on the account of V&P Produce in purported payment of the onions. These cheques were all dishonoured. George Valamios was the son of E & C Valamios but was not an owner of the business. The cheques were clearly drawn on the account of "E&C Valamios trading as V&P Produce".

Mr Demarco commenced proceedings against George Valamios on the basis that he signed the cheques in his personal capacity with the consequence that he became personally liable for their dishonour. In his grounds of defence, George Valamios admitted that he had signed the cheques but alleged that he had done so in his capacity as an employee of V&P Produce and denied that he signed the cheques in his personal capacity or that he intended to become personally liable on them.

The Court of Appeal agreed with his argument and held that the mere fact that a third party signs a cheque is not sufficient to become personally liable on them. The Court of Appeal adopted the reasoning in an earlier English case by holding that, simply on the face of the cheque itself, it was clear that the cheque was drawn on the account of V&P Produce and not on any other account. Accordingly, the drawer of the cheque was that entity and not George Valamios, thereby relieving Mr Valamios of any personal liability on the dishonoured cheques.

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