

News

May 2005

Litigation Newsletter

In this issue we will outline the following topics:

- Liability for economic loss suffered by members of a commercial venture
- Proportionate Liability Reforms
- Psychiatric Patient Loses Damages Claim
- High Court Warning on Workplace Safety
- Termination without notice due to restructuring not considered harsh

1. Liability for economic loss suffered by members of a commercial venture

The decision of Douglas J, sitting in the Supreme Court of Queensland, in *Fortuna Seafoods Pty Limited v The Ship 'Eternal Wind'* [2005] QSC 004 (14 January 2005) has further developed the common law duty of care owed to common members of a commercial venture.

The trawler, *Melina T*, owned by Fortuna Fishing Pty Limited, and the bulk carrier, *Eternal Wind*, owned by Ganta Shipping SA, collided 48 nautical miles east of Noosa Heads in Queensland. Proceedings brought by Fortuna Fishing against the *Eternal Wind* were settled.

The Plaintiff, Fortuna Seafoods, shared common ownership with Fortuna Fishing. The relationship between the two Fortuna companies involved Fortuna Fishing in the operation of the *Melina T* in bringing catches of fish to shore, whereby Fortuna Seafoods would, for a fee, process and sell the catch as Fortuna Fishing's agent. Those agency fees formed the vast majority of Fortuna Seafoods' revenue. Fortuna Seafoods therefore sought damages against the *Eternal Wind* for economic loss suffered by it as a result of the *Melina T* being rendered unable, as a result of the collision between the two vessels, to supply it with catches of fish for processing and sale.

Douglas J was satisfied that, to some extent, the two Fortuna companies operated as one single commercial venture, despite some aspects of the two companies, such as the keeping of bank accounts, remaining separate.

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— L A W Y E R S —

Douglas J, from a review of a number of High Court decisions, most notably that in *Perre v Apand*, distilled the following salient matters in a consideration of Ganta Shipping's liability to Fortuna Seafoods for consequential economic loss:

- i. reasonable foresight on the part of Ganta Shipping of the likelihood of harm being suffered by Fortuna Seafoods as a result of the collision with the *Melina T*;
- ii. Ganta Shipping's knowledge, including imputed knowledge, that damage to the *Melina T* was likely to be productive of consequential economic loss to those who relied directly upon her use;
- iii. that the present was not a case of Ganta Shipping being exposed to indeterminate liability to strangers to a collision with the *Melina T*;
- iv. that Ganta Shipping knew or had the means of knowing that Fortuna Seafoods was a member of an ascertainable class of vulnerable persons who were unable to protect themselves from harm in the event of damage to the *Melina T*;
- v. that the recognition of a duty owed to Fortuna Seafoods would not impair Ganta Shipping's legitimate pursuit of its own commercial interests; and
- vi. that the damage suffered by Fortuna Seafoods flowed from matters within Ganta Shipping's control.

His Honour was satisfied that Ganta Shipping had foresight of the harm suffered by Fortuna Seafoods as a result of the collision. Further, his Honour was satisfied that damage done to the *Melina T* was likely to produce consequential economic loss to those that relied upon her, including those that process and sell her catch.

Ganta Shipping was not here exposed to indeterminate liability – Fortuna Seafoods was a "first line victim", whose loss (the loss of agency fees) was readily ascertainable. Further, Ganta Shipping's pursuit of its own commercial imperatives would not be impeded by the imposition of a duty of care owed to Fortuna Seafoods, because it already owed an identical duty to Fortuna Fisheries, viz., to avoid collision with the *Melina T*. Similarly, the safe navigation of the *Eternal Wind*, such as to avoid collisions, in discharge of such a duty, was a matter within Ganta Shipping's control.

In determining to whom a duty of care is owed, one must be mindful of situations where members of a group or class of persons are economically dependent, or inter-dependent, upon each other. Such a situation may extend beyond formal joint ventures and into other less formal areas of commercial and economic co-operation, where the component parts of a commercial undertaking are split up between numerous participants. Potential liability for economic loss is thus greatly broadened. However, it still remains for plaintiffs to prove their membership of some commercial venture in common with the injured person, which will not always be as straightforward as it was for the plaintiff in *Fortuna Seafoods v The 'Eternal Wind'*. Matters such as centralised control and/or ownership, exclusive agencies and the sharing of revenues and expenses will clearly be relevant in such an assessment.

2. Proportionate Liability Reforms

Reforms to replace joint and several liability with proportionate liability in certain types of civil cases involving "multiple wrongdoers" have recently been introduced by the Commonwealth and States.

This area of law involves situations in which the same damage is caused by the negligence, or other legal wrong, of more than one person. Where the action of two or more people acting

together causes harm to another they are jointly liable. Where two or more people act independently of one another but their various independent actions cause the same harm to another, they are severally liable (collectively "**Multiple Wrongdoers**").

Severally liable means that each of the Multiple Wrongdoers can be held liable for the full amount of any damages awarded to a plaintiff. A plaintiff is entitled to seek to recover the full amount of the damages awarded from any of the wrongdoers held liable. However, the plaintiff can only recover once. This maximises a plaintiff's chance of obtaining a full recovery in situations where, for example, one or more of the wrongdoers is unavailable to be sued or is insolvent. A liable wrongdoer is entitled to recover "contribution" from other liable wrongdoers, toward any amount paid to the plaintiff. Pursuant to the relevant statutes dealing with "contribution" a court, using its discretion, will apportion the liability between the various wrongdoers in such proportions as the court thinks just.

In contrast to the above, under a proportionate liability regime, liability for the harm caused by Multiple Wrongdoers is divided or apportioned between or amongst them according to their respective shares of responsibility for the harm caused. A plaintiff can only recover from any particular wrongdoer the proportion of the total damages awarded for which that wrongdoer is held liable. This is assessed by reference to the wrongdoer's comparative degree of responsibility. The main effect of proportionate liability is that the risk that one or more of the Multiple Wrongdoers will be unavailable to be sued, or will be insolvent, now rests on the person who suffers the harm. It follows that under such a regime no liable wrongdoer has a right to recover "contribution" from any other liable wrongdoer towards the damages which the former wrongdoer has to pay.

Proportionate liability reforms were introduced by the Commonwealth in the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth). The reforms apply, in certain respects, to sections 52 and 82 of the *Trade Practices Act 1974* (Cth) and also to the misleading and deceptive conduct provisions found in sections 12GF and 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) and sections 1041I and 1041H of the *Corporations Act 2001* (Cth).

In New South Wales, the proportionate liability reforms were introduced by Part 4 of the *Civil Liability Act 2002* (NSW) and apply to a wide range of claims as detailed in this Part. Part 4 of the New South Wales Act does *not* apply to any claim arising out of personal injury and section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), which governed contribution between wrongdoers in New South Wales prior to the introduction of the proportionate liability reforms, will still apply to such claims.

Other States and Territories have introduced equivalent, but not always identical, legislation.

It would appear that plaintiffs, in certain types of claims, will now need to consider ways in which to plead their claims so that the proportionate liability provisions may be excluded. However, if this is not possible, they will have to join all possible defendants, to ensure that they are not left "undercompensated".

Conversely, a defendant will now need to consider carefully whether written notice of all possible Multiple Wrongdoers should be given to a the plaintiff and, if so, what the content of the written notice should include. This is because under the legislation, adverse costs consequences for a defendant may flow from a defendant's failure to give such notice to the plaintiff. This may give rise to tactical difficulties.

The legislation does appear to give rise to some uncertainties and it shall be interesting to see how the courts interpret the legislation in the future.

3. Psychiatric Patient Loses Damages Claim

On 21 April 2005, the New South Wales Court of Appeal overturned a damages verdict in favour of a psychiatric patient.

Kevin Presland had an obvious psychiatric condition. He had been in a severe psychotic state. He was a patient of John Hunter Hospital, Newcastle. He was released from hospital and, about six hours later, killed the fiancée of his brother. Mr Presland was acquitted of the murder of his brother's fiancé on the grounds of mental illness. He brought proceedings in negligence against the hospital and his treating psychiatrist for wrongfully discharging and failing to restrain him in circumstances where he was a risk to himself and others as a consequence of his mental illness.

At trial, Mr Presland was successful and obtained a damages award of about \$370,000.00.

The hospital and doctor appealed to the New South Wales Supreme Court which reversed the decision. By 2:1 majority, the Court held that it was clear that the hospital and the doctor owed to Mr Presland a general duty of care to exercise reasonable care and skill in the provision of professional advice and treatment. However, the Court held that while Mr Presland was acquitted of murder on the grounds of mental illness, his act was and remained an unlawful act. As a matter of public policy, the Court found that Mr Presland should not be compensated for the harm he suffered after being arrested and detained in strict custody in a psychiatric hospital. The Court found that the Mental Health Act 1900 enabled detention only as a last resort and if psychiatric patients refuse to stay in circumstances where they were not scheduled, there is little a hospital or psychiatrist can do about this. The Court found that, when dealing with causation, it would be unjust to hold the hospital and doctor legally responsible for an injury which although it may be traced back to their wrongful conduct, was the immediate result of unreasonable action by Mr Presland.

Accordingly, the Court overturned the Trial Judge's decision and entered a verdict in favour of the hospital and doctor.

The case demonstrates in the way in which judicial interpretation has changed over the past few years relating to personal injury claims and the judiciary's preparedness to recognise the notion of personal responsibility of one's actions.

4. High Court Warning on Workplace Safety

On 21 April 2005 the High Court handed down an important decision dealing with workplace safety and the concept of personal responsibility.

Thelma Thompson and her husband conducted a bread delivery service in Queensland. Mrs Thompson made daily deliveries to a Woolworths store in Stanthorpe between 5:00am – 5:30am. The Woolworths store was part of a shopping centre complex. Deliveries were made to a loading dock at the end of the lane. The loading dock led to a storeroom which was under the control of the storeman employed by Woolworths. There was a roller door between the loading dock and the storeroom.

Mrs Thompson, like other deliverers of supplies, would reverse her truck along the lane way and load her goods on to the loading dock from where they would be taken to the storeroom.

Sometimes the storeman did not have the shutters up to the loading dock when Mrs Thompson arrived at approximately 5:00am. When that occurred, she pressed a buzzer to attract his attention and bring him to the loading dock. Sometimes this took 10-15 minutes.

There was an area adjacent to the loading dock where two large industrial waste bins were located. Sometimes the Council employees when emptying the bins would not return them to the dedicated area and would leave them in front of the loading dock. This had the effect of blocking access to the loading dock and was a long-standing source of friction between Mrs Thompson (and other deliverers) and employees of Woolworths.

Some delivery drivers tried to save time by moving the large industrial bins themselves, even though it was not their job to do so. Their aim was to save time so that they could get quick access to the loading dock, deliver their supplies to Woolworths, and proceed to the next job.

Mrs Thompson had on many prior occasions moved the industrial waste bins herself, although on occasions she asked for assistance from a Woolworths employee. On the day in question, she arrived at the shopping complex at about 5:15am. No other person was present. The roller door between the loading dock and the storeroom was down. No storeman came out. There were empty waste bins in front of the loading dock. She reversed her truck along the lane way towards the loading dock and then attempted to move one of the bins. She attempted to push the bin with her arms but it would not move. She then used her leg as well and as she pushed again, she felt pain radiate down her back and leg.

She brought proceedings against Woolworths claiming that there was a systemic failure to exercise reasonable care for her safety. The High Court held that although Mrs Thompson was not an employee, she was owed a duty as a contractual entrant to receive reasonable care for her safety. The Court found that Woolworths should have instituted a proper delivery system. Such a system should have included arrangements for moving the waste bins left in the laneway by Council workers in order to clear access to the loading dock. The power and responsibility to design and implement a delivery system on Woolworths' premises was solely in the domain of Woolworths.

However, the Court found that Mrs Thompson had to exercise reasonable care for her own safety. She was aware of the risk involved in moving the bins herself. The Court said that she accepted the risk of injury by attempting to move the bins in circumstances where she did not have to. Accordingly, the Court reduced her damages by 1/3, based on the notion of personal responsibility, as she was partly responsible for her own injuries.

5. Termination without notice due to restructuring not considered harsh

In *Paper Australia Pty Limited v. Stephen Day*, the Industrial Relations Commission considered whether a termination without notice due to restructuring was harsh.

Mr Day was made redundant and his employment terminated without notice on 27 November 2003. Mr Day was not given an opportunity to be heard in relation to his suitability for alternative positions. At the time of his redundancy, Mr Day was the Administration Manager in the Packaging and Industrial Papers Division of Paper Australia Pty Limited. He was appointed to the position a few months prior to the termination of his employment. Mr Day had worked 17 years with Paper Australia Pty Limited in another position and had worked for the predecessor company for 5 years.

The restructuring which led to the redundancy of Mr Day's position involved the abolition of 11 positions as well as the abolition of Mr Day's division, the Packaging and Industrial Papers Division. However, the reorganisation of the company created several new positions.

The Full Bench of the Industrial Relations Commission found that Mr Day's termination by way of redundancy was for a valid reason, as the new positions created were at a more senior level and he lacked the skills to fulfil the newly created roles. The alternative role was a much more junior position and involved a significant demotion and a substantial reduction in salary together with the loss of use of a company car. The discounting of this alternative by senior management was not unreasonable according to the Full Bench.

The Full Bench noted that Mr Day was paid a significant amount in lieu of notice and a generous redundancy payment. Further, he was provided with the services of an outplacement consultant and was permitted to retain a company vehicle for a certain period of time after termination. These factors offset any unfairness in the implementation process of the restructuring of the company.

The Full Bench was at pains to point out that this decision should not be interpreted by employers as authority for the general proposition that an employer may fill new positions created in a restructure without giving employees notice of their impending redundancy or interviewing the employees for the newly created positions.

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:

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