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2012

Workplace Health and Safety Law in Australia Update No 1

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UPDATES TO *WORKPLACE HEALTH AND SAFETY LAW IN AUSTRALIA (2012)*
Update No 1: Changes concerning nervous shock in the workplace

Since the book was finalised there has been an important change to the law of negligence in relation to workplace injuries and the topic of “nervous shock” or psychological harm.

Background

The law of negligence has previously allowed recovery for psychological harm occasioned to the family members of workers who have been injured or killed in the workplace- see for example *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33, noted at WHSLA 4.34. It has also allowed recovery for nervous shock suffered by one worker at witnessing harm to a fellow worker- see *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383, noted at 4.35.

The Change

The NSW Government has introduced a bill drastically amending the workers’ compensation area, which was enacted as the *Workers Compensation Legislation Amendment Act 2012* (No 53 of 2012, received Royal Assent on 27 June 2012). Most of the Act relates to the statutory compensation scheme. But Schedule 3 makes two apparently important changes to the provisions of the *Workers Compensation Act 1987* (NSW) (‘WCA 1987’), which impose limits on common law claims. The two changes, which came into effect on Royal Assent (see s 2(1)(a) of the amending Act):

- Repeal s 151P;
- Add a new provision, s 151AD which reads as follows:

151AD No damages for nervous shock injury to non-workers

(1) No damages for pure mental harm may be awarded against an employer liable to pay compensation under this Act in respect of the death of or injury to a worker if the pure mental harm arises wholly or partly from mental or nervous shock in connection with the death of or injury to the worker unless the pure mental harm is a work injury (that is, an injury to the worker or to another worker).

Note. This section prevents a claim for damages for nervous shock when the nervous shock is not a work injury. It prevents claims for damages by relatives of an injured or deceased worker because their injuries are not work injuries.

(2) In this section, *pure mental harm* has the same meaning as in Part 3 of the *Civil Liability Act 2002*.

The Effect of the Change

The full effects of the change will not be known until we see how the courts interpret the provision. But it seems to me that the effects are as follows:

- “Pure mental harm” is defined in s 27 of the CLA 2002 as “impairment of a person’s mental condition” which is not consequential upon a “personal injury” of a non-mental kind.
- The clear intention seems to be to cut off claims such as those that succeeded in *Gifford*. This is pretty hard-hearted: normally claims of this sort would only succeed where there had been a sudden and horrific death of the worker, and now we are saying to the bereaved family they cannot recover for a genuine psychological condition that may have resulted!
- However, it is entirely possible that the provision fails to achieve this aim.

- It only operates to preclude damages for shock “in respect of the death or injury to a worker.”
- But the previous decision of the Court of Appeal in *Kimberly-Clark Australia Pty Ltd v Thompson* [2006] NSWCA 264 explicitly decides that a claim for damages by the wife of an injured worker is **not** “in respect of” the death or injury of the worker under the WCA 1987!
 - Per Bryson JA at [4]: “The damages she claims are not damages recoverable **in respect of** the death of her late husband: they are not damages **in respect of** an injury to her husband: in the way in which language is used in this definition, they are damages recoverable in respect of nervous shock to herself.”
 - Basten JA (with whom Ipp JA agreed) held that the widow’s claims was not one for “work injury damages” which required the procedures in the WIMWCA 1998 to be followed (see **5.90** for reference to this Act.) But seemed to generally also agree with Bryson JA.
- Still, because Parliament seems to have made its intention clear in the “Note” to the provision, a future court will have wrestle with these apparently conflicting considerations.
- It should be noted, however, that in fact the new provision is much clearer than former s 151P in *allowing* a claim for nervous shock made by a fellow employee- it recognises in the last clause of s 151AD(1) that “pure mental harm” may be a “work injury” (see **4.35** where I argue that this was the case already despite some odd wording in former s 151P.)
 - However, the final bracketed words in the clause are odd in that they include the words “to the worker.”
 - The logic of the sentence is that claims for “pure mental harm” (PMH) cannot be made “if the PMH arises wholly or partly from mental or nervous shock in connection with the death of or injury to the worker” *except* if the PMH is a “work injury.”
 - But in such a case it cannot be an injury to “the worker” concerned, since
 - If they are dead, they cannot claim for PMH;
 - If they are injured physically, then it would not be a claim for “pure” mental harm (see the definition from the CLA noted above);
 - If they are injured only mentally, then it seems bizarre to postulate a *further* mental injury flowing from a previous mental injury.
- Finally, it seems that s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) is still in operation (see **4.38-39**). Whether it may amount to a separate route for recovery of damages for nervous shock by relatives is unclear, though probably not likely.

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10 August 2012