

# **TORT REFORM**

## *(There is Movement at the Station)*

### **1 Introduction**

The beginning point for this topic, at least in an Australian context, is probably 15 March 2000 – this is the day HIH collapsed and was placed in liquidation. Commentators have generally agreed that prior the collapse the insurance market was in a hyper-competitive state which drove premiums lower while at the same time accepting increasingly unfunded risks.

Underlying the above environment was a perception that tort law, particularly negligence was being interpreted by the courts too liberally resulting in an extension of a Defendant's liabilities. There was also a broad view that heads of damage were becoming more creative and overall the quantum of claims was increasing.

Following the collapse of HIH there has been a noticeable degree of rationalisation in the insurance sector. Without making any comment on the connection between the two events – this rationalisation has coincided with increased premiums and in some cases insurers declining to underwrite certain (high) risk areas – e.g. medical indemnity.

In short, the insurance sector has done a 180 degree turn since 15 March 2000.

### **2 Ipp Enquiry**

Rising insurance costs and reducing risk coverage lead to Federal government intervention in the form of an enquiry by Justice Ipp of the NSW Supreme Court. The Ipp Committee has returned two reports the first in August 2002 and the second shortly after in September 2002. The Ipp enquiry took a national approach despite the fact that constitutionally, tort law is a state/territory responsibility. Therefore, national proposals made by the Ipp Committee required agreement between the federal, state and territory governments to ensure uniformity. Uniform agreement was not reached and after 15 November 2002 the states/territories effectively embarked on their own "tort reform" agenda. Without exception reforms have taken place in all jurisdictions. I will return to this in due course and provide a little more detail.

The above discussion essentially sets the scene leading to legislative reform. However, from a common law perspective it is very interesting to note that at the same time as the so called "tort reform" debate was raging the High Court appeared to register community concerns by delivering a number of decisions which refined limitations on the expansion of tort liability. I will now deal with a number of these decisions.

### 3 Owner's Liability

*Jones –v- Bartlett [2000] HCA 56 (16 November 2000)*

In this case the Plaintiff suffered an injury when he walked into a glass door which separated the dining room and the games room of a house his parents leased from the Defendant. The house, including the glass door was built in the 1950s or early 1960s. The parents had rented the house since November 1992 and their son had lived with them in the house for about 4 months before the accident occurred in 1993.

The alleged negligence by the Defendant owner of the house consisted in failing to have an expert inspect the premises before being leased to the parents and, in failing to have a 4mm glass in the door replaced with thicker glass which would have complied with the safety standards that would have applied had the building been newly constructed, or had the glass been replaced at that time.

It should be noted that 4mm glass complied with the 1957 Australian Standard when the house was constructed. This standard was superseded in 1989 requiring 10mm glass. This was the standard in place at commencement of the parents lease in November 1992.

At the first hearing the Plaintiff succeeded with the court finding:

*“.....if the premises were inspected on or before 6 November 1992 by a person with building qualifications to assess safety then it is likely that comment would have been made that the glass in the door fell a long way short of the then current standard with a recommendation that it be replaced.”*

The Defendant owner appealed to the Full Court of the WA Supreme Court which reversed the finding.

On appeal there was no dispute that the Defendant owed a duty of care to the Plaintiff – the dispute centred on the content of that duty – in particular whether the duty extended to the Defendant having an expert conduct a pre-lease assessment of the glass door in question. **Implicit in this proposition is the idea that reasonable care required that there should have been an expert assessment of all features of the premises potentially capable of harming someone renting or visiting the premises.**

In the circumstances, the WA Supreme Court was unable to conclude that any reasonable requirement to have the door expertly assessed arose.

The Plaintiff then appealed to the High Court of Australia. By a majority of 6 to 1 the Plaintiff's appeal was dismissed.

Chief Justice Gleeson found the duty of care amounted to an obligation *“to take reasonable care to avoid foreseeable risk of injury to the prospective tenants and members of their household,”* and [this] *“cannot be circumvented by an attempt to formulate the legal duty with greater particularity in a manner which seeks to preempt the decision as to reasonableness.”*

In short, the High Court declined to refine the test for reasonableness to something which in the day to day running of affairs was wholly impractical.

*Hoyts Pty Limited –v- Burns [2003] HCA 61 (9 October 2003)*

In this case, the Plaintiff attended the Hoyts Cinema complex at Bankstown near Sydney and at the time accompanied a disabled 4 year old boy who had a propensity to become highly agitated. The Plaintiff did not go to the cinema regularly and had never been to the Bankstown complex. The cinema theatre had retractable seats which rose automatically when not in use. There were no signs or warnings given as to this style of seating. The Plaintiff took a seat in the front row with the disabled child close by in a wheelchair. The lights went down, the show began and the disabled child became agitated and commenced to scream. The Plaintiff removed him from the wheelchair and placed him on the ground in front of her. He crawled away and she left the seat to retrieve him. She picked him up. He was screaming and kicking as she attempted to resume her seat which had become upright. When the Plaintiff sat down the seat was up and she fell suffering severe injury.

The Plaintiff commenced a personal injury action in the District Court of NSW alleging negligence for a failure to warn of the seats folding up. The Plaintiff gave evidence that if a warning had been given she would have heeded it. The Judge found the Plaintiff's evidence in this respect unreliable and rejected it. Detailed consideration of her Honour's judgment shows she believed the Plaintiff fell because of the struggling child and the difficulty this caused in operating the seat – not because of a lack of warning.

The Judge was satisfied that giving a warning would have ensured that the Plaintiff became expressly aware that the seats retracted automatically but that it did not follow that such awareness would have changed the Plaintiff's course of conduct on the day in question and so could not be used as a mechanism to establish negligence.

The Plaintiff successfully appealed to the NSW Supreme Court of Appeal. The issues dealt with on appeal were the need or otherwise for a warning and its efficacy had it been given. The Court of Appeal found the risk consisting in the seats was foreseeable, that a warning should have been given and that this oversight grounded the pleading in negligence.

Hoyts appealed to the High Court who reinstated the decision of the trial Judge. The High Court effectively found that the pure absence of a warning (even in the circumstances where it is arguable one should have been given) is not a ground for establishing negligence in circumstances where the Plaintiff's conduct was generated by events beyond what the warning would have prevented.

It can be seen the decisions in both *Jones-v-Bartlett* and *Hoyts-v-Burns* go to refining the law of negligence and to this extent limiting liability in tort. If you are a Defendant or an insurer you will no doubt regard these decisions as a form of "positive tort reform". Plaintiff lawyers and certainly Mr Jones and Ms Burns would disagree.

Before returning to the legislative aspects of tort reform I would like to touch on one further area involving two further High Court cases.

#### 4 Nervous Shock

The term “nervous shock” relates to the tort of negligence in the context of an action seeking damages for psychiatric injury as opposed to physical injury.

This area is not so much one of tort reform but rather tort clarification. Indeed, opinion about whether psychiatric injury is compensable has been changing over the years both in Australia and overseas. It is fair to say that medical identification of psychiatric injury has out paced the legal recognition of it.

At one stage in the development of this law it was considered necessary for a Plaintiff to be physically present at the scene of an accident in order to suffer the requisite compensable nervous shock. This changed in 1984 with the High Court decision *Jaensch-v-Coffey (1984) 155 CLR 549* which held it:

*“.....was out of accord with common sense to draw the border line between liability and no liability according to whether the plaintiff encountered the aftermath of the accident at the actual scene or at the hospital to which the injured person had been quickly taken.”*

However, for a duty of care to arise, the injury (i.e. nervous shock) relied on by the Plaintiff must nevertheless be foreseeable by the party (Defendant) who caused the injury. In considering this point it is important to note that in *Jaensch-v-Coffey* Justice Brennan also said:

*“It is not necessary that the precise events leading to the administration of the shock should be foreseeable. It is sufficient that the shock and a psychiatric illness induced by it are reasonably foreseeable.”*

It is the test of foreseeability for injury by nervous shock which has given rise to the difficulties associated with this area of tort law. In 2002 the High Court sought to address these difficulties in deciding the two following cases.

*Tame-v-State of New South Wales:* Here the Plaintiff alleged psychotic depression after a police officer erroneously reported of a motor vehicle accident stating the Plaintiff had a blood alcohol concentration of 0.14 when, in fact, the Plaintiff was a dedicated teetotaler.

*Annetts-v-Australian Stations Pty Limited:* This case was well covered by the media at the time of the events occurring and involved a young jackeroo who became lost on a Western Australian cattle station. The jackeroo’s parents suffered nervous shock consequent on learning their son was missing and was probably in danger. Their concerns were confirmed by the finding the boy’s dead body some months later.

After a lengthy review of the law relating to nervous shock the High Court held and thereby clarified the following:

- (a) The overriding test to be applied in determining whether a duty of care exists to avoid psychiatric injury is whether such an injury is reasonably foreseeable;

- (b) Absent specific knowledge of an unusual susceptibility of psychiatric injury, a Defendant is not liable for psychiatric injury where that injury would not have been caused in a person of an “normal fortitude”;
- (c) Liability for psychiatric injury is not limited to cases where the injury is caused by a sudden shock to the senses and/or direct perception of the event or its aftermath;
- (d) However, the absence of a sudden shock to the senses and/or direct perception of the event or its aftermath may be relevant to whether the psychiatric injury was reasonably foreseeable; and
- (e) Once it is established that a duty of care exists and has been breached, a Defendant is only liable for nervous shock which manifests itself in a recognisable psychiatric disorder rather than mere emotional disturbance or upset.

In *Tame* the High Court found that the Plaintiff’s alleged shock arising from the police error was not foreseeable in a person of normal fortitude and therefore there was no liability to the police for her emotional state.

In *Annettes* - notwithstanding their son was thousands of miles away and the perception of his death by his parents was not immediate - the court found their reaction should have been foreseen by the Defendant. Accordingly, liability was established consequent on the parents suffering a recognisable psychiatric disorder.

## **5 Tort Reforms in Action**

I now return to the legislative tort reforms and suggest that the combined effects of the common law and the legislative reform since the HIH collapse have been responsible for restricting the extent of tort law - in particular negligence.

The Ipp report made some 61 recommendations which to varying degrees have been addressed by the respective Labor governments in the various states and territories across Australia. In general terms the Ipp recommendations go to “reforming” the law of tort relating to negligence – this is reflected in the reform Acts of the respective states and territories.

The primary recommendations can be summarised as follows and have been variously dealt with by state/territory legislators in their respective “tort reform” legislation:

- what constitutes a “foreseeable” risk;
- assumptions of risk by Plaintiffs where the nature of the risk being considered was obvious to a reasonable person;
- standards of care required of professionals including medical practitioners;
- contributory negligence again considered in the context of what a reasonable person would have done in the Plaintiff’s position;

- causation and confirmation that the Plaintiff bears the burden of proof on this issue;
- liability for nervous shock/mental harm along the lines of that clarified in *Tame* and *Annetts*;
- detailed and prompt notification of claims and a 3 year limitation on the general commencement of personal injury actions;
- implementation of broad ranging thresholds and caps on a Plaintiff's entitlements to damages; and
- limitations on legal costs in personal injury matters.

The above list is a general summary which is not exhaustive and merely indicative of the types of reforms that have been addressed.

## **6 Conclusion**

Much of the legislation is still in the process of being introduced. If faced with a new claim it is essential to ascertain the nature and extent of the "reforming" legislation in the respective jurisdiction and carefully assess the claim against it. You will find there is a wide range of commencement dates and in some cases even if the accident date occurred before introduction of the legislation, many of the reforming Acts do have a degree of retrospectivity.

While there is no doubt the above reforms have reduced the number of matters being commenced in courts around the country there is some debate as to whether it has reduced the number of claims and indeed whether the complexity of the legislation in the various jurisdictions makes the reforms practical from an administrative point of view.

From an insurance risk manager point of view the more commercial question is whether the reforms have, or will in the near future result, in reduced premiums across all relevant risk areas. It should be noted that the Ipp enquiry was largely motivated by the need to allow the community and business affordable and sustainable insurance. If insurance companies fail to deliver in this respect then one may have legitimate grounds to question the benefit of "tort reform". Time will no doubt tell.

I hope the above has provided an interesting overview of Australian tort reform. If you have any questions please contact:

Kent L. Owen  
Partner  
Sparke Helmore  
Direct Dial: 02 6263 6316  
Fax: 02 6248 7522

# **RISK MANAGEMENT AND DUE DILIGENCE**

## *(Tools of Trade)*

### **1 Introduction**

Risk managers and indeed all levels of management are charged with certain standards of compliance in a range of areas including, for example, corporate governance, commercial reporting and most relevantly OH&S. Proper compliance with such standards is known as due diligence and establishes a viable defence to allegations/prosecutions in relation to a breach of such standards.

A number of principles have emerged from a wide range of cases both in Australia and overseas in relation to what type of systems are necessary to satisfy due diligence. It is ultimately the courts who will determine whether a system does in fact meet the due diligence criteria. If an organisation seeks to establish due diligence as a defence, it will need, as a minimum, to demonstrate:

- Clear evidence of board and senior management commitment.
- A compliance policy or mission statement that communicates and forms the basis of the development of a sound culture of compliance.
- A system of ensuring the identification of legal risks and compliance with relevant laws. This must include identifying and understanding the laws applicable to the company's operations.
- A system of identification, delegation and supervision in relation to the identified risks.
- The provision of adequate resources to ensure that compliance requirements can be identified and satisfied.
- Proper instruction and training for officers and employees in the operation of the compliance system and their rolls within it.
- Monitoring on and reporting upon the system to appropriate levels of management. Reporting levels should reflect the seriousness of the issues identified in relation to both the frequency and the speed with which matters are reported and the levels of management to which those issues are reported.
- Awareness by the organisation of the general compliance standards and practices within its industry and the adoption of appropriate practices.
- The adequate documentation of the system to provide evidence of its operation and enable verification of the necessary elements.
- An audit and verification program.

In considering OH&S risk management strategies, managers should be guided by relevant Australian Standards. As a foundation, the Australian Standards AS 4801 *Occupational Health & Safety Management Systems – Specification with Guidance for Use* and AS 4804:2001 *Occupational Health and Safety Management Systems – General Guidelines on Principles, Systems and Supporting Techniques* provide sound

guidance as a management system model to assist in meeting these due diligence standards. An analysis of the elements of the system model under AS 4804 indicates that it addresses each of the due diligence principles. Additional guidance can be obtained from AS 3806:1998 *Compliance Programs*.

As an OH&S governance link, risk managers can ensure executive level support for OH&S by ensuring OH&S reporting in annual reports. Valuable guidance in this area can be obtained from the Australian Government National Occupational Health & Safety Commission paper headed *Guidance on OH&S Reporting in Annual Reports* dated April 2004.

## **2 Conclusion**

Putting corporate and commercial compliance aside - in the context of OH&S it is well recognised that the various WorkCover authorities are becoming increasingly vigilant with respect to risk assessment/management and linking management failures in these areas to prosecutions. Penalties for breaches of OH&S laws are increasing. Avoidance of such penalties lies squarely within the process of maintaining a sound, sustainable risk assessment/management and due diligence process.

I hope the above brief information has provided some assistance in highlighting the foundations of a risk assessment/compliance program and therefore the automatic benefits which flow to providing a due diligence defence. If you have any questions, please contact:

Kent L Owen  
Partner  
Sparke Helmore  
Direct Dial: 02 6263 6316  
Fax: 02 6248 7522

# INDUSTRIAL MANSLAUGHTER

## *(The Ultimate Penalty)*

### Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT)

#### 1 Introduction

The beginning point for this topic is a brief summary of what constitutes manslaughter.

Manslaughter arises where death is caused by an act or omission which is grossly reckless or negligent. The fundamental difference between manslaughter and murder is that murder involves a direct intent to cause death.

*Criminal recklessness is the equivalent of knowing of a risk and taking it.*

*Criminal negligence is conduct which merits criminal punishment because such conduct involves such a great falling short of the standard of care a reasonable person would exercise in the circumstances.*

Manslaughter has been a part of the criminal law in the ACT since 1900 and has always been available for use by authorities in prosecuting all sections of the community in the event of a fatality – including employers. Indeed, this remains the case today.

#### 2 Why Introduce New Laws Termed Industrial Manslaughter?

Part of the answer to the above question lies in a desire by WorkCover authorities to raise the awareness of workplace fatalities. However, the more technical answer to this question lies in the fact that most people are not employed by an individual or natural person but by a company or similar entity – including government.

Therefore, if authorities sought to rely on the conventional manslaughter laws in the context of prosecuting a workplace fatality, those authorities may have to prove the offence against the employer – who as we have just seen in the majority of cases, is a company or similar structure.

Prosecuting a company for manslaughter is very difficult because authorities have to prove that the person within the company who caused the fatality was the “*directing mind and will*” of the company.

As you will know from your own life/work experience there are often numerous layers of governance within a corporate employment structure. Indeed, it is this complexity which frustrates proving, on a balance of probability, that the act or omission of a particular individual within the company constitutes the “*directing mind and will*” of the employer company responsible for the fatality.

*The Crimes (Industrial Manslaughter) Amendment Act 2003* which commenced on the 1 March 2004 seeks to re-dress the above situation.

### **3 What is the Extent of the Industrial Manslaughter Laws?**

To create a “level playing field” the laws go beyond common company structures to include the full range of scenarios that may constitute an employment situation. This includes corporations in their various manifestations, government, including government entities, agents of employers, independent contractors and sub-contractors and even organisations engaging volunteers.

It is clear the Industrial Manslaughter laws bind the ACT government and its entities. Having regard to Section 121(6) of the *Legislation Act 2001* (ACT) it would appear the amendments may also bind State Governments/entities having employees in the ACT.

However, the amendments are said not to bind the Commonwealth. To place this beyond doubt it should be noted that the Commonwealth has recently introduced the *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004*. This bill provides that the *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) does not apply to “an employer.” For the purposes of the Commonwealth Bill “employer” is defined in s5 of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* as the “Commonwealth or a Commonwealth Authority.”

In short, the Commonwealth Government has effectively distanced itself from the ACT Industrial Manslaughter laws. Therefore, in practical terms Commonwealth Departments operating in the ACT are not subject to the Industrial Manslaughter laws.

However, State Government and private employers based interstate but having employees in the ACT should expect to be subject to the Industrial Manslaughter laws if death (this being the crux of the offence) or injury leading to death occurs in the ACT.

Conversely, the words “*dies in the course of employment by, or providing services to or in relation to, the employer.....*” appearing in s49C and s49D of the Industrial Manslaughter laws would appear to suggest that employers based in the ACT having employees interstate may also be bound by the laws even where death or injury leading to death occurs interstate. The critical issue here will be establishing where the offence (with the requisite reckless or negligent act or omission) occurred.

### **4 Offences Created By the Industrial Manslaughter Laws**

The new laws do not in any way amend existing OH&S requirements on ACT employers. Although, as mentioned above, there is no doubt these laws move OH&S to “front of mind”.

The Industrial Manslaughter laws effectively form part of the ACT Crimes Act and expressly create two Industrial Manslaughter offences.

#### 4.1 **The Employer Offence** – Section 49C

An employer (however defined) commits an offence where its reckless or negligent conduct causes death.

#### 4.2 **The Senior Officer Offence** – Section 49D

A senior officer of an employer (however described) commits an offence in the same circumstances as required by S49C where the senior officer's conduct causes death.

Conduct: *is defined by Section 13 of the ACT Criminal Code to mean an act or omission to do an act in relation to a state of affairs.*

Causes death: *a person's conduct causes death if it substantially contributes to the death.*

The penalty for each of the above offences is 2,000 penalty units, imprisonment for 20 years, or both.

The value of one penalty unit in the ACT as at 9 April 2004 was \$100.00 for an individual (maximum fine \$200,000) and \$500 for a corporation (maximum fine \$1,000,000).

If the employer is not a natural person then obviously it cannot be imprisoned and one must assume a fine would be imposed on the entity which constitutes the employer. However, in such circumstances one must also assume the prosecuting authorities would look very closely at raising charges against senior officers of the employer. It is these individuals that can be imprisoned, fined, or both. For individuals in senior management this aspect of the law represents the most critical issue.

Section 49E of the Industrial Manslaughter laws enables a court to make certain orders against a corporation in addition to or instead of any other penalty the court may impose on that corporation. It should be noted these powers are limited to corporations only and go to the corporation publishing details of the fatality and offence etc. Clearly, this is designed to impact on the public knowledge/reputation of the corporation in a negative way and therefore to act as a deterrent.

A court may also order a corporation to establish or carry out within a specific time frame, a stated project for the public benefit, even if the project is unrelated to the offence. The cost to the corporation of complying with such orders can range up to \$5M – depending on the resources available to the corporation.

## 5 **A Critical Issue: What is a Senior Officer?**

Section 49A of the *Crimes (Industrial Manslaughter) Amendment Act 2003* defines "Senior Officer" as follows:

*Senior Officer, of an employer, means –*

- a) *For an employer that is a government, or an entity so far as it is a government entity – any of the following:*
  - i. *A minister in relation to the government or government entity:*
  - ii. *A person occupying a chief executive officer position (however described) in relation to the government or government entity:*
  - iii. *A person occupying an executive position (however described) in relation to the government or government entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the government or government entity; or*
- b) *For an employer that is another corporation (including a corporation so far as it is not a government entity) – an officer of the corporation; or*
- c) *For an employer that is another entity – any of the following:*
  - i. *A person occupying an executive position (however described) in relation to the entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the entity;*
  - ii. *A person who would be an officer of the entity if the entity were a corporation.*

It can be seen from the above that it is “an officer of [a] corporation” or a “person occupying an executive position “(however described)”” that is exposed, not only to fines, but also to imprisonment.

The Industrial Manslaughter laws further define officer of a corporation by reference to the Commonwealth Corporations Act as follows:

- (a) *A director or secretary of the corporation; or*
- (b) *A person:*
  - (i) *who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or*
  - (ii) *who has the capacity to affect significantly the corporation’s financial standing; or*
  - (iii) *in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation); or*
- (c) *A receiver, or receiver and manager, of the property of the corporation ;or*

- (d) *An administrator of the corporation; or*
- (e) *An administrator of a Deed of Company arrangement executed by the corporation; or*
- (f) *A liquidator of the corporation; or*
- (g) *A trustee or other person administering a compromise or arrangement made between the corporation and someone else.*

## **6 Preventative/Protective Action**

While the above represent critical issues for senior management it is equally critical to ask what can be done to protect/prevent senior management from charges in the event of a workplace fatality?

The answer to this question lies in being proactive in risk assessment and diligent in the maintenance of safe systems of work including policy development, training, safety equipment, employer/ee consultation etc. Indeed, this question squarely raises the **separate** issue of proper OH&S management.

## **7 Conclusion**

While there is no doubt the Industrial Manslaughter laws place an increased onus on employers and the senior management of employers, concern about these laws are given some perspective when it is considered that proof of the offences will be judged on the criminal standard of – beyond reasonable doubt.

In addition to the above, ACT WorkCover has stated:

*“The new law does not impose any new OH&S requirements on employers or their employees. An employer who is concerned about the new laws simply needs to ensure that they are making all reasonable steps to provide a safe workplace consistent with current OH&S legislation. Employers should take a risk management approach to health and safety. This means identifying any hazards and risks to workers at the place of work and taking all reasonable steps to eliminate or minimise these risks. This may include providing safe equipment, replacing or repairing worn machinery and giving employees training on how to perform their duties safely.*

*Employers will NOT be held liable for accidents that they could not anticipate, or for the dangerous actions of other people including their employees. Industrial Manslaughter would only apply where employers themselves are criminally reckless or negligent.”*

It follows that the “take away” from this subject is that ACT employers should ensure their OH&S house is in order and that they keep it that way. Due diligence in this

respect and indeed in respect of all other prosecutions bought in the context of OH&S certainly acts as a strong starting point for mounting a defence to any charge.

I hope the above has provided some enlightenment on the subject. If you have any questions please contact:

Kent L Owen  
Partner  
Sparke Helmore  
Direct Dial: 02 6263 6316  
Fax: 02 6248 7522