

WHEN AN EMPLOYER WILL BE FOUND LIABLE FOR WORKPLACE-RELATED INJURIES

Bruce Thomas

Director Principal, BTLawyers

Wednesday 12 February 2020





WELCOME

- Webinar session 1.00 pm – 2.00 pm
- Send in your questions – button is on the right hand side of your screen
- Session will be recorded and uploaded to WorkCover Queensland's YouTube channel

OUR GUEST PRESENTER **BRUCE THOMAS**



Bruce Thomas is the Director Principal of BTLawyers.

With more than 25 years experience in insurance and workers' compensation, Bruce oversees large scale insurance, workplace, commercial and personal litigation projects for government and private clients all around Australia.



BTLawyers 

Employer's Duty of Care A 'Reasonably Practicable' Guide

Bruce Thomas – Director Principal

About BTLawyers

- I have acted for WorkCover for 27 years
- BTLawyers is a firm of dispute resolution experts servicing Queensland employers across the state
- 18 lawyers all dedicated to providing advice and representation for Queensland employers in workers' compensation, liability and workplace claims.
- Provide advice and representation on statutory claims, HR and IR issues, workplace health and safety advice and prosecutions and common law claims.
- I have had the good fortune to have had the opportunity to work with great people at WorkCover and great employers who have helped us debunk the Plaintiff's myth that employers cannot win common law claims.
- There can be no doubt that the task of "winning" a common law claim is a difficult one indeed. The standard of care demanded of an employer in the modern era is a challenging one to meet.

The Duty of Care – Why?

- Common Law – the body of legal principle, established by precedent cases, which establishes the rules that govern our community. It grows and adapts with the times. It is “Judge made law”
- The current law of negligence was founded in the early 20th century and has developed since
- The fundamental principle of negligence reflects the bible’s golden rule – love thy neighbour.
- We must all take reasonable care to avoid injuring our neighbor
- Who are our neighbours, and why is this relevant to an employer?

The Employer's Duty – Common Law

- Control and responsibility are the touchstones when determining the duty people owe.
- Low control and responsibility – low duty.
- With great power comes great responsibility
- The relationship between employer and employee is a special one – because of the level of control an employer can exert over the employee. “Master and Servant claims”
- In practical terms an employer still controls:
 - how, when, where and with what an employee works
 - what they do, when they do it and how they do it.

What is the Duty

The duty at common law is to:

“take reasonable care to avoid the unnecessary risk of foreseeable injury in the course of employment”

Simple? What does this mean?

The 2 key elements are:

1. Foreseeable injury.
2. Reasonable care.

“In the course of employment” is a large topic for another day.

What is Reasonable – What is Foreseeable

- These are obviously both highly subjective standards. The Court has however deliberately chosen subjective terms so they are sufficiently flexible to deal with the changes in society.
- Reasonable is:
 - Not perfect - Not the “gold standard”
 - Considered in context of industry standards, magnitude of risk, practicality and cost
- Foreseeable – not required to guard against every possible risk
 - Not required to guard against freak accidents – meteors and falling pianos
 - “Not far fetched or fanciful”
 - “Anything is foreseeable if you are pessimistic enough”

Legislation

- Law made by the parliament – written down in a single document
- Tort Reform - Civil Liability Act, WCRA
- Workplace Health and Safety legislation
- However, still interpreted by Judges!
- Concerns:
 - Different judges interpret differently – people with inherent prejudices and beliefs
 - Lack of real world experience as to what is practical in the context of operating a business

WCRA - Duty

305B General principles

A person does not breach a duty to take precautions against a risk of injury to a worker unless—

- the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the position of the person would have taken the precautions.

In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—

- the probability that the injury would occur if care were not taken;
- the likely seriousness of the injury;
- the burden of taking precautions to avoid the risk of injury.

WCRA Duty – Part 2

305C Other principles

In a proceeding relating to liability for a breach of duty—

- the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and
- the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

WCRA Duty – Part 3 - Causation

305D General principles

A decision that a breach of duty caused particular injury comprises the following elements—

- the breach of duty was a necessary condition of the occurrence of the injury (*factual causation*);
- it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (*scope of liability*).

If it is relevant to deciding factual causation to decide what the worker who sustained an injury would have done if the person who was in breach of the duty had not been so in breach—

- the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
- any statement made by the worker after suffering the injury about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

Safety Legislation

The Work Health and Safety Act now establishes a safety obligation that parallels the common law duty

A person conducting a business or undertaking must **ensure**, so far as is **reasonably practicable**, the health and safety of—

- Workers engaged, or caused to be engaged by the person; and
- workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking.

Note this does not give rise to a civil duty – it is an issue of penalty.

Content of the Duty

It is the employer's control that gives rise to the duty of care:

- A safe place of work
- Safe plant and equipment
- A safe system of work
- Training, instruction and supervision

Safe Place of Work

A safe place of work:

- a) Is free from hazards as you can reasonably make it;
- b) Has safe access and egress;
- c) Has appropriate standards of conduct – free from bullying and harassment;
- d) Traffic management;
- e) Ergonomics
- f) Contaminants and health hazards

Beven v Brisbane Youth Service

Safe Plant and Equipment

Safe plant and equipment

- a) The right tool for the job.
- b) Meets relevant safety standards
- c) Adequately inspected and maintained
- d) Proper PPE
- e) Adequately guarded

Not an absolute duty, but a duty to undertake preventative maintenance – *Schonell v La Spina*

Safe System of Work

A safe system of work

- a) Identifies and assess the risks – consider repetitive work issues
- b) The right way to do the job.
- c) Is prescriptive – does not allow for discretion
- d) Carefully considered, documented
- e) Specific to the task – not generic
- f) Current – reviewed and updated
- g) Takes account of the possibility of operator error/inadvertence

Baig v AWX; Stitz v Manpower; Ataera v Thomas Borthwick & Sons

Training

Training:

- a) Proper system of induction
- b) Task specific training – appropriate to level of expertise
- c) Effective communication - assessment of competence
- d) Regular refresher
- e) Properly recorded
- f) Ensure it is properly understood

Not required to train experts? – *O'Connor v Commissioner for Railways*

Instruction and Supervision

McLean v Tedman – it is not enough to devise a safe system of work. It must be trained, supervised and enforced

- a) Job specific instructions
- b) Explicit warnings of hazards
- c) Need to report injuries, hazards and symptoms
- d) Clear reporting lines
- e) Auditing compliance – and enforcement
- f) Enforcement – consequences for non-compliance

Mears v Coles Myer

Adlington v Dominos; Karanfilov v Inghams; Karanfilov v MSS

Example – machine entrapment

Brand new machine - \$16M purchase and commissioned price

Full cage, interlock devices

Work instructions

Training records.

Machine started while worker inside the cage

What went wrong.

What is the outcome?

Why do Claims Fail

There is no doubt most common law claims succeed. Which claims fail and why?

Most claims do **not** fail because the employer discharged its duty.

Most claims fail because they fall at the edges of difficult judgement decisions about:

Whether the alleged event happened – *Bird v Blue Care*

Whether any injury was sustained at all – *Knott v Withcott*

Whether the injury was caused by work, or the employer's breach of duty – *Tat v Inghams*

Whether the injury was foreseeable – *Rudd v Starbucks*

They can also fail because of poor preparation by the Plaintiff's lawyers, or the Plaintiff presents poorly – *Robinson v Lorna Jane*

Discharging the Duty

Should an employer give up on discharging its duty?

No - If the employer discharged its duty, the real 'win' is that no injury is sustained and there is no claim to be made

Employers are in fact “winning” common law claims every day because they are preventing injuries.

Each day that people perform hazardous work and do not suffer injury is a common law claim avoided, or “won”.

Discharging the Duty

Cases where the employer discharges its duty also usually do not go to court.

Claimant's lawyers do not want to invest in losing battles.

1. Proven risk assessment processes
2. Proper incident investigation
3. Documented work procedures, and proven non-compliance by the worker
4. Documented training and instruction
5. Witness evidence of compliance and enforcement of systems

What Next

Discharging the duty requires continual vigilance and painstaking detail

Documented systems

Proper assessment of Risk

Considered solutions

Expert assistance and advice – WorkCover’s lawyers can provide proactive assistance in helping you manage your duty to your workers

But the wins are delivered every day – a safe place of work with healthy employees.

Questions?

Bruce.thomas@btlawyers.com.au

Phone: (07) 3211 2233
Email: manager@btlawyers.com.au
Website: www.btlawyers.com.au

BTLawyers 