

Insurance Brief

April 2003
Issue 14

VIVE LA DIFFERENCE - WHY WE ARE NOT YET PART OF AUSTRALIA

As we mark the anniversary of A.C.E.R., it is often noted how the Australian and New Zealand economies have grown closer together over the last 20 years. This merging has also resulted in a move to a closer alignment of our respective laws (e.g. consumer legislation such as the Fair Trading Act).

One area, however, where there has long been a marked difference between our legislation and that of the Australians has been in the field of tort liability.

Now, a combination of recent events has led to a major shake up in Australia on the liability front. This was brought about as a result of a combination of events, including:

- The collapse of HIH Insurance.
- The collapse of a leading medical indemnity insurer.
- A hardening worldwide market with huge premium increases.
- The reputation of Australia (and in particular New South Wales) as highly litigious.

All of the above combined to cause a lack of liability insurance cover.

In this Issue	
1	Vive la Difference - <i>Why we are not yet part of Australia</i>
2	Liability for the Acts of Employees

In turn, this meant that small businesses had to close, doctors withdrew their services from certain areas and volunteer organisations were no longer able to operate, all because they could not obtain insurance to carry on their business.

The Australian response was to pass two pieces of legislation. The first was the Civil Liability Act 2002 (NSW), ("Act 1") and the second, the Civil Liability Amendment (Personal Responsibility) Act ("Act 2").

Act 1 was passed in the face of strong opposition by plaintiff lawyers. Its purpose is to tighten controls on the level of damages paid out and also to impose strict requirements on lawyers and plaintiffs so as to discourage unmeritorious claims. The hope is that it will reduce levels of exposure for insurers, thereby encouraging capacity back into the market.

As an example, the maximum amount of damages that can now be awarded for non-economic loss is set at a statutory limit, which is presently A\$350,000. Moreover, awards for exemplary and aggravated damages in negligence cases are prohibited. And if a lawyer were to assist a plaintiff in bringing a frivolous claim (or defence) then that could either amount to professional misconduct and/or costs could be awarded personally against the lawyer involved.

Act 2 has also fundamentally changed the law of negligence.

It brought in a number of measures but the most significant were:

- To define the standard of care for professionals.
- To protect volunteers and volunteer rescue organisations from any liability for good faith acts.
- To protect good Samaritans from liability for good faith acts.
- Introducing a new rule for calculating limitation period for personal injury claims.
- Limiting the liability in tort of public authorities.



PAUL SMITH
PARTNER

It has also introduced proportionate liability (but not in relation to personal injury claims). That is, where two or more persons are jointly liable for a loss, they can now be held liable only to the extent of their actual responsibility rather than for the whole of the damages. This would apply even if the other party jointly liable is insolvent, wound up or has died.

No doubt this new legislation will be well tested in the Courts and it remains to be seen whether the "if in doubt, sue" attitude can be reined in. However, notwithstanding these significant changes, New Zealand still operates in a vastly different manner in this area. Not only are there the obvious differences in the ACC personal injury field, but there

are also marked differences in the general tort area.

In the past, decisions of the Australian Courts would be regularly referred to by the New Zealand Courts when considering

tort law/common law issues. Now that such cases will often be decided as a consequence of what these new Acts say (as opposed to ongoing development of the common law) there is likely to be a greater degree of caution in New

Zealand regarding the precedent value of such Australian judgments. It seems we can continue to celebrate our differences for a while longer yet.

Insurance

LIABILITY FOR THE ACTS OF EMPLOYEES – AN AUSTRALIAN ATTEMPT AT RECONCILING THE CASES?

State of New South Wales v Lepore; Rich v State of Queensland; Samin v State of Queensland
High Court of Australia 6/2/03

There have been a number of cases in a number of common law jurisdictions (notably Canada and the United Kingdom) which have addressed the issue of an employer's liability for the sexual abuse of its charges by its employees.

The above Australian cases related to sexual assaults committed by employee teachers on students. There have been similar cases in respect of other agencies.

Traditionally, the analysis has been to consider the vicarious liability of the employer. The law here holds an employer liable not only for the authorised acts of the employee but also the unauthorised acts if they are so connected with the authorised activity that they may not be considered to be separate acts.

This consideration of connection becomes all-important in these types of cases. In two Canadian cases, **Bazley** and **Jacobi**, the Supreme Court came to two different conclusions on the connection test applied to sexual assault cases. The different decisions were rationalised on the basis that in one the employer adopted a quasi-parental role whilst in the other it did not.

In the later United Kingdom House of Lords decision in **Lister**, a finding of vicarious liability was made in respect of the actions of a boarding school warden who sexually abused students residing in the school residence. It may well be seen as a quasi-parental role case when looking at it in the light of the Canadian decisions.

In the present Australian cases, the evidence was held to be insufficient to allow the Court to consider the "connection" test and thereby to determine vicarious liability. Instead, the appeals were considered in the light of a non-delegable duty of care.

A non-delegable duty is a strict personal duty owed by an employer which is not capable of delegation to its employees.

Here the High Court of Australia approved its 1982 decision in **Antrovigne** where a student's claim against the Commonwealth in respect of injury sustained as a result of the school's negligence while at school was successful under a non-delegable duty of care claim.

In the above cases the intentional infliction of abuse by employees went beyond the boundaries of the

non-delegable duty. It was not prepared to extend the duty to intentional criminal conduct. As such, the claimants' cases failed.



ROBERT COLMAN
PARTNER

A reconciliation of the various international authorities was not able to be attempted in this case because of the limited evidence available. What the Court did do was refuse to cast the employer as an absolute insurer under this non-delegable duty concept. Whether it would have felt so constrained if evidence as to the vicarious liability "connection" test had been available, one can only speculate.

Fortune Manning
66 Wyndham Street
Auckland
Phone 09 915 2401
Fax 09 915 2402

Geoff Turner
gjt@fmlaw.co.nz
DDI 09 915 2435

Rob Colman
rpc@fmlaw.co.nz
DDI 09 915 2417

Paul Smith
pms@fmlaw.co.nz
DDI 09 915 2415

Visit our website
www.fmlaw.co.nz