LexisNexis Butterworths

AUSTRALIAN civil liability

Volume 4 Number 1

Print Post Approved 255003/07024

Information contained in this newsletter is current as at April 2007

NSW Civil Liability Act: negligence and the intentional acts of others

Bill Madden SLATER GORDON and
Tina Cockburn QUEENSLAND UNIVERSITY OF TECHNOLOGY

contents

The operation of the 'intentional tort' exclusion contained in s 3B(1)(a) of the *Civil Liability Act 2002* (NSW) (CLA)[1] has now been considered by the NSW Court of Appeal on several occasions.[2]

Most recently, in *New South Wales v Bujdoso*,[3] the Court of Appeal has overturned the decision of the Supreme Court in *Bujdoso v NSW*,[4] which had the effect that s 3B(1)(a) of the CLA applied where a defendant was liable in negligence for another's intentional act. Concerns about the consequences of this decision prompted speedy legislative amendment.[5] However, given the findings on appeal, those legislative changes have proven unnecessary. As noted by Basten JA in the *Bujdoso* appeal, '(i)t is now clear that the exception only applies to remove from the operation of the [CLA] liability of a person who carries out the assault or other intentional act'.[6]

Intentional tort exclusion

Section 3B(1) excludes from the operation of the CLA seven different categories of case, mostly in respect of other statutory schemes. Prior to the recent amendment, s 3B(1)(a) relevantly excluded:

> (a) civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct—the whole Act except:
> (i) section 15B[7] and section 18(1)[8] (in its application to damages for any loss of the kind referred to in section 18(1)(c))[9], and
> (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death. [Endnotes added.]

Following amendment, s 3B(1)(a) now provides:

> (a) civil liability *of a person* in respect of an intentional act that is done *by the person* with intent to cause injury or death or that is sexual assault or other sexual misconduct committed *by the person* ... [Emphasis added.]

To understand why that change was made, it is necessary to review the Supreme Court decision.

AUSTRALIAN civil liability

Bujdoso v NSW — the Supreme Court decision

The NSW Supreme Court decision of Sully J in *Bujdoso v NSW*[10] arose from the filing of a summons seeking a declaration 'that, on the true construction of the [CLA], and in the events which have happened, Div 6 of Pt 2A thereof does not apply to the plaintiff or to his award of damages in District Court proceedings 6023/02'.

In 1990, many years before enactment of the CLA, Bujdoso was sentenced to a term of imprisonment for sexual assaults on a male person under the age of 18. The following year, while at Silverwater Correctional Centre, Bujdoso sustained serious injuries when two or more assailants wearing balaclavas forced the lock on his room, entered and assaulted him with iron bars.

In 1992, after his release from prison, Bujdoso commenced proceedings against the state of NSW claiming damages, alleging negligence for the state's alleged failure to take reasonable steps to protect him from the foreseeable risk that he would be the victim of an intentional act of violence.

The matter thereafter had a long history of judgments and appeals, ultimately coming before the High Court.[11] Having been returned to the NSW District Court for assessment of damages, an issue then arose as to Bujdoso's entitlement to retain the damages awarded to him given the offender damages provisions of the CLA.[12]

The first issue before the NSW Supreme Court was whether a proper construction of s 3B(1)(a) had the effect that the plaintiff's damages as assessed by McLoughlin DCJ were not caught at all by the amended CLA.[13]

Relevantly the plaintiff submitted that while, without doubt, his injuries were caused by the negligence of the defendant within the meaning of s 26B(1) of the CLA, the defendant's liability to the plaintiff was a civil liability '*in respect of* intentional acts done with intent to cause injury or death, within the meaning of s 3B(1)(a)'.[14]

Conversely, the defendant argued that although the assault on the plaintiff by a person or persons unknown was intentional, the civil liability (of the state of NSW) arose in respect of negligent acts or omissions on its part in failing properly to protect the plaintiff from the assault, not from intentional acts.[15]

Sully J considered that the determination of those competing arguments required construction of the section and in particular the words 'in respect of'.[16] In determining this issue, his Honour said:

> Is it a civil liability in respect of an intentional act done with intent to cause injury? That there was such an intentional act perpetrated upon the plaintiff while he was in the custody and under the complete practical control of the defendant, also, could not be sensibly disputed.
>
> Is there, then, the necessary nexus between the established civil liability and the demonstrated intentional act done with the prescribed intent? In my opinion there is.
>
> What made the defendant civilly liable in damages to the plaintiff was not the defendant's negligence and nothing more. It was that negligence coupled with the suffering by the plaintiff of damage consequential upon that negligence. That damage is not to be either defined or measured in some kind of conceptual vacuum. It is to be, and it can only be in fact, defined and measured by reference to the circumstances and the incidents of the relevant intentional act done with the prescribed intent. That suffices, in my opinion, to provide the nexus which the plaintiff must establish in order to succeed on the first issue.[17]

Absent a plain statutory provision to the contrary, Sully J could find no justification for shifting personal responsibility to victims of unprovoked, unexpected and vicious assaults, and concluded:

> As has been previously noted, the amending Act which inserted section 3B into the principal Act effected a major re-casting of the civil law of negligence, and did so upon the basis that the exercise was designed to re-balance the antecedent law by linking significant

> statutory caps and restrictions to a concept of personal responsibility. If there is one thing that cannot be laid at the door of this plaintiff it is that he had any personal responsibility for an unprovoked, unexpected and vicious assault. It can certainly be laid at the door of the defendant, and has been so laid by a unanimous Bench of the Court of Appeal, and subsequently by the High Court of Australia, that the defendant bears direct responsibility for the coming into existence of the opportunity for the carrying out of that assault. In such a state of affairs why, it might well be asked, should the blameless victim of the assault not be permitted to have his normal common law entitlement to just compensation, assessed without reference to restrictive legislation which could readily have enacted in simple language the limitation now proposed by the defendant, but which has not done so?[18]

This decision had considerable practical significance. As noted by the defendant in *Bujdoso v NSW*, the outcome implied that every prisoner who is assaulted is entitled, assuming liability,[19] to by-pass the CLA damages regime[20] and to recover from the state all traditional common law heads of damage,[21] contrary to the perceived legislative intention of the offender damages provisions.

Similarly, in cases involving the liability in negligence of hotels for failing to prevent assaults by patrons upon other patrons, following *Bujdoso v NSW,* it would have been possible to argue that such claims were also outside the provisions of the CLA. This approach can be contrasted with that taken in *Wagstaff v Haslam,*[22] an earlier case involving the liability of a hotel for assaults by patrons of the hotel upon another patron. There, the plaintiff did not seek to argue that s 3B(1)(a) operated to exclude the application of the provisions of the Act, 'doubtless because the action against the defendants is brought as an action in negligence'.[23] Given the outcome in *Bujdoso*, it would seem that this argument would then have been available.[24]

However, in respect of the other category of case excluded in s 3B(1)(a), sexual assault or other sexual misconduct, for example cases involving sexual assault of a pupil by a school teacher,[25] the impact of *Bujdoso v NSW* may have been less clear as the exclusion refers to 'civil liability … *that is* sexual assault or other sexual misconduct [emphasis added]'.

New South Wales v Bujdoso — the appeal

The state of NSW appealed the Supreme Court decision of Sully J, although by the time of the hearing, the wording of s 3B(1)(a) had been the subject of legislative amendment as set out above.

> … the outcome implied that every prisoner who is assaulted is entitled, assuming liability, to by-pass the CLA damages regime and to recover from the state all traditional common law heads of damage …

Relevantly to this article, the Court of Appeal unanimously took a different view to that of Sully J.[26] It held that the construction of the phrase 'in respect of' in s 3B(1)(a) prior to the *Civil Liability Amendment Act 2006* should be understood to refer to the liability of the person who carried out the intentional act and not to the liability of a person which derives from his or her own negligent conduct, where the risk against which precautions must be taken is the intentional violent act of another.

The primary judgment was that of Basten JA, with whom Hodgson JA agreed substantially[27] and Ipp JA agreed.[28]

Basten JA noted that the primary judge dealt with s 3B(1)(a) by adopting a literal construction giving a broad effect to the exception and thus restricting the operative provisions of the Act.[29] That approach invokes the principle of construction that it is 'improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.[30]

However, he went on to note that 'the strength of this principle of presumption is diminishing',[31] citing the following statement of McHugh J in *Malika Holdings Pty Ltd v Stretton*:[32]

> Speaking generally, a much surer guide to the legislative intention in areas of legislation dealing with ordinary rights or the general system of law is to construe the language of the enactment in its natural and ordinary meaning, having regard to its context — which will include other provisions of the enactment, its history and the state of the law — as well as the purpose which the enactment seeks to achieve.

His Honour then concluded that this approach was 'in part, required by the injunction in s 33 of the *Interpretation Act 1987* (NSW) to adopt, where alternative constructions are available, that which would "promote the purpose or object underlying the Act"'.[33] Applying that principle to the *Civil Liability Act* is not easy as it 'reveals a number of purposes, most of which seek to alter the general law and, to that end, vary the rights and liabilities of affected individuals. But that occurs in different ways, and in some respects to an extent which is largely arbitrary'.[34]

Having considered the alternative constructions, Basten JA concluded:

> Giving full weight to all the matters referred to above and relied on by his Honour, the construction of the phrase 'in respect of' in s 3B(1)(a) (prior to the 2006 Amendment Act) should have been understood to refer to the liability of the person who did the intentional act with the relevant intent and not to a person whose liability

derives from his or her own negligent conduct, where the risk against which precautions must be taken is the intentional violent act of another.[35]

In light of the conclusion reached by the Court of Appeal, it seems that the *Civil Liability Amendment Act 2006* was unnecessary, although, as Basten JA commented, 'it gives effect with far greater clarity than had previously been the case to the view set out above'.[36]

Conclusion

In relation to the construction of the intentional torts exclusion contained in s 3B(1)(a) of the CLA, the following can now be said:

- the exclusion is not limited to criminal conduct;[37]
- there has been judicial reluctance to impose a threshold level of impairment, such that a minor injury will suffice;[38]
- the injury intended need not be the specific injury that was suffered by the plaintiff;[39]
- injury is to be given its ordinary meaning and is not limited to bodily injury, such that it may include deprivation of freedom, restraining mobility with force, humiliation, damage to reputation, emotional trauma and apprehension of physical violence;[40]
- an intentional act is a voluntary act, in the sense that the defendant meant to do it;
- the relevant intentional act need not be directed towards the plaintiff;[41]
- where a defendant is liable in negligence for another's intentional act, s 3B(1)(a) will not apply;[42] and
- recklessness may be sufficient to constitute an intentional act.[43] ●

Bill Madden,
National Practice Group Leader (Medical Negligence),
Slater & Gordon Lawyers,
<*wmadden@slatergordon.com.au*>; *and*

Tina Cockburn,
Senior Lecturer,
Faculty of Law,
Queensland University of Technology,
<*t.cockburn@qut.edu.au*>.

Endnotes

1. Intentional torts are excluded from the operation of civil liability legislation to various degrees across Australia. There are three main legislative approaches. A similar legislative approach to s 3B(1)(a) of the *Civil Liability Act 2002 (*NSW) has been adopted in Tasmania, Victoria and WA: *Civil Liability Act 2002* (Tas), s 3B(1)(a); *Wrongs Act 1958* (Vic), s 28C(2)(a) and s 28LC(2)(a); *Civil Liability Act 2002* (WA), s 3B(1). In SA the provisions which limit damages apply to 'accidents caused wholly or in part by negligence or some other unintentional tort': *Civil Liability Act 1936* (SA), s 51(a)(ii). In Queensland, unless a narrow interpretation is adopted as to the meaning of the word 'claim', the provisions may apply to intentional torts as the Act applies 'to any civil claim for damages for harm' and intentional torts are not expressly excluded: *Civil Liability Act 2003* (Qld), ss 4 and 5; see also *Civil Law (Wrongs Act) 2002* (ACT), s 93; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 4(1).

2. *New South Wales v Ibbett* (2005) 65 NSWLR 168; *Drinkwater v Howarth* [2006] NSWCA 222; BC200606119 and *Wagstaff v Haslam* [2007] NSWCA 28; BC200700932.

3. [2007] NSWCA 44; BC200701466.

4. [2006] NSWSC 896; BC200606968.

5. See *Civil Liability Amendment Act 2006* (NSW) which relevantly amended CLA, ss 3B(1)(a) and 26A(1).

6. *New South Wales v Bujdoso* [2007] NSWCA 44; BC200701466 at [54] (Basten JA).

7. Damages for loss of capacity to provide domestic services, inserted to partially reinstate the type of damages recognised in *Sullivan v Gordon* (1999) 47 NSWLR 319 but removed in NSW by *CSR Ltd v Eddy* (2005) 222 ALR 1; [2005] HCA 64; BC200507889.

8. Interest on damages.

9. Loss of a claimant's capacity to provide gratuitous domestic services to the claimant's dependants (as provided by s 15B).

10. [2006] NSWSC 896; BC200606968.

11. Cooper J in the District Court gave judgment for the defendant. The Court of Appeal declared that the defendant had breached the duty of care that it owed the plaintiff and remitted the matter to the District Court for trial as to damages. This decision has been reported: *Bujdoso v NSW* (2004) 151 A Crim R 235. The High Court of Australia in *New South Wales v Bujdoso* (2005) 222 ALR 663 granted special leave to appeal against the decision of the Court of Appeal but ultimately unanimously dismissed the defendant's appeal.

12. *Civil Liability Act 2002* (NSW), ss 26K–26W.

13. [2006] NSWSC 896; BC200606968 at [22].

14. At [32].

15. At [33].

16. The court made reference to guidance in the joint judgment of Deane, Dawson and Toohey JJ in *Workers' Compensation Board of Queensland v Technical Products Proprietary Ltd* (1988) 165 CLR 642 at 653, 654, cited with approval in the joint judgment of Gaudron AC-J, McHugh, Gummow and Callinan JJ in *Commissioner of Taxation of the Commonwealth of Australia v Scully* (2000) 201 CLR 148 at 171.

17. [2006] NSWSC 896, BC200606968 at [38]–[40].

18. At [47].

19. In *New South Wales v Bujdoso* (2005) 222 ALR 663 at [32] the High Court noted the absence of a dispute that a duty was owed. In *New South Wales v Napier* [2002] NSWCA 402; BC200207795 at [75], Mason P had said: 'The control vested in a prison authority is the basis of a special relationship which extends to a duty to take reasonable care to prevent harm stemming from the unlawful activities of third parties.'

20. It would not only be the damages regime that would be by-passed, but also the majority of the provisions concerning duty, causation and the like.

21. A different result would seem likely under the comparable Victorian provisions. The *Wrongs Act 1958* (Vic) at s 28C(2)(a) says: 'an award where the fault concerned is an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct'. The inclusion of the words 'where the fault concerned' appears significant.

22. [2006] NSWSC 294; BC200602506 (21 April 2006). On appeal see *Wagstaff v Haslam* [2007] NSWCA 28; BC200700932 at [75].

23. At [76].

24. Alternatively, the claim might have been brought as an assault claim against the assailants, so that the intentional tort exclusion applied directly, with an allegation of vicarious liability against the employer as in *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107; BC200500840.

25. *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126 (6 February 2003) (Gleeson CJ) at [2]: 'A school authority may have been negligent in employing a particular person, or in failing to make adequate arrangements for supervision of staff, or in failing to respond appropriately to complaints of previous misconduct, or in some other respect that can be identified as a cause of the harm to the pupil. The relationship between school authority and pupil is one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such behaviour is criminal. Breach of that duty, and consequent harm, will result in liability for damages for negligence'. Contrast *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; 176 ALR 411; [2000] HCA 61; BC200007093 (23 November 2000).

26. *New South Wales v Bujdoso* [2007] NSWCA 44; BC200701466 judgment delivered 13 March 2007 (Hodgson JA, Ipp JA and Basten JA).

27. At [3].

28. At [22].

29. At [56].

30. *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; BC0800025 (O'Connor J), discussed [2007] NSWCA 44; BC200701466 at [56].

31. At [56].

32. (2001) 204 CLR 290; 178 ALR 218; [2001] HCA 14; BC200100870 at [29].

33. [2007] NSWCA 44; BC200701466 at [56].

34. At [57].

35. At [66].

36. At [69].

37. *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107; BC200500840.

38. As above.

39. *Fuz v Carter* [2006] NSWSC 771; BC200607168.

40. *Houda v NSW* [2005] NSWSC 1053; BC200507966; *New South Wales v Ibbett* (2005) 65 NSWLR 168; [2005] NSWCA 445; BC200510884.

41. *Drinkwater v Howath* [2006] NSWCA 222; BC200606119.

42. *New South Wales v Bujdoso* [2007] NSWCA 44; BC200701466.

43. For a more detailed analysis of these cases, see Madden B and Cockburn T 'NSW Civil Liability Act and Intentional torts: six cases' (2006) 3 (7) & (8) *CL* 58.

casenote

When is an accident caused solely by 'violent visible and external means'?

MBF LIFE LTD v MARCHANT

[2006] NSWCA 363; BC200610585

In this recent decision of the NSW Court of Appeal, it was held that a death brought on by chemotherapy was an 'accident' according to an accidental death policy held by the deceased's wife.

Mr Marchant was diagnosed with non-Hodgkin's lymphoma and underwent chemotherapy between 1998 and 1999. He was re-admitted to hospital on 2 August 2002 at which time there was no history of allergy noted by the hospital. He underwent a second round of chemotherapy, which was administered intravenously.

On the day following the treatment, Mr Marchant began experiencing breathing difficulties, leading to a diagnosis of pneumonitis. By the next day, he had developed haemoptytis and by 18 August 2000 he had developed neutropenic sepsis. He died later that evening. The death certificate, recorded the cause of death as both the result of the hypersensitivity to the chemotherapy as well as chronic airflow limitation secondary to smoking.

Mr and Mrs Marchant held an accidental death insurance policy with MBF Life Ltd. MBF refused to pay an insurance claim made by Mrs Marchant on the basis that Mr Marchant's death was outside the terms of the policy in that the circumstances of his death did not constitute an 'accident' within the terms of the policy.

'Accident' for the purposes of the policy was defined as:

> … an event which occurs while your cover is in force; and where the life insured suffers physical injuries caused solely by violent, visible and external means.

MBF disputed whether the circumstances of Mr Marchant's death were an 'event' and whether the cause was 'solely of violent visible and external means.' Mrs Marchant was successful at first instance and MBF appealed to the NSW Court of Appeal. That appeal was unanimously dismissed.

What was the 'event' giving rise to the injury?

MBF submitted that the relevant event was the intentional administration of the chemotherapy through the insertion of a cannula. It was further submitted that this event did not give rise to any injury other than the breaking of the skin.

This approach was rejected by the court. It was held that the focus on the word 'event' in isolation from the words of the policy is an erroneous approach to the construction of the policy. The court found that the appropriate response was to identify a circumstance or a happening that caused the life insured to suffer physical injury. That was the administration of the chemotherapy. However, the court went on to state that it would be artificial to isolate the administration of the chemotherapy from the manner in which it was administered. The 'event' where Mr Marchant suffered physical injury, was held to be in the 'composition of circumstances whereby the deceased was given a dose of chemotherapy and thereby suffered injury.'

Was the injury caused solely through violent, visible and external means?

MBF submitted that as the injuries were caused by the administration of the chemotherapy agent, the injury was wholly internal and that the administration of the chemotherapy agents themselves did not give rise to any physical injuries but that it was a later reaction of the body to those agents which gave rise to the physical injuries.

Again, the court did not agree with this overly mechanical approach and held that the word *'means'* had to be approached in a commonsense way. The court quoted the decision of *National and General Insurance Co Ltd v Chick* [1994] 2 NSWLR 86 with approval, where Samuels JA held that:

> … it seems to me that the cause of an injury does not differ from the

It was held that the focus on the word 'event' in isolation from the words of the policy is an erroneous approach to the construction of the policy.

> means by which it was caused, since the word 'means' may be defined as a way to an end or that which is concerned in bringing about a result; or, in other words, as a cause.

In respect of the terms 'violent', the court noted that the history of the phrase is such that the term simply means 'the contrary of without any violence at all'. The court held that the term merely expresses that the injuries are due to other than purely natural causes such as bodily weakness or disease. It was also noted that drowning has been held to be a violent means as has death by poison. Given that Mr Marchant's injury was not as the result of purely natural causes, it satisfied the definition of 'violent' in the policy.

As such, the court found that the injuries were caused by visible external means (the administration of chemotherapy) and that such means were violent in the way in which that phrase had been interpreted by the authorities.

Was there a sole cause?

A further difficulty encountered by Mrs Marchant was the listing of two causes on the death certificate. MBF submitted that in circumstances where the death was said to be caused in part by chronic airflow limitation secondary to smoking, it did not fall within the policy conditions.

The court identified that pursuant to the terms of the policy, it was not the death that needed to be solely caused by the violent visible external means but the injuries constituting an accident.

The policy provided that:

> We will pay a Death Benefit if the life insured:
> - is involved in an accident; and
> - as a direct result, dies immediately within the next 90 days.

One cause of death listed on the death certificate was certainly a direct result of the accident, which was caused solely by external visible and violent means. The court went on to find that as the other cause of death listed on the death certificate was not caused by the accident, it was therefore irrelevant for the purposes of determining cover.

As such, the policy responded and Mrs Marchant was successful in the appeal.

What should insurers take from the decision?

The decision reinforces the well-settled principles that govern the construction of insurance policies, that is, that such policies should be constructed according to the language used, the commercial circumstances addressed by the policy and the objects of the policy.

The decision is a clear example of a court interpreting the policy liberally in favour of an assured so far as the ordinary and natural meaning of words used permit this to be done. Given those principles, insurers should be wary of using an overly technical analysis of policy terms and conditions to refuse cover. ●

Ed Zappert,
Senior Associate, CLS Lawyers,
<ezappert@clslawyers.com.au>.

AUSTRALIAN civil liability

Intentional torts in NSW — no need to get personal

Samara Fitzpatrick DEACONS

The intentional tort exclusion under s 3B(1)(a) of the *Civil Liability Act 2002* (NSW) (the Act) has been considered in several cases. The decisions have indicated that intended injuries need not be 'personal injuries' for the exclusion to apply.

In *Houda v New South Wales* (2005) Aust Torts Reports 81-816; [2005] NSWSC 1053; BC200507966 (25 October 2005), the plaintiff, a solicitor, was waiting outside a local court for two clients when he became involved in an altercation with a police officer. The plaintiff was arrested, detained and charged with assaulting the police officer. The charge was eventually withdrawn.

The Supreme Court found that the police officer could not justify the arrest of the plaintiff and that the torts of malicious prosecution, false imprisonment, wrongful arrest and assault by the police officer had been established.

The plaintiff argued that the police officer's conduct was an intentional act, done with intent to cause injury, such that the provisions of the Act did not apply to the claim.

While the court was satisfied that the police officer had intentionally deprived the plaintiff of his freedom, restrained his mobility with force, caused him humiliation, damaged his reputation and caused him the upset associated with a criminal charge, it had to be considered whether these came under the meaning of 'injury'.

The court found that the word 'injury' in the subsection was not limited to bodily injury and extended to all forms of injury, including injury to reputation, as well as the emotional upset and distress suffered by the plaintiff.

It was noted that the purpose of the Act was to restrict damages which courts could award and had the legislature intended to restrict the damages which flow from the torts pleaded and injuries sustained in the present case, it could have expressly said so.

In *New South Wales v Ibbett* (2005) 65 NSWLR 168; [2005] NSWCA 445; BC200510884 (13 December 2005), the respondent had successfully brought an action in the District Court for assault against a police officer and was awarded general and exemplary damages.

The assault had occurred when the police officer chased the respondent's son into the garage of their home. The automatic garage door had closed behind the police officer, who pointed his gun at the respondent and demanded that the door be retracted so that his colleague could also enter. The District Court judge had found that the respondent's damage arose from the anxiety and distress the incident had caused.

Before the Court of Appeal, the appellant argued that the District Court judge had erred in awarding exemplary damages, as they were precluded under s 21 of the Act. It was argued that the intentional tort exclusion did not apply to the circumstances in question, since the respondent's anxiety and distress did not amount to an 'injury' as defined under s 11 of the Act.

The Court of Appeal found that the definition of an 'injury' as a 'personal injury' under s 11 did not apply to s 3B(1)(a), as the two sections fall under distinctively different Parts of the Act, each with their own discrete definitions.

Accordingly, the Court of Appeal found that an award of exemplary damages was not precluded. The amount awarded by the District Court was in fact increased.

Special leave to appeal to the High Court on the issues of damages for trespass and vicarious liability, both unrelated to the operation of the Act, was allowed, but the appeal was dismissed. ●

Samara Fitzpatrick, Lawyer, Deacons, <*Samara.Fitzpatrick@deacons.com.au*>.

AUSTRALIAN civil liability

Indemnification of directors and officers — amendments to the Trade Practices Act 1974

Rehana Box
BLAKE DAWSON WALDRON

The *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth) came into force on 1 January 2007. The Act implemented a number of important reforms to the *Trade Practices Act 1974* (Cth), including imposing a restriction on the ability of a body corporate to indemnify its officers against a liability for breach of the restrictive trade practices provisions in Pt IV of the *Trade Practices Act*.

Amendments to the Trade Practices Act

The proposed amendments to the *Trade Practices Act* are now in force.

From 1 January 2007 the *Trade Practices Act* imposes restrictions on the ability of a company to indemnify its officers against a liability to pay a pecuniary penalty for a contravention of the restrictive trade practices provisions in Pt IV of the Act.

Section 77A(1) provides:

> A body corporate (the *first body*), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed company) against any of the following liabilities incurred as an officer of the first body:
>
> (a) a civil liability [defined to mean 'a liability to pay a pecuniary penalty under s 76 for a contravention of Part IV'];
>
> (b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

The word 'officer' has the same meaning as in the *Corporations Act 2001* (Cth).

An indemnity is void to the extent that it contravenes s 77A. The penalty for breach of s 77A is 25 penalty units, which is currently $2750. (One penalty unit is currently equal to a fine of $110: s 4AA of the *Crimes Act 1914* (Cth).)

This is a criminal penalty.

The restriction imposed by s 77A applies even in respect of conduct in good faith. The section imposes an outright prohibition on corporations indemnifying officers, regardless of the absence or presence of good faith. The absence of a carve out for indemnification where the conduct is in good faith may be of concern for many officers, due to the potential increase in personal exposure that it creates.

The restriction on indemnification in s 77A only applies to a liability incurred by a person 'as an officer' of a body corporate. Accordingly, a body corporate is not prohibited from indemnifying a person who is not an officer for a liability to pay a pecuniary penalty for a contravention of the restrictive trade practices provisions in Pt IV of the *Trade Practices Act*.

The maximum penalty for a contravention of Pt IV of the *Trade Practices Act* is currently $500,000 for an individual. That said, s 85(6) of the *Trade Practices Act* provides some comfort by providing discretion for a court to waive a pecuniary penalty or damages where a person has been found to have acted honestly, and in the circumstances, ought to be excused.

The Explanatory Memorandum suggests that a company could legally loan funds to an officer to defend proceedings, subject to those moneys being repayable if the officer is found to have contravened Pt IV of the *Trade Practices Act*.

Extraterritorial application

Section 5 of the *Trade Practices Act* deals with the extraterritorial application of the Act, and relevantly provides that Pt IV, Pt IVA, Pt V (other than Div 1AA), Pt VB and Pt VC extend to conduct engaged in outside of Australia by bodies corporate (including foreign companies) carrying on business within Australia.

Section 77A is located in Pt VI of the *Trade Practices Act*, which is not referred to in s 5, and may therefore not have extraterritorial application. I question whether this was intended by the legislature.

Required action

Companies should review existing indemnities to ensure that they do not breach s 77A of the *Trade Practices Act*. The best way to ensure compliance is to only grant indemnities to the extent allowable at law.

Directors and officers insurance policies should also be reviewed to ensure coverage is appropriate. Given the limitations on indemnification, rights to cover under insurance are of increased importance to directors and officers. In particular, policies should be reviewed to ascertain whether the policy covers liabilities arising out of breaches of the *Trade Practices Act* and civil penalties.

Where relevant, companies should seek advice on whether indemnities granted extraterritorially are subject to the restrictions imposed by s 77A of the *Trade Practices Act*. ●

Rehana Box,
Partner,
Blake Dawson Waldron, Sydney,
<*rehana.box@bdw.com*>.

AUSTRALIAN civil liability

locating THE LAW

Consent to cosmeticmedical procedures — a role for irrationality?

Bill Madden
SLATER GORDON

The Review of the Law of Negligence 2002,[1] suggested a different approach to treatment than to consent for medical procedures — a dichotomy between treatment and information:[2]

> An important implication of the patient's right to give or withhold consent is that the opinions of medical practitioners about what information ought to be given to patients should not set the standard of care in this regard. The giving of information on which to base consent is not a matter that is appropriately treated as being one of medical expertise. Rather, it involves wider issues about the relationship between medical practitioners and patients and the right of individuals to decide their own fate. The court is the ultimate arbiter of the standard of care in regard to the giving of information by medical practitioners.

There was little novelty in the approach, as is apparent from the later decision of the NSW Court of Appeal in *Ambulance Service of NSW v Worley* [2006] NSWCA 102; BC200602905:

> Those provisions maintain the dichotomy suggested in Rogers[3] between a breach of duty to give a warning or other information, and other forms of professional negligence: the Bolam principle (in its statutory form) applies only to the latter.[4]

The dichotomy approach is now reflected in the civil liability legislation, such as the *Civil Liability Act 2002* (NSW) at s 5P which provides:

> This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

However, there remains the potential for cross-over between treatment and the giving of information in circumstances which in broad terms might be described as 'suitable candidate' or 'refusal to treat' cases. A number of examples may be given — for example, is a particular patient a suitable candidate for laparoscopy or is a laparotomy warranted? Perhaps of greater difficulty is the suitability of potential patients for purely elective procedures, such as cosmetic surgery.

An unusual matter of that type was highlighted recently, not in a civil claim, but before the Health Practitioners Tribunal (Queensland) (HPT), in a complaint brought by the Queensland Medical Board (QMB) against a plastic surgeon, Dr Peter Haertsch.[5]

Dr Haertsch was approached by a 31 year-old woman, following a breakdown of her relationship and the death of a close relative. She requested a bilateral reduction mammaplasty or, according to the surgeon, a bilateral mastectomy with nipple removal. He refused the nipple removal but performed the mastectomy, without first referring the woman for psychiatric counselling or imposing a 'cooling-off period' prior to the surgery.[6] Before the HPT, the surgeon pleaded guilty to unsatisfactory professional conduct.

In the context of such relatively extreme cosmetic surgery requests, including for example gender reassignmen,[7] the failure to provide information or warnings may not be

the central issue in a later dispute. Rather, there arises a prior gateway or threshold issue, that of acceptance of a person for surgery at all, forming part of the single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment[8] — or more accurately, the potential refusal to provide treatment.

In those circumstances, which may be seen as a somewhat paternalistic[9] protection of the patient from themselves,[10] the provisions such as s 5P of the *Civil Liability Act* are not drafted so as to apply. Rather, it becomes necessary to turn to provisions such as s 5O(1) of the *Civil Liability Act* where, either as a standard of care or as a defence,[11] evidence of competent professional practice widely accepted in Australia by peer professionals will reassume its importance.

With no underlying clinical need for surgery, and the somewhat entrepreneurial nature of cosmetic surgery, there is arguably a greater degree of inherent tension between the wish of a surgeon to sell his or her services, and the more rigorous patient selection required to protect the patient seeking such procedures from misconceived notions as to what may be to their benefit. Evidence of competent professional practice widely accepted in Australia by peer professionals may not paint the whole picture[12] if it transpires that peer plastic or cosmetic surgeons do not customarily apply psychiatric screening and/or cooling off periods.

It is in this context that a role may emerge for argument as to breach of fiduciary duty[13] and failing that for provisions such as s 50(2) of the *Civil Liability Act*, whereby peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational. ●

Bill Madden,
Slater & Gordon Lawyers,
National Practice Group Leader,
Medical Negligence;
<*wmadden@slatergordon.com.au*>

Endnotes

1. See <http://revofneg.treasury.gov.au/content/review2.asp>.
2. Paragraph 3.1.
3. *Rogers v Whitaker* (1992) 175 CLR 479: 'The duty of a medical practitioner to exercise reasonable care and skill in the provision of professional advice and treatment is a single comprehensive duty. However, the factors according to which a court determines whether a medical practitioner is in breach of the requisite standard of care will vary according to whether it is a case involving diagnosis, treatment or the provision of information or advice' (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).
4. At [39].
5. *Medical Board of Queensland v Peter Haertsch* [2007] QHPT 001.
6. The specific grounds for disciplinary action were that there should have been a further consultation, that sufficient time should have elapsed between consultation and procedure, or that the complainant should have received some form of counselling from a psychologist or psychiatrist.
7. See (with co-incidental involvement of the same medical practitioner) *Bergman v Haertsch* [2000] NSWSC 528; BC200003498 at [16] where Abadee J recorded: 'The surgery when ultimately performed (with full understanding of the risks) followed as I have said years of consideration, investigation and enquiry. The plaintiff's decision was not hasty but was in my view, the subject of long consideration and mature reflection.' By way of contrast see [21] quoting from the consent document: 'In preparation for this surgery you have seen two psychiatrists who agree that it is reasonable for you to pursue this surgery.'
8. *Rogers v Whitaker* (1992) 175 CLR 479 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).
9. Nonetheless recognised as an ethical duty: 'You must not abuse your patient's trust. You must not, for example … give patients, or recommend to them, an investigation or treatment which you know is not in their best interests'. Clause 2.8, Code of Professional Conduct July 2005 made under s 99A of the *Medical Practice Act 1992* (NSW).
10. But distinguishable from the classic 'incompetent' patient. See, generally, *Marion*'s case (1992) 175 CLR 257; [1992] HCA 15.
11. *Halvorsen v Dobler* [2006] NSWSC 1307 at [182].
12. Though as I have argued elsewhere, the inclusion of the word 'competent' may assist: 'Competence and irrationality — Locating the Law' (2006) 3(5) & (6) *CL*.
13. See the discussion of *Breen v Williams* (1996) 186 CLR 71 in the broader article Faunce & Bolsin 'Fiduciary disclosure of medical mistakes: The duty to promptly notify patients of adverse health care events' (2005) 12 *JLM* 478.

LexisNexis Butterworths

AUSTRALIAN civil liability

LEGISLATION update

NSW

Civil Liability Act 2002

Crimes and Courts Legislation Amendment Act 2006 No 107

The Crimes and Courts Legislation Amendment Bill 2006 (noted in (2006) 3 (7) & (8) *CL* — please see this issue for text regarding amendments to the Act) is now an Act, amending the *Civil Liability Act 2002*.

Assent and commencement details follow [Table 1].

QLD

Civil Liability Act 2003

Criminal Code and Civil Liability Amendment Act 2007 No 14

Commencement details in Table 2 below.

The *Criminal Code and Civil Liability Amendment Act 2007* amends the *Civil Liability Act 2003* to exclude the application of the Act to all work injuries for which compensation is payable under Queensland's workers compensation legislation, apart from recess and journey claims, regardless of whether the injury is caused by an employer or a third party.

Table 1

Sch 1 (cl 1.9) (items (5) to (8)): 23/2/2007 (s 2(2))	GG 33 23/02/2007 p 947	29/11/2006	GG 175 08/12/2006 p 10385
Sch 1(cl 1.11) (items (20) and (21)): NYP (s 2(2))		29/11/2006	GG 175 08/12/2006 p 10385
Sch 1(cl 1.12): NYP (s 2(2))		29/11/2006	GG 175 08/12/2006 p 10385
Sch 1(cl 1.15) (items (1) and (2) and (13)): 02/02/2007	GG 24 02/02/2007 p 588	29/11/2006	GG 175 08/12/2006 p 10385
Remainder: 29/11/2006 (s 2(1))		29/11/2006	GG 175 08/12/2006 p 10385

Table 2

Ss 1 and 2: 20/03/2007 [Assent]	20/03/2007
PT 3 [is taken to have commenced]: 06/11/2006 (s 2)	20/03/2007
Remainder: 20/03/2007	20/03/2007

The *Civil Liability Act 2003* was introduced as part of the government's broader personal injury law reform agenda with the aim of placing downward pressure on insurance premiums. The *Civil Liability Act 2003* caps general damages at $250,000 and places restrictions on the recovery of some special damages, notably a cap on compensation for lost income at three times average weekly earnings, limits on the calculation of superannuation and a threshold before compensation for gratuitous services can be recovered. Section 5 of the *Civil Liability Act 2003* was inserted to exclude work related injuries from the application of the Act.

The amendment to the *Civil Liability Act 2003* aims to redress the effect of the Queensland Court of Appeal decision in *Newberry v Suncorp Metway Insurance Limited* [2006] QCA 48; BC200600943 (*Newberry*), which was handed down on 3 March 2006. In *Newberry*, although the claimant was injured in a motor vehicle accident while at work, the damages were assessed under the *Civil Liability Act 2003* because his claim was against a third party (the driver of the other vehicle) and his employment was not a material ingredient to the claim against the third party.

The intention of the amendment is to protect workers' rights by providing that a common law claim for damages by a worker in factual situations such as those in *Newberry*, will be assessed at common law, rather than under the *Civil Liability Act 2003*. The amendment will reinstate the Government's stated intention regarding the protection of worker's rights under the *Civil Liability Act 2003*. *First and Second Read 7 February 2007*. <*www.legislation.qld.gov.au*>. ●

PUBLISHING EDITOR: Virginia Ginnane MANAGING EDITOR: Bruce Mills PRODUCTION: Christian Harimanow
SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au darren.smith@lexisnexis.com.au

ISSN 1449-6127 Print Post Approved PP 255003/07024 Cite as (2007) 4(1) *CL*