Carter Newell LAWYERS

CN | Insurance

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By Rebecca Stevens, Partner and
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Labour Hire Claims - Is *TNT v Christie* still the law?

Traditionally, apportionment of liability between an employee and the beneficiary of that employee's services pursuant to a labour hire agreement has been governed by the principles outlined by the New South Wales Court of Appeal in *TNT v Christie*.[1]

However, since that 2003 decision, there have been a number of instances where the Courts have considered the individual facts of a case to depart from that view.

In this newsletter, we consider a few of those cases and potential arguments which may be raised on behalf of a labour hirer/host employer to defer as much liability as possible onto the employer.

The traditional position – 75/25% apportionment

In the case of *TNT v Christie*, the Court of Appeal outlined several key principles to guide defendants as to the appropriate culpability of each party to a workplace injury claim involving a labour hire scenario.

The plaintiff, who was employed by Manpower Services and worked for a brewery operated by TNT Australia, was injured while using a pallet jack which malfunctioned and backed over his foot.

The court determined that a non-delegable duty of care is to be imposed on categories of persons regardless of personal fault on their part giving rise to the plaintiff's injury, as long as the plaintiff proves that damage was caused by lack of reasonable care on the part of someone within the scope of the relevant duty of care.

TNT was found to be in a position analogous to that of the plaintiff's employer which gave rise to a non-delegable duty of care upon it.

The question of Manpower Services' culpability was addressed on the basis that, as the plaintiff's employer, it was unable to abdicate its non-delegable duty simply because its employees are sent to work for a client. Manpower was found at trial to have breached its duty by failing to adequately instruct and provide proper assistance to the plaintiff and failed to properly inspect, maintain and provide appropriate equipment for the plaintiff to undertake his work. On appeal, the Court of Appeal agreed, finding that Manpower remained responsible for the proper performance of the duty of care owed to the employee by the delegate, TNT.

However, the greater degree of culpability was apportioned to TNT on the basis that the plaintiff had worked alongside four permanent TNT employees and was treated in the same capacity for several months and it directed the plaintiff's duties and system of work. The trial judge found that TNT should have taken steps to acquire a system of work which would have protected the plaintiff from the risk of injury which eventuated.

Liability was apportioned on the basis that the employer bore 25% and the remaining 75% of the claim was attributed to TNT. This position was upheld on appeal, with the Court of Appeal finding that there was a want of care in the maintenance of the plant which employees were directed to use at the workplace which constituted a breach on the part of each defendant.

Employer found greater than 25% liable

In 2010, the Queensland Supreme Court considered the case of *Tuan Van Duong v Versacold Logistics Limited & Ors*.[2] In that case, Versacold, the host employer, had received the plaintiff's services through a labour hire arrangement with APS. In a similar factual scenario to that of *TNT v Christie*, this plaintiff was using a ride-on pallet jack at his host employer's premises which was supplied to the host employer by a third party when he suffered injury.

The plaintiff alleged that the steering mechanism of the pallet jack jerked without warning causing him to lose his balance and fracture his right arm. It was alleged this arose from a defect in the pallet jack or wear and tear or its inherent nature, or from its coming into contact with an object on the floor.

Contrary to the position of the defendants, the court found that the jerking of the handle was not due to the plaintiff's use of the pallet jack or the result of a deficiency in the machine. The court then turned to consider whether the incident occurred due to a collision with debris on the floor of the premises.

[1] *TNT v Christie & Ors* [2003] NSWCA 47.

[2] *Tuan Van Duong v Versacold Logistics Limited & Ors* [2010] QSC 466.

Evidence was given by Versacold's work place health and safety officer that she "got down on her hands and knees" to check the floor after the incident and found no debris. Further, expert engineering evidence suggested that an alternative scenario that the plaintiff deliberately made a severe turn of the handles was a more likely explanation than the pallet jack running over a piece of wood.

Despite this, the trial judge accepted the plaintiff's evidence of past experiences when he had been operating the pallet jack and its response when he had run up against a stray fragment of wood on the floor.

In determining the apportionment of liability between the defendants, the court was critical of the lack of evidence from Versacold regarding its attempts to keep the floor free of debris and found that the system in place was insufficient in the context of the risk posed to an operator should a pallet jack encounter such debris. The judge also found that APS should have taken more comprehensive steps to ensure that Versacold maintained a sufficient cleaning regime.

As distinct from *TNT v Christie*, APS had a presence on Versacold's site. The court found that APS was aware of a cleaning problem and failed to ensure that Versacold adequately dealt with it.

On that basis, the court apportioned liability on the basis of 70% to Versacold and 30% to APS.

In the case of *Glynn v Challenge Recruitment Australia Pty Ltd*,[3] the plaintiff was injured at work when a ladder on which he was standing was not properly secured and he fell.

At trial, liability was apportioned between the defendants on the basis that the employer would bear 40% of liability with the labour hirer bearing the remaining 60%. The trial judge accepted that the plaintiff assumed, and was entitled to assume, that the foreman or another labourer would be at the base of the ladder to hold the ladder when he climbed it. In finding for the plaintiff, the trial judge found that the plaintiff's employer failed to exercise any consideration or control over the circumstances in which it was requiring the plaintiff to work at the site, having failed to undertake even the preliminary step of visiting the site to see what the working conditions were.

The appeal addressed other unrelated matters and did not disturb this conclusion on apportionment.

Employer found less than 25% liable

The New South Wales Supreme Court considered a rather unusual set of circumstances in 2010 in the matter of *Hodge v CSR Ltd*.[4]

During the course of his work pursuant to a labour hire arrangement, this plaintiff usually used a jackhammer which weighed around 15kg. However, on the date of the incident he was provided with a substitute which weighed 25kg which he alleged caused back injuries.

The labour hirer sought to apportion 35% of liability to the plaintiff's employer.

The court held that a direct breach of duty of care was required in order for liability to be apportioned and found the employer did not directly breach its duty of care because it had no direct involvement at the site, the worker had been provided with a handbook with safety instructions and there was no issue with the ordinary system of work. On that basis, no apportionment could be made to the employer.

This case turns on its own facts and appears to be limited to circumstances where the hirer has departed from the usual system of work without the employer's knowledge or any opportunity to become aware of the change, and that departure led to the plaintiff's injuries.

While not able to completely defeat the claim against it, the employer in the case of *Galea v Bagtrans Pty Limited & Ors*[5] successfully reduced its culpability from the traditional level of apportionment based on the circumstances of the case.

This plaintiff suffered injuries during the course of his work driving a truck pursuant to a labour hire arrangement where he was employed by Adecco and labour hired to Bagtrans. He drove a Mack truck owned by Bagtrans on a long haul route. The seat of the truck caused the plaintiff discomfort when driving. He complained about this to co-workers at Bagtrans and was told that it had been fixed. However, when driving the truck the following day, it became apparent that the defect had not in fact been remedied. During that trip, the plaintiff felt a significant jolt and heard his neck crack.

The plaintiff was unsuccessful at trial but that decision was overturned on appeal.

The Court of Appeal, in finding against both defendants, stated that the fact that Adecco was unable to control Bagtrans' exercise of reasonable care and the fact that Adecco was not personally at fault in this matter was not to the point. The breach of duty was found to include the negligent maintenance of equipment which constituted a breach of a duty to exercise care in providing safe equipment which could not be delegated.

The co-worker's confirmation to the plaintiff that the seat had been fixed was not viewed as a deliberate act of deceit but the Court of Appeal determined that it went to an inference that Bagtrans had an

[3] *Glynn v Challenge Recruitment Australia Pty Ltd* [2006] NSWCA 203.
[4] *Hodge v CSR Ltd* [2010] NSWCS 27.
[5] *Galea v Bagtrans Pty Limited & Ors* [2010] NSWCA 350.

inadequate system of keeping track of repairs and maintenance.

However, Adecco was found to bear less liability than an employer in a traditional scenario, bearing 15% of liability and Bagtrans bearing the remaining 85%. The Court of Appeal determined this apportionment on the basis that the serious breach of duty was not the failure to fix the seat but advising the plaintiff that it had been fixed.

Lessons learned

While the decision of *CSR v Hodge* has raised some element of concern for non-employer defendants, as it is a New South Wales trial decision, we recommend arguing that *TNT v Christie* remains the law in Queensland.

Should the decision be raised as a basis upon which an employer is attempting to avoid a claim entirely, it would be helpful to obtain any evidence that the employer was aware of the departure and that reasonable inspections would have identified the risk (if possible and applicable).

Decisions will of course always turn on their own facts so there is scope for a defendant to attempt to reduce its exposure to liability at the traditional level. Enquiries into the level of control held by an employer and the circumstances leading to an injury the subject of a claim are critical in identifying means of doing so.

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Insurance team welcomes four

Carter Newell is delighted to announce the addition of four new members to our Insurance team.

Anthony Bagnette joined the team as a senior solicitor working closely with partner Stephen White. Anthony has extensive experience in defending a wide variety of liability claims under the *Personal Injuries Proceeding Act 2002* (Qld), the *Workers Compensation and Rehabilitation Act* (2003), the *Civil Liability Act and Regulations 2003* (Qld) for insurers brokers, claims handlers and corporate self-insureds. In addition, Anthony is also experienced in defending claims for insurers, brokers and corporate self-insureds involving construction and contract works, professional indemnity, public liability, trade and transport.

Mariam Morad joined the team as a solicitor working with partner Rebecca Stevens. Mariam is experienced in handling public liability and motor vehicle accident pursuant to the *Personal Injuries Proceeding Act 2002* (Qld) and the *Civil Liability Act and Regulations 2003* (Qld). She is also experienced in medical malpractice claims and property and injury claims.

Nicholas Maiorana joined the team as a solicitor working with partners Rebecca Stevens and Glenn Biggs. Nicholas has a wide variety of insurance experience including insurance disputes, product liability matters, property damage and motor vehicle claims. Nicholas has also represented clients in debt recovery matters, contractual and building construction disputes.

Sarah Von Rurik joined the team as a solicitor working with partner Stephen White. Sarah specialises in public liability, negligence and personal injury claims. She is also experienced in defamation and general commercial litigation.

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2012/13 Financial Year Update

Cost Applicable to injuries under the *Personal Injuries Proceedings Act 2002* (Qld)

Damages $[1]				
Injury arising on and from	**Lower Threshold**	**Upper Threshold**	**Cost between threshold**	**Cost above threshold**
2 December 2002 to 30 June 2010	$30,000	$50,000	$2,500	Standard
1 July 2010 to 30 June 2011	$35,340	$58,900	$2,950	Standard
01 July 2011 to 30 June 2012	$36,400	$60,670	$3,040	Standard
01 July 2012 to 30 June 2013	$38,390	$63,990	$3,210	Standard

September 2012

[1] Prescribed limits taken from s13 Personal Injuries Proceedings Regulation 2002 (Qld) and s56 *Personal Injuries Proceedings Act 2002* (Qld).

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