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Attempted murder – host employer found liable for placing labour hire worker in peril

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Introduction

The duty of care owed by the hirers of temporary labour, often referred to as '*host employers*', to labour hire employees was spelt out in the oft-cited 2003 New South Wales Court of Appeal decision of *TNT Australia Pty Ltd v Christie* (**TNT**).[1] In this regard, the duty of care owed by a host employer to a labour hire worker is often analogous to that owed by the actual employer, given that the host employer exercises the day to day control over the labour hire worker's duties. *TNT* has, since that time, effectively become the starting point for the apportionment of liability between a host employer and the labour hire company as the actual employer in labour hire injury claims. Separately, in the decision of *Modbury Triangle Shopping Centre Pty Ltd v Anzil*,[2] the High Court made clear that an occupier will not owe a duty of care to protect entrants against the (unlawful) actions of third parties save in very limited circumstances where there was special knowledge or control.

The '*labour hire*' issues evident in *TNT* and the '*unlawful actions*' issues that arose in *Modbury* combined as a result of an attempted murder in the workplace, in the recent New South Wales Supreme Court decision of *Wright by his tutor Wright v Optus Administration Pty Ltd*.[3]

Background

Glen Wright (**plaintiff**) and Nathaniel George (**assailant**) were both placed by separate labour hire employers to perform call centre work at the premises of Optus (**defendant**). The plaintiff was employed by IPA Personnel Pty Ltd (**IPA**) while the assailant was employed by Drake International Pty Ltd (**Drake**). Neither IPA nor Drake was joined to the claim as a defendant, although a cross-claim for indemnity was made against IPA by the defendant.

On 15 March 2001, the plaintiff and the assailant were undertaking training at the defendant's premises. They were unknown to each other at the

time, save that they had a brief conversation earlier on the day of the incident. Evidence later showed that on the previous day the assailant had developed homicidal thoughts and had devised a plan to push another worker off the balcony of the fourth floor of the premises. However, the intended victim walked away before the assailant could realise his plan. That night, the assailant decided that his new intended victim would be the plaintiff.

On the day of the incident, the assailant excused himself from training. The assailant tried to lure the plaintiff up onto the balcony by arranging for a note to be sent back into the training session asking the plaintiff to come to the balcony. The plaintiff ignored this request, as well as a verbal request from another trainee that the assailant wished to see the plaintiff on the balcony. Eventually, the defendant trainer, Ms Hedges, was frustrated by the distractions taking place in the training session and went to look for the assailant. Ms Hedges discovered the assailant on the balcony and he came into the recreation room where she was. The assailant was in an incoherent state when Ms Hedges attempted to communicate with him, and persisted in enquiring as to the whereabouts of the plaintiff. Ms Hedges assumed the assailant was on drugs.

Ms Hedges was concerned by her interaction with the assailant and sought help from her supervisor, Mr Williams. Ms Hedges was shaken when she told of her experience to Mr Williams. Mr Williams determined that the assailant posed a risk to the safety of others. Ms Hedges, Mr Williams and another employee of the defendant, Mr Dee, then went back to the recreational room but the assailant was again on the balcony. They then went out onto the balcony, where the assailant was evasive, except that he again asked to see the plaintiff. Initially, Mr Williams was concerned that the assailant might try to harm himself, but was assuaged of this concern by the time he went to notify others of the situation. Ms Hedges enquired as to whether she should go and get the plaintiff, as requested by the assailant. Under the mistaken assumption that the assailant and the plaintiff were friends, Mr Williams agreed with this course of action, before both he and Ms Hedges left the scene.

> “Defendants and their insurers cannot simply rely upon *Modbury* as a definitive answer to matters involving third party criminal conduct.”

Ms Hedges returned to the training room and found the plaintiff. It was accepted that Ms Hedges cajoled the plaintiff to attend upon the balcony with her. The plaintiff was not sure why he was required or what the assailant might want. Nonetheless, Ms Hedges was in a supervisory role and so the plaintiff felt that he should comply with her request. When Ms Hedges and the plaintiff returned to the balcony, the plaintiff approached the assailant and enquired as to what was wrong. The assailant lured the plaintiff towards the edge of the balcony. By this point, Mr Dee was 15m away from the assailant and the plaintiff. The assailant then attempted to lift the plaintiff, with a view to throwing him over the balcony edge. The plaintiff was shocked, but held on tight to the balcony railing. The assailant then punched the plaintiff hard to the face. Mr Dee then intervened to subdue the assailant and removed him from the balcony area. The plaintiff later commenced a claim for damages centred on his psychiatric injury arising from the incident.

Duty of care

The defendant contended that it did not owe a duty of care to the plaintiff, except that owed by an occupier to a lawful entrant. The defendant argued that *Modbury* was authority for the principle that an occupier is not liable for injury to lawful entrants caused by the criminal acts of third parties on the occupier's property. The court disagreed with this characterisation of the duty owed and pointed out that there are categories of relationships that are exceptions to the *Modbury* principle, which included the employer and employee relationship. Relying on several other authorities,[4] the court held that the employer/employee exception to the *Modbury* principle included instances of host employment, given the degree of control and direction exercised over the worker(s) by the host employer.

Having established that the case fell into the categorisation of the employer/employee exception to the Modbury principle, the court held that the defendant owed the plaintiff a duty to take reasonable care in establishing, maintaining and enforcing a safe system of work and safeguarding the plaintiff from unreasonable risks in the methods by which the work was to be undertaken. The test for civil liability based upon New South Wales' *Civil Liability Act 2002* (**CLA**) was applied in this case and while

the difference between the statutory '*not insignificant*' and common law '*far fetched nor fanciful*' elements of the civil liability test were addressed in detail, it seems unlikely that this decision would have been different at common law.[5] Accordingly, in the specific circumstances that arose on the day of the incident, the duty of care involved the exercise of reasonable care in devising and instituting a system for managing the '*aberrant*' behaviour of the assailant so as to safeguard co-workers including the plaintiff from the foreseeable, non-insignificant risk that the assailant might assault him.

The defendant correctly argued that pursuant to s 32 of the CLA a defendant need only take care in a nervous shock case when a reasonable person in the defendant's position would realise that his/her conduct might cause psychiatric injury. The defendant argued that call centre work was innocuous in nature and not violent, and so it was not reasonably foreseeable that a person of normal fortitude would suffer psychiatric injury in the circumstances. The court disagreed and focused on the specific risks present in the events that unfolded in the lead up to the incident, all of which were within the knowledge of the defendant, as distinct from a general analysis of the workplace and the work. In doing so the court concluded that a reasonable occupier/host employer ought to have appreciated the potential for harm, including psychiatric harm, to a worker such as the plaintiff in these circumstances and in exposing him to an erratic co-worker.

Breach of duty

The relevant risk of harm was not the *Modbury*-like risk of injury to an entrant from the unpredictable criminal act of a third party, but rather was the specific risk of the assailant inflicting personal injury (including mental harm) on the plaintiff in circumstances known to the defendant.

The court found that the risk was reasonably foreseeable to the defendant. The assailant was agitated and repeatedly specifically asking for the plaintiff. The defendant did not ascertain the relationship (or lack thereof) between the assailant and the plaintiff, or why the assailant was seeking the plaintiff. It was open to the defendant to remove the assailant from the premises and/or to prevent the eventual interaction between the assailant and the plaintiff. In essence, the defendant ultimately put the plaintiff in harm's way without taking sufficient care.

As to whether the risk of harm was not insignificant, the court did not accept that the risk had a low probability of occurring, or that it was unlikely to occur. Based upon his conduct in notifying others employed by the defendant (and also Drake) of the unfolding situation, Mr Williams clearly regarded the situation as requiring the taking of precautions and as being relatively serious. In addition, had Mr Williams known that the assailant and plaintiff were not friends (based upon his own erroneous assumption) he conceded he would not have permitted the plaintiff to attend upon the balcony. Accordingly, the risk was deemed not insignificant.

Finally, the court concluded that a reasonable entity in the defendant's position would have removed the assailant from the premises or, at the very least, not allowed the plaintiff to be put in harm's way. The assailant was acting strangely in the lead up to the incident, specifically enquired of the plaintiff and also appeared to pose a risk of harm to either himself or someone else. In these circumstances, the court held it was inappropriate for the defendant to permit the plaintiff to be in close physical proximity to the assailant and a reasonable entity in the defendant's position would not have conducted the situation in the manner that the defendant did. The defendant therefore breached the duty of care owed to the plaintiff.

Causation

It was held that had the defendant not cajoled the plaintiff into coming up to the balcony and interacting with the assailant the incident would not have occurred. The defendant contended that its negligence was not a necessary condition of the occurrence of the harm to the plaintiff, on the basis that there was ample opportunity for the assailant to commit the same act on any other occasion when the assailant and plaintiff were together on the balcony. In other words, if the incident did not occur on 15 March 2001, it very easily could have occurred with the same parties at a later stage. This argument was rejected, as the assailant

targeted someone else only the day before and might have targeted someone different later. Furthermore, had the defendant removed the assailant from the premises instead of bringing the plaintiff to the scene, the incident would not have occurred.

Employer - IPA

No liability was attributed to IPA, the plaintiff's legal employer. While as the employer IPA owed the plaintiff a non-delegable duty of care, the plaintiff's injury did not occur within the scope of this duty or in the manner in which the plaintiff performed work. It was the defendant that exercised control over the premises and over the circumstances that lead the plaintiff to be exposed to the relevant risk, not IPA. The risk presented by the assailant was not known to, and could not have been known by, IPA.

Given s 151Z(1) of the *Workers Compensation Act 1987* (NSW), the defendant was required to indemnify IPA for the compensation paid to, for or on behalf of the plaintiff under the workers' compensation scheme. In this instance, that compensation and indemnity was $679,952.36.

Quantum

The plaintiff's psychiatric injury was described as near-catastrophic and he was further described as a chronically and severely dysfunctional man living an isolated and unproductive life. The plaintiff had resorted to self-harm in the aftermath of the incident, was taking significant psychiatric medication and was unable to function in the same way that he was prior to the incident. While he initially returned to work until approximately August 2001, as his condition worsened he was unable to work at all due to his injury. The plaintiff was awarded damages in excess of $3.85 million.

Comment

The *Modbury* principle, that there is no duty of care for the unlawful acts of third parties on an occupier's premises, may not apply when the occupier has some form of special knowledge or control over the unlawful acts or the entrant's exposure to them. The host employer-labour hire employee relationship dealt with in *TNT* qualifies as one of the exceptions to the *Modbury* principle as a result of the control implicit in the relationship. Defendants and their insurers cannot simply rely upon *Modbury* as a definitive answer to matters involving third party criminal conduct, and instead must show that they met the duty of care imposed upon them to minimise the risk of foreseeable harm. Furthermore, employers (such as IPA here) may not face any liability despite owing a non-delegable duty of care if the harm suffered by the plaintiff does not fall within the scope of that duty, leaving the host unable to secure contribution and required to refund workers compensation benefits. Finally, the court's identification of the specific risk (as opposed to the broader circumstances of the plaintiff's host employment) when determining reasonable foreseeability serves as a reminder for practitioners that it is vital to properly identify the relevant risk of harm in a specific claim.

[1] [2003] NSWCA 47.
[2] [2000] HCA 61.
[3] [2015] NSWSC 160.
[4] English v Rogers [2005] NSWCA 327; Coca Cola Amatil (NSW) P/L v Pareezer [2006] NSWCA 45.
[5] Such as if the incident occurred, and the claim was brought, in Queensland.

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