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Self-defence instruction to move as '*quickly as possible*' was reasonable

By Glenn Biggs, Partner and Allison Haworth, Associate

***Endeavour Foundation v Christine Anne Weaver* [2013] QCA 371**

Introduction

The Queensland Court of Appeal has confirmed that reasonableness of response to risk is to be assessed in the larger context of the purpose of the activity.

In this instance, it was reasonable for Endeavour Foundation to instruct the Claimant to perform the '*back steps*' manoeuvre (a self-defence manoeuvre) as '*quickly as possible*', as a means of avoiding assault.

Background

Endeavour Foundation provides opportunities for people with intellectual disabilities who can sometimes become agitated or violent. WorkCover records presented at trial confirmed some 90 claims arising from client assault.

To satisfy their duty of care as employer and to provide employees with protection from client assault, the Endeavour Foundation engaged consultants to train employees in '*professional assault response training*' (**PART**). The training was designed to equip employees with techniques to avoid client assault. Once trained it was intended that employees would then become PART trainers.

Christine Anne Weaver (**claimant**), an employee of Endeavour Foundation attended a five day PART course in October 2005.

Following completion of the course, the claimant went on to become a trainer. She trained employees in PART on six occasions prior to the incident.

On the date of the incident the claimant was injured whilst demonstrating a '*back steps*' manoeuvre when her feet got caught and she fell over. She suffered injuries to her spine and coccyx.

The claimant alleged that the Endeavour Foundation had unnecessarily exposed her to a foreseeable risk of falling by requiring her to perform the '*back steps*' manoeuvre '*quickly*'. The manoeuvre entailed the claimant moving backwards away from her assailant, whilst looking for the closest exit point.

The primary judge found that Endeavour Foundation had unnecessarily exposed the claimant to risk of injury and awarded the claimant $369,000 in damages.

Endeavour Foundation appealed on a number of grounds claiming that the trial judge had erred in his finding that the claimant was instructed to carry out the manoeuvre quickly, when the instruction was that it was to be done as quickly as possible. They submitted in accordance with the above, the instruction was reasonable and within the bounds of the claimant's skill. It was also argued the primary judge had failed to consider the reason for issuing the relevant instruction, which was to promote employees' safety.

Findings

The evidence of Endeavour Foundation was that the claimant was told to move more quickly as she became more practised, and to move '*as quickly as possible*'.

Holmes JA found the trial judge had misapprehended the nature of the instruction given to the claimant. The question was therefore whether it was reasonable for Endeavour Foundation to direct the claimant to move as quickly as she could, rather than slowly and carefully.

It was accepted on appeal that there was some risk involved in the claimant performing the manoeuvre however Holmes JA considered that the reasonableness of the Endeavour Foundation's response to the risk must be assessed in the larger context of the purpose of the activity, which was to provide employees with the means of avoiding assault.

Holmes JA found the trial judge had overlooked the benefit to an employee in being able to perform the manoeuvre quickly. The act of practising the manoeuvre was to assist employees to get accustomed to the move, to enable them to move as quickly as possible. Performing the manoeuvre slowly would be of little benefit to employees when faced with an assailant.

Holmes JA ultimately found that Endeavour Foundation had a responsibility to safeguard employees from assault and the instruction to move as quickly as possible was a reasonable one.

With the agreement of Fraser JA and Margaret Wilson J the judgment at first instance was set aside and judgment was entered for Endeavour Foundation.

Comment

This decision reinforces the comments of *Gummow J in RTA v Dederer* (2007) 238 ALR 761:

> *'It is only through the correct identification of risk that one can assess what a reasonable response to that risk would be.'*[1]

In a real life situation an employee needs to move relatively quickly when faced with the threat of actual assault. There is limited benefit in training employees to carry out self-defence manoeuvres in a slow and careful fashion, at least not once the basics of the manoeuvre are well understood and practised.

The aim of the training provided by Endeavour Foundation was to prepare their employees to face real life client assault situations. On this basis the direction to move as quickly as possible within the individuals own physical ability and limitation was reasonable. It was reasonable for the Endeavour Foundation to rely on the Claimant's own assessment of her competency in this regard.

This decision is of relevance to those high-risk occupations where patterns of client-initiated violence have been identified and self-defence training is given.

[1] Gummow J at [59]

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Court cans cover under liability policy - Exclusion clauses enforced in appeal on product defect claim

By Rebecca Stevens, Partner and
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Introduction

The Full Federal Court recently considered the viability of a claim by a manufacturer pursuing a recovery action for product defect losses involving several parties within the supply chain in the matter of *Siegwerk Australia Pty Ltd (in liquidation) v Nuplex Industries (Aust) Pty Ltd* [2013] FCAFC 130.

The respondent to this appeal (**Nuplex**) had supplied a resin which was used by the applicant (**Siegwerk**) to manufacture a lacquer. Visy Packaging Pty Ltd (**Visy**) manufactured ring pull cans with the lacquer applied inside to prevent corrosion caused by the contents, being tuna with vinaigrette. The cans of tuna were sold under the John West brand but corrosion of the cans led to two product recalls which resulted in multi-million dollar losses.

John West initially pursued a claim for its losses against Visy, who settled the claim as well as a claim brought against it by the canner who filled the cans. Visy sought to recover against Siegwerk, who subsequently settled the claim brought against it.

In turn, Siegwerk sued Nuplex for the loss, who sought to defend the claim at trial as well as claiming cover under its insurance policy held with QBE. Coverage was refused based on policy exclusions.

The appeal before the Full Court of the Federal Court involved consideration of two issues – whether Siegwerk's claim against Nuplex should succeed, and whether QBE should cover Nuplex for the claim and its costs.

Siegwerk's claim

At trial, it was determined that Nuplex was not liable to Siegwerk for the losses arising out of the defective cans.

The question was determined to be one of causation – that is, whether Nuplex's breach of its contract with Siegwerk caused the corrosion of the cans.

This was not a straightforward question. The breach of contract claim was advanced on the basis that Nuplex had substituted an ingredient in the resin, which was not allowed by the contract with Siegwerk. However, evidence was led

that the substitution coincided with Visy's decision that the lacquer should be less viscous. There was also an, albeit less contemporaneous, change of another ingredient in the lacquer around eighteen months prior to the problem with the cans. Those events were described by the court as having '*muddied the waters*'.

Detailed expert evidence was led by Siegwerk in an effort to demonstrate a direct causal link between the ingredient substituted by Nuplex and the consequent viscosity of the lacquer which, it was argued, resulted in the lacquer being more brittle and more likely to fail. The trial judge did not accept that the theory led by the expert demonstrated causation.

Siegwerk appealed the decision on the basis that the trial judge had made an error in fact by finding that the substituted ingredient had not lowered the molecular weight of the lacquer or that this action caused the lacquer to be more brittle and more likely to fail.

The trial judge had determined that the evidence led by each party's expert was insufficient to support Siegwerk's allegations. On appeal, the court accepted Siegwork's argument that a simple conclusion in favour of one expert over another without reasoning was inadequate. In the absence of reasons, the appeal court was unable to determine the correct conclusion and considered any effort to do so would be pure speculation. The matter was therefore remitted for a new trial on the question of causation.

Policy coverage

At trial, QBE was ordered to indemnify Nuplex for the costs of the claim by Siegwerk.

QBE appealed that decision and the Full Federal Court considered the appeal both in relation to indemnity under the policy in respect of any liability Nuplex may have to Seigwerk (in the event Siegwerk succeeds on retrial) but also regarding Nuplex's costs and other expenses incurred in defending the claim against it.

Nuplex held a broadform liability policy with QBE. It was accepted at trial that Siegwerk's claim sought damages for property damage as the cans were physically damaged by corrosion. It was accepted that the concept of property damage extended to the loss of use of tangible property which was not physically damaged but such loss of use was caused by physical damage to other tangible property, so coverage should extend to that part of the claim relating to cans which had not corroded but were recalled.

It was further accepted that the claim constituted an occurrence which was in connection with Nuplex's business on the basis that the event was the failure of the lacquer and the composition of the resin in breach of Nuplex's obligations to Siegwerk.

QBE pursued several grounds of appeal. Its objection to the claim constituting an occurrence under the policy on the basis that there was no '*event*' which resulted in the property damage was unsuccessful. Similarly, QBE's argument that Nuplex's liability was in respect of economic loss as opposed to property damage also failed.

The policy contained an exclusion for liability resulting from the failure of Nuplex's products. At trial, the judge found that the exclusion arose, but did not apply in this case as the loss of use of the property was due to sudden and accidental physical damage to Nuplex's products after they were used by another party. The Full Federal Court did not agree with that reasoning as there was no sudden and accidental physical damage to Nuplex's resin after it had been used by others. A distinction was drawn between damage to the lacquer, as distinct from Nuplex's resin, in the scoring process carried out by Visy. This was found not to fit within the proviso to the exclusion in the QBE policy.

As a result, the policy exclusion applied to coverage otherwise potentially available to Nuplex.

A further successful ground of appeal by QBE arose out of the product recall exclusion in the policy. At trial, the judge distinguished between claims for the loss of value of the property recalled and other costs and expenses associated with the recall. On appeal, the Full Federal Court determined that the exclusion is directed to a loss of the value of the property itself as well as the expenses associated with withdrawing the product from the market or from use.

As a further matter of appeal, QBE challenged the trial judge's conclusions as to the '*active malfunctioning*' endorsement in the policy. QBE argued that Nuplex was required to demonstrate that the property damage resulted from the failure of the resin to function in its normal manner (for which it was designed) and that such failure was active.

QBE argued that the trial judge erred in finding that the resin failed to function in its normal manner, having confused the lacquer with the resin. The Full Federal Court concluded that the property damage may have resulted from the failure of the resin to perform the function or serve the purpose intended by Nuplex, but did not fail to function in its normal manner for which it was designed. The endorsement therefore did not arise so the exclusion remained in force.

In any event, even if that conclusion was found to be incorrect, the Full Federal Court determined that it was not established that the resin acted to cause property damage from its failure to function in the manner for which it was designed.

Therefore, on appeal, the related exclusion was found to apply and QBE succeeded on that point.

As a result, QBE's appeal was allowed. Although the matter of costs was left open for written submissions by the parties, the Full Federal Court tended towards a view that Nuplex should pay QBE's costs of the appeal and of the trial.

Conclusion

This decision reinforces the importance of critically reviewing each term of the policy to ensure its proper application to the circumstances of each case, which often turn on their own facts.

Various factual scenarios may appear to provide *prima facie* coverage, with exclusions and endorsements still requiring detailed consideration.

The intention of the policy and nature of coverage generally provided are relevant indications as to the potential outcome of a claim for indemnity.

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Proportionate liability – defendant fails to prove concurrent wrongdoer

By Rebecca Stevens, Partner and Allison Bailey, Associate

The Queensland Supreme Court considered an application last month in the matter of *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd & Anor* [2013] QSC 319, which required it to determine whether a defence of proportionate liability could be raised by pleading that a third party subcontractor was a concurrent wrongdoer.

Hobbs Haulage Pty Ltd (**applicant**) had purchased a truck from Zupps Southside Pty Ltd (**respondent**) with some modifications. The respondent engaged a contractor, Trakka Pty Ltd (**Trakka**), to perform those modifications. The value of the modifications was included in the purchase price.

The applicant alleged that the respondent breached implied conditions as to fitness for purpose and merchantable quality pursuant to the *Sales of Goods Acts 1896* (Qld). Those breaches, as well as a breach of the implied warranty that services would be rendered with due care and skill, was also alleged pursuant to the *Trade Practices Act 1974* (Cth) in the alternative.

The respondent joined Trakka as a third party, pursuing claims for breach of contract and negligence.

In its defence to the applicant's claim against it, the respondent pleaded that its liability should be reduced pursuant to the proportionate liability defence found in section 31 of the *Civil Liability Act 2003* (Qld) (**Act**). The defence was framed on the basis that Trakka owed a duty of care to the applicant independent to any duty owed by the respondent and its negligence in performing the work caused the applicant's loss. It alleged that Trakka was a concurrent wrongdoer within the meaning of s 30(1) of the Act.

The applicant applied to the court to have that component of the defence struck out.

The court commented on the inconsistency created by the defence. On the one hand, Zupps argued that, if the applicant succeeded against the respondent, then the applicant's loss was caused by Trakka and not the respondent. However, on the other hand, the allegation that Trakka was a concurrent wrongdoer required that there must be two or more parties responsible for the loss before any one party's wrongdoing can be said to be concurrent with anothers.

The court reviewed the relevant sections of the Act which establish a defence of proportionate liability. The court accepted that the applicant's claim was an apportionable one. The duty alleged to have been breached was required to be comprised, at least in part, of a duty of care in tort.

The bases of the applicant's claims regarding the truck itself were not apportionable within the meaning of the Act because they did not arise from a duty of the respondent to take reasonable care or to exercise reasonable skill, but rather as a result of alleged breaches of the contract of sale.

The question as to whether the alleged failure to render services with due care and skill constituted a duty of care within the meaning of the Act was not dealt with in detail as the applicant did not lead arguments in the negative. The applicant, for the purposes of the application, accepted that it was arguable that Trakka owed a duty of care to the applicant in negligence.

Despite that concession, the applicant argued that Trakka was not a concurrent wrongdoer pursuant to the Act. The applicant pursued that argument on the basis that Trakka was not independently responsible for the applicant's damage. That is, the applicant argued that the respondent had not pleaded any acts or omissions on the respondent's part which are independent of those pleaded against Trakka. Therefore, the applicant argued, the same acts or omissions by the respondent and Trakka caused its loss.

By virtue of those circumstances, the applicant argued that the conduct of the respondent and Trakka were one and the same so they could not be concurrent wrongdoers.

The court agreed with the applicant's position and concluded that the respondent and Trakka could not be concurrent wrongdoers as the loss-causing acts and omissions of each wrongdoer were the same so they cannot be said to have caused the applicant's loss independent of each other.

The court confirmed that the potentially apportionable claim must be considered in light of the allegations made by the applicant against the respondent, and not some possible claim not made by the applicant against some other party. Therefore, the respondent was unable to allude to allegations the applicant may have been able to make against Trakka had it pursued a claim against it.

As a result, the acts or omissions constituting the breach of the implied warranty by the respondent (that it would exercise due care and skill in rendering the services supplied to the applicant under the contract in carrying out the modification work) were the same acts or omissions that would constitute Trakka's breach of any duty of care it owed to the applicant in tort. The respondent and Trakka could not, therefore, be concurrent wrongdoers, because their actions did not cause the applicant's loss or damage independently of each other.

The applicant's application succeeded and that part of the defence alleging that Trakka was a concurrent wrongdoer was struck out.

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