Civil Liability Implications of the Queensland *Workplace Health & Safety Act* 1995

By John Griffin QC, Qld

What are the implications of the *Workplace Health & Safety Act* 1995 in relation to the establishment of civil liability in a master and servant action?

The original *Workplace Health & Safety Act* came into force in 1989. The bulk of the Act became law on 31st July, 1989.

The 1989 Act has now been replaced by the *Workplace Health & Safety Act* 1995, which came into force on 1 July 1995.

In the Second Reading Speech to the 1989 Act, Mr. Vince Lester, then the Minister for Employment, Training & Industrial Affairs said:

> "The legislation draws together in the one Act all prescriptions relative to workplace health and safety, and embodies the most modern and effective strategies for promoting the safest possible working environment."

The 1995 Act, whilst continuing to seek to achieve those objectives, constitutes a revamp of the legislation. All aspects of the legislation are reworked and reworded. The 1995 Act is also an example of modern-day drafting inasmuch as it frequently provides "examples" at the foot of its provisions.

I intend to examine one aspect of the new Act only, namely its impact on the establishment of civil liability.

It will be recalled that the core provision of s 9(1) of the 1989 Act was:

> "9.(1) An employer who fails to ensure the health and safety at work of all his employees, save where it is not practicable for him to do so, commits an offence against this Act."

The equivalent provision in the 1995 Act is s 28(1) which reads:

> "28(1) An employer has an obligation to ensure the workplace health and safety of each of the employer's workers at work."

Subsequent provisions to s 28(1) place similar obligations on employers in respect of their own safety, self-employed persons, persons in control of workplaces, principal contractors and various others. Section 36 imposes obligations on the worker himself, although that section, unlike the sections which precede it, does not oblige the worker to "ensure" that anything occurs.

It will be immediately apparent that the major difference between Section 28(1) of the 1995 Act and Section 9(1) of the 1989 Act is that the 1995 Act does not use the work "practicable", it does not contain the exception contained in the 1989 Act, which was embodied by the words "save where it is not practicable for him to do so".

What the 1995 Act does contain, however, is a series of "defences". In s.37 the following provisions are made:

> "**37.(1)** It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove—
>
> (a) if a compliance standard has been made about the way to prevent or minimise exposure to a risk — that the person followed the way prescribed in the standard to prevent the contravention; or
>
> (b) if an advisory standard has been made stating a way or ways to identify and manage exposure to a risk—
>
> (i) that the person adopted and followed a stated way to prevent the contravention; or
>
> (ii) that the person adopted and followed another way that identified and managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention; or
>
> (c) if no compliance or advisory standard has been made about exposure to a risk — that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention;
>
> **(2)** Also, it is a defence in a proceeding against a person for an offence against division 2 or 3 for the person to prove that the commission of the offence was due to causes over which the person had no control.
>
> **(3)** In this section, a reference to a standard is a reference to a standard in force at the time of

the contravention."

Whilst the 1989 Act was in force, the question whether that section had any, and if so, what, impact on civil liability was frequently debated. However, the issue was not even close to settled when the 1989 Act was replaced by the 1995 Act. The Court of Appeal touched on the issue in the *Roman Catholic Trust Corporation for the Diocese of Townsville v. Geoffrey Maurice Finn* (unreported, 27 October, 1995, Appeal No. 106 of 1995). The plaintiff was a school groundsman who in 1993 had contracted a serious lung disease caused by a fungus. The condition was not operable in his case because the condition of his lungs was severely compromised by pre-existing abnormalities, including the effect of previous surgery for a different infection which he suffered in 1990. He had been employed by the respondent since 1985. It was established that both the 1990 illness and the 1993 illness were work-related. The first was thought to have been contracted through the groundsman's inhaling of dust in the course of mowing, and the second through his inhaling of mist while using a pressure-sprayer to clean paths and walls, both being in the course of his employment with the school.

The basis upon which it was asserted that liability existed was that the plaintiff should have been provided with a mask to wear whilst carrying out his mowing and cleaning duties.

The case involved an issue as to whether the plaintiff was obliged, at the commencement of the employment, to advise the employer of his pre-existing chest problems, or whether, on the other hand, the employer should have been more astute to seek details of them, the employee not having advised the employer, and the employer not having enquired with any vigour, about the pre-existing lung abnormality.

The trial Judge held for the plaintiff, inter alia on the basis of s.9 of the *Workplace Health & Safety Act*.

The Court of Appeal overturned the finding in favour of the plaintiff on the basis that the conditions sustained by the plaintiff were not reasonably foreseeable; as a result, the employer had not been in breach of any duty in, for example, failing to supply, or failing to insist upon the wearing of, a mask.

In dealing with the impact of s.9 on the case, Thomas J. (with whom McPherson JA concurred) said:

> "It is arguable whether this section creates a civil cause of action, and the appellant reserved its position on that point. It is unnecessary to consider that question because, for the reasons already given, there was no sufficient general awareness of the problem to activate a duty in the appellant to introduce special protective measures. If this is correct, it cannot be said that it was practicable for the employer to have done things the need for which was not known or required to be known by it."

Williams J, in a separate concurring judgment, said on this point:

> "Further, in my view, there is nothing in the *Workplace Health & Safety Act* 1989 (including s.9 thereof) which would require an employer to take precautions against a risk which was wholly unforeseeable. Because of that, the respondent cannot improve his position by relying on that statute."

In the earlier New South Wales case of *Kingshott v. Goodyear Tyre & Rubber Co Australia Ltd* (1987) 8 NSWLR 707, a majority of the New South Wales Court of Appeal gave much more weight, in the plaintiff's favour, to s.40 of the *Factories, Shops and Industries Act* 1962 (NSW). That section provided:

> "(1) There shall so far as is reasonably practicable, be provided and maintained in every factory safe means of access to every place at which any person has at any time to work."

The majority of the New South Wales Court of Appeal held that, in an action for breach of statutory duty based upon the section, once the injured employee had established an alternative safe system of work which could have been provided by the employer, the onus lay on the employer to show that it would not have been practicable to implement the alternative system, having regard to such considerations as cost, worker resistance and the urgency of performing the tasks at hand.

The High Court refused the defendant's application for special leave to appeal against the decision on the statutory breach issue. Mason CJ said:

> "In this case, the competing considerations are finely balanced. However, the interpretation of the relevant statutory provision favoured by the majority in the Court of Appeal is supported by high authority which has recently been affirmed, or reinforced, by the House of Lords in *Hunt's* case in England."

The other authority to which reference should be

made is the English Court of Appeal decision in *Larner v. British Steel* (1993) All.E.R. 102. The plaintiff was a mechanical fitter who had been instructed to dismantle a heavy roller for repair. The roller fell and crushed his leg. The plaintiff's action relied, inter alia, on breach of statutory duty under s.29(1) of the *Factories Act* 1961 in failing, so far as was reasonably practicable, to ensure that the workplace was "made and kept safe".

The full text of the relevant provision was as follows:

> "29(1) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there."

The plaintiff led evidence that it would have been reasonably practicable to have supported the equipment by slings or from below, but no evidence was led by the defendant employer. The Judge dismissed the claim holding, inter alia, notwithstanding the evidence led by the plaintiff, that the employer had taken all reasonable and practical steps to keep the plaintiff safe. The plaintiff appealed on the ground that lack of reasonable practicability could only be relied on by the defendant if it was pleaded and affirmatively proved. The employer contended that the term "safe" in s.29(1) meant "safe from a reasonably foreseeable danger" and that the plaintiff, in order to establish that the workplace was unsafe, had to prove to the satisfaction of the tribunal of fact that the danger was reasonably foreseeable by the defendant.

The Court of Appeal held that all that the plaintiff had to allege and prove was that the place at which he had to work was not in fact made or kept safe, and it was for the defendant to prove that it was not reasonably practicable to keep the premises safe if he were to escape liability. Furthermore, reasonable foreseeability did not arise in considering under s.29(1) whether a workplace was safe, since the section contained no reference to foreseeability, and to imply a foreseeability test would reduce the protection afforded by the Act by limiting the success of a claim for breach of statutory duty to circumstances where a claim in negligence would also succeed.

Reference was made to *John Summers & Sons Ltd v. Frost* (1955) 1 All.E.R. 870, where Lord Reid considered that reasonable foreseeability was an aspect of the type of provision under consideration, whereas Viscount Simonds laid stress on the strictness of the test as an "absolute obligation". The Court of Appeal preferred the approach of Viscount Simonds.

It does seem to have been assumed, by the Judges in the Court of Appeal, that the question of "foreseeability" would arise at the later stage in deciding what was "reasonably practicable". Indeed Hirst LJ approved the following statement in Munkman *"Employer's Liability at Common Law"* (11th Edn, 1990) pp.292 - 293:

> *"(v) When is access - or place - unsafe?*
> ... "Safe" is, however, a simple English word and there is no reason why it should not be decided as a pure question of fact whether a place is "safe" or not. Unfortunately, the vague and uncertain notion of "foreseeability" has been introduced as a test. So long as it is used as no more than a test, there is no great harm, but it would be unfortunate if it were used to limit and circumscribe the plain meaning of "safe". In *Robertson v. R B Cowe & Co Ltd* (1970 SC 29) the Court of Session said that "foreseeability" does not have to be proved to establish that a thing was unsafe, but only at the later stage of deciding what was "reasonably practicable". In the later case of *Morrow v. Enterprise Sheet Metal Works (Aberdeen) Ltd* (1986 SC 96), on the other hand, they applied the foreseeability test to decide that there was nothing "unsafe" about cardboard sheets protecting the floor surface, which slid away when trodden on."

The Court of Appeal would not accept the proposition that there was no distinction between the common law duty of care and the statutory duty.

What, then, is the position under the 1995 Act?

If the approach being followed in England at the present time is to be followed in Australia, there is no reason why s.28(1) should not be seen as creating a statutory duty, and there is no reason why such duty should not be absolute, in the sense that it does not involve any concept of foreseeability.

One would then turn to s.37. As all of the provisions of s.37 relate to "defences", if these sections are to be applied in the case of civil actions, as I believe they are, the onus of proof would shift to the employer to plead and prove a relevant defence.

In relation to a compliance standard, as the only defence provided (in s.37(1)(a)) is that the employer followed the way prescribed in the standard to prevent the contravention, the effect would be that the compliance standard would create an absolute

obligation, and there would be no defence unless the defendant could prove that it was complied with.

Under s.27(1)(b), the position would be slightly different in relation to an "advisory standard". In that instance, although it would be still a matter of defence only, it would be a defence if an alternative method was followed which entailed "reasonable precautions" and "proper diligence".

In the event of there being no compliance or advisory standard, s.37(1)(c) would apply, and, again by way of defence, it would be open to show that the defendant "chose an appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention". In this exercise, no doubt ordinary principles of foreseeability would be relevant, and the only difference between statutory liability based on the statutory regime on the one hand, and common law on the other, would be that the burden of proof would, under the statutory scheme, lie on the defendant.

My own view is that the general approach taken by the New South Wales and English Courts of Appeal will ultimately prevail in Queensland in the interpretation of the new provisions, albeit that such approach was developed in relation to legislation which is more akin to the old s.9(1) than it is to the new s.28(1). It seems to me that, so far as s.28(1) is concerned, the application of that approach will ultimately put to rest three matters which are still uncertain.

First, applying that approach, I consider that it will become apparent that s.28(1), whilst predominantly directed at creating a quasi-criminal liability, will found an action for breach of statutory duty.

Secondly, the obligation by s.28(1) will be seen as an absolute obligation involving no question or investigation of reasonable foreseeability. The concept of reasonable foreseeability might or might not come into the application of some of the defences referred to in s.37, but it will have no bearing on the application of the s.28(1) duty on the part of the employer to ensure the workplace health and safety of employees.

Thirdly, when the statutory methodology is transposed to the civil area, it will be evident that the burden of proof must be shifted to the defendant employer. In the case of a breach of a compliance standard, the effect of this will be to leave the employer's defence with nowhere to go once breach of an appropriately worded compliance standard is shown. (I say "appropriately worded" because the compliance standard's wording itself might be such as to contain some sort of "let out"). The defence of the employer would have greater scope in circumstances in which the breach involved is of an advisory standard; and greater scope again, if it is a case in which there is no question of the breach of any standard.

Reference should also be made to contributory negligence. The new provision setting out obligations on the part of employees is s.36, which reads as follows:

> **"36.** A worker or anyone else at a workplace has the following obligations at a workplace—
>
> (a) to comply with the instructions given for workplace health and safety at the workplace by the employer at the workplace and, if the workplace is a construction workplace, the principal contractor, for workplace health and safety at the workplace;
>
> (b) for a worker—to use personal protective equipment if the equipment is provided by the worker's employer and the worker is properly instructed in its use;
>
> (c) not to wilfully or recklessly interfere with or misuse anything provided for workplace health and safety at the workplace;
>
> (d) not to wilfuily place at risk the workplace health and safety of any person at the workplace;
>
> (e) not to wilfully injure himself or herself."

The general effect of the section is similar to the effect of s.13 of the 1989 Act.

Breach of the employee's obligations under s.36 constitutes an offence against the Act in the same way as a breach by an employer of the employer's duties constitutes such a breach. However, leaving aside failure to comply with instructions and failure to use protective equipment in circumstances in which the employee is properly instructed in its use, the provision operates only in the event of wilful or at least reckless conduct on the part of the employee. The net result is that the provisions probably strengthen the prospect of a finding of contributory negligence in cases of failure to follow instructions and failure to wear protective clothing, but weaken that prospect in other respects, given that the employee is in breach in other respects only in the event of wilful or at least reckless conduct on his part.