How should the permanent impairment tables be interpreted?

Richard Faulks

Whelan and the Department of Defence

Richard Faulks, Canberra

Employees who are injured in circumstances which are covered by the Safety Rehabilitation and Compensation Act 1988 (Cth) are entitled to claim a lump sum payment where the injury leads to "permanent impairment".

Such an impairment is only considered to be permanent if it is likely to be of indefinite duration when taking into account the factors set out in Section 24 of the Act. Those factors include the duration of the condition, the likelihood of improvement by treatment or otherwise and whether reasonable rehabilitation has been undertaken.

The level of impairment is assessed under tables set out in a guide to the assessment of impairment published by Comcare. Difficult issues have arisen in relation to the interpretation of those tables, particularly when assessing impairment under the various tables set out in Part 9 dealing with musculo-skeletal injuries.

Comcare have often rejected a claim for impairment on the basis that, in applying what they consider to be the correct table, there was no impairment even if an employee may qualify as being impaired under another table in that part.

It is now clear, in my opinion, that **Comcare is obliged to apply the table which is most favourable to the worker**. In a recent decision by Senior Member Dwyer in the Administrative Appeals Tribunal, re *Whelan and the Department of Defence*, issues arose as to whether an employee's impairment to her knees could only be assessed under Table 9.2 or whether there was an option to assess that impairment under Table 9.5. Under one of the tables the employee would be entitled to a lump sum payment while under the other the appropriate threshold could not be reached. The Tribunal reviewed the relevant authorities and referred to comments in the Federal Court case of *Ticsay* in finding that there is a discretion to choose the table which is most beneficial to the applicant. The Tribunal in *Whelan's* case found that it was appropriate to make an assessment under Table 9.5 even though the applicant would not have qualified for any payment under Table 9.2 because she had suffered no loss of movement.

This approach was also adopted in the decision re: *Kay and Comcare* where the Tribunal accepted that compensation could be payable under Table 9.1 or Table 9.4 in relation to a shoulder disability. In that case the Tribunal concluded:

"The Tribunal regards itself as bound to apply the table most favourable to the worker in accordance with the decision in Ticsay and Comcare."

Therefore, it is clear that employees should ensure that their entitlements to a lump sum payment are considered under a broad interpretation of the tables and in particular, even where there is no permanent loss of movement, there may be an entitlement under the other tables dealing with the effect of such an injury. ■

Richard Faulks is Managing Partner with Snedden, Hall & Gallop in Canberra. **Phone** 02 6201 8985 or **email** shg@netinfo.com.au

St Vincents Hospital v Hardy

(Unreported, CA Qld, 6 May 1998)

Gerard Mullins, Brisbane

The Court of Appeal in Queensland has recently addressed the necessity for a Plaintiff to prove foreseeability of harm in the context of an action for breach of statutory duty based on the Workplace Health and Safety Act, 1989.

Betty Hardy was injured in a fall at work on 8 September 1993.

She was 63 years old and worked for the St Vincents Hospital in Toowoomba. She was a cleaner. She worked from 6:30 a.m. - 3:00 p.m. and fell at the end of her shift when she was tired. The Trial Judge found that "the position was simply that she was 63 and the job was getting beyond her".

She fell when she was ascending a set of stairs in the course of her duties. There was nothing wrong with the stairs; the Plaintiff argued that she had to move up and down four flights of stairs quite often in the building. She would not have fallen had she used a lift.

The Trial Judge found that the cleaners would not use the lifts unless they were moving equipment from floor to floor. The practice was largely the result

of some official discouragement of cleaners from using the lifts in a way which might interfere with or inconvenience patients.

The Trial Judge also found that there were no real problems which would have been caused by cleaners using the lifts at times when they were not immediately required by patients. He found that the policy that the cleaners did not use the lifts was not justified, at least to the extent that it served to discourage the Plaintiff from using the lift at the time. The finding was to the effect that it would have been safer for the Plaintiff to go up and down using the lifts rather than the stairs.

The *Workplace Health and Safety Act*, 1989 provides a statutory basis for a civil right of action for breach of statutory duty. Section 9 of that Act was similar to legislation in other States dealing with the obligation of employers to provide safe systems of work.[1]

Section 9 provided that:

"an employer who fails to ensure the health and safety at work of all the employers employees, except where it is not practicable for the employer to do so, commits an offence against this Act."

The provision had been recently interpreted by the Court of Appeal in Queensland in Rogers v Brambles Australia Limited.[2] In that case, the Court had determined that once a Plaintiff was able to prove that she had sustained an injury at work and that there was a remedial measure available which would have prevented or reduced the risk of injury, the onus shifted to the Defendant to prove that the particular measure was "impracticable".[3]

In Mrs Hardy's case, the Court of Appeal took the principle one step further in favour of the Plaintiffs.

The employer argued that not only must the Plaintiff prove the injury and the remedial measure, the Plaintiff must also prove that the remedial measures were necessary to avert reasonably foreseeable harm to the employee.

The employer argued that the words "ensure" should be interpreted as meaning less than the common meaning of "make certain" or "make sure". It was argued that it should be interpreted as meaning "equivalent to ascertaining or satisfying oneself and does not mean anything in the nature of warranty or guarantee".[4]

The employer argued that if the former interpretation of the word were used, an absolute offence would be created. This would be unjust to the employer.

The Court of Appeal chose to follow a series of decisions of the Industrial Commission of New South Wales where the view had been expressed that s15 of the Occupational Health and Safety Act, 1983 posed an:

"...absolute duty cast upon an employer to ensure (in the sense of guaranteeing, securing or making certain) an employee's health, safety and welfare at work; and that is subject only to the statutory defences available under Section 53...".[5]

Further, the Court of Appeal found that the Section did not impose, expressly or implicitly, any test of reasonable foreseeability. Section 6 of the Act provided a definition of "practicable" which included "the degree of risk that exists in relation to such potential injury or harm".[6]

Matters which went to the issue of reasonable foreseeability were contemplated in the definition of "practicable".

The effect of the decision in Queensland is that in actions under the Workplace Health and Safety Act, 1989, an employee need only show an injury at work and a remedial measure that would have prevented or reduced the risk of injury. The employer then bears the onus of proving that the implementation of the remedial measure was "impracticable". Impracticability includes reasonable foreseeabilty. As the employer bears the onus of proving the exceptions to the Section, the allegation should be pleaded. In particular, from a Plaintiff's perspective, allegations that the implementation of the remedial measure was not cost-effective should be fully explored.

Should the Defendant wish to argue or lead evidence on the issue of impracticability, the Plaintiff should demand that the relevant issues are clearly and specifically pleaded. Otherwise, evidence on the issue is simply inadmissible.[7] ■

Gerard Mullins is a Barrister and can be contacted on **phone** (07) 3236 1882 or **fax** (07) 3236 1883

Notes:

1. See, for example, Section 15 Occupational Health and Safety Act, 1983 (NSW).
2. [1998] 1 Qd. R. 212.
3. Rogers -v- Brambles (supra) at 217; per Pincus J.A.
4. Reliance Permanent Building Society -v- Harwood - Stamper [1944] Ch. 362, 373; Vaisey J.; cited in Rogers -v- Brambles (supra) per Shepherdson J., dissenting at 226.
5. St Vincents Hospital -v- Hardy (supra), at page 6; approving Shannon -v- Comalco Aluminium Limited (1986) 19 I.R. 358, 359; Gardner Bros Pty Ltd -v- McAuliffe (1986) 15 I.R. 477; State Rail Authority of New South Wales -v- Dawson (1990) 37 I.R. 110.
6. Section 6(1)(b) Workplace Health and Safety Act, 1989.
7. Peachey -v- MIM (Unreported, Supreme Court of Queensland, 24 November 1997, Byrne J.).

New Special Interest Groups

The APLA Executive has resolved to create two new SIGs covering Commercial Litigation and Employment & Discrimination. Meetings of the new groups will be held at the National Conference. Members interested in registering their interest in these groups should contact Jane Staley, Member Services Manager, at the APLA National Office.