

Effect of TPA claim on common law damages

Joseph Baukes v All Tools (Tullamarine) P/L, County Court of Victoria, 29/3/01, Morrow J. (unreported)

As the hands of governments around Australia (both state and federal) continue to tighten around injured workers and motor vehicle accident victims' rights to access common law damages, the recent ruling of His Honour Judge Morrow in *Baukes v All Tools* may have loosened the grip where a potential claim also exists pursuant to the *Trade Practices Act 1974*.

The facts

In March 1997, Bravo Constructions employed Baukes as a diesel mechanic. Baukes was required to

provide his own tools as a diesel mechanic. In May 1997 he purchased an engine stand from All Tools. On 3 June 1997, whilst performing his duties as an employee he suffered an injury when the stand collapsed.

The plaintiff sought to bring an action under s 52, and s 82 of the *Trade Practices Act* (TPA). The defendant alleged that the Plaintiff was prohibited from bringing such a claim as the Plaintiff failed to comply with s.135A of the *Accident Compensation Act* (Vic) (ACA). Section 135A requires an injured worker to be determined as having a serious injury (as defined), by either the insurer or court, as well as

Tim Dionyssopoulos is a Solicitor at Michael D Ruse Solicitors, Level 8, 155 Queen Street, Melbourne Vic 3000
PHONE 03 9600 3000

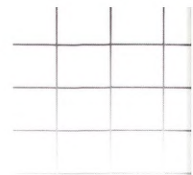
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satisfying procedural requirements before a claim for common law damages may be commenced.

Section 52 (1) of the TPA states:

“A Corporation shall not in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.”

Section 82(1) of the TPA states:

“A person who suffers loss or damage by conduct of another person, that was done in contravention of Part V, may recover the amount of the loss or damage by action against that other person or against any person involved in that contravention”

The issue

His Honour summarised the issue as being one where if the Plaintiff were using the engine stand at home he would be free to claim as a “consumer” under the TPA (this point was conceded), but as he was using it a work, it was argued that he was no longer a consumer but a worker and the State Act applied.

In those circumstances is s 135A of the ACA inconsistent with ss 52 and 82 of the TPA and if so does s 109 of the Constitution apply? Section 109 states:

“When a law of a State is inconsistent with a law of the Commonwealth,

the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.”

Intention of Parliament and interpretation of s 109

His Honour considered the relevant intention of Parliament in proclaiming the TPA as well as the various cases dealing with s 109 and made the following finding:

“In my view it is clear that the TPA is intended to give consumers certain rights in relation to defective goods and that it is intended that it’s (sic) legislation in relation to these matters was to be paramount and was intended as a complete statement of law governing consumer rights. I find that in section 135A in attempting to regulate consumer rights, when he happens also to be a worker, is a detraction from the full operation of the Commonwealth law and as such is inconsistent.”

Effect of s 75AI TPA

It was argued by the defendant that although s 75AI expressly limits itself to ss 75AD, 75AE, 75AF, and 75AG, it was

nevertheless the intention of Parliament that its legislation intrude into the area of industrial accident. Section 75AI states that:

“(the sections) does not apply to a loss in respect of which an amount that has been, or, could be recovered under a law of the Commonwealth, a State or a Territory that relate to Workers Compensation.” His Honour found that the phrase “Workers Compensation” applied only to no fault benefits (weekly payments, medical benefits and any no fault lump sum) and any restriction should be limited to same and not to any claim for common law damages. Section 82 therefore remained unaffected.

Conclusion

The ruling may, on one analysis be limited to the particular facts and circumstances, but it shows that with considered thought and imagination, and using the tools currently available to them, plaintiff lawyers may rebuild some of the common law rights taken away from injured victims. PL

A Notice of Appeal was lodged on 18 June 2001. A copy of the ruling may be found at www.countycourt.vic.gov.au/judgements/baukes_alltools.htm

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