Manual Handling Injuries in the Workplace – when can an employer be liable?[1]

Legal Principles – a ready reckoner

1. The duty of care owed by an employer to a worker, is to take reasonable care to avoid exposing the worker to an unnecessary risk of injury[2].

2. In *Bankstown Foundry Pty Ltd v. Braistina*[3] the High Court of Australia explained the content of the duty of care owed in this way:

> Furthermore, it has long been recognised that what is a reasonable standard of care for an employee's safety is "not a low one" … whether or not it will be fund to have been satisfied is always a question of fact to be determined in light of the circumstances of each case … on the other hand, being a question of fact, it is undoubtedly true, as McHugh J A said, that what reasonable care requires will vary with the advent of new methods and machines and with changing ideas of justice and increasing concern with safety in the community… in every case the tribunal of fact … must determine whether or not in the circumstances of the particular case the employer failed to take **those precautions which an employer acting reasonably would be expected to take. What is considered to be reasonable in the circumstances of the case must be influenced by current community standards**. Insofar as legislative requirements touching industrial safety have become more demanding upon employers, this must have its impact on community expectations of the reasonably prudent employer … (emphasis added).

3. In *Wyong Shire Council v. Shirt*[4] the High Court guides us when there is a breach of the duty of care owed:

> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the employer's position would have foreseen that his conduct involved a risk of injury to the worker or to a class of persons including the worker. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. **The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability off its occurrence**, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balance out that the tribunal of fact can confidently asset what is the standard of

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2 *Hamilton v. Nuroof W A Pty Ltd* (1956) 96 CLR 18, 28

3 (1986) 169 CLR 301 at 308-9

4 (1979-80) 146 CLR 40 at 47.

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> response to be ascribed to the reasonable man placed in the employer's position.
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> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, **the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors.** (emphasis added)

4. An employer is not required to safeguard employees completely from all perils – *Vozza v. Tooth & Co Ltd*[5] the High Court put it like this:

> The statement that the common law requires that an employer have a safe system of work for his employees means only that he must take reasonable care for their safety. **It does not mean that he must safeguard them completely from all perils**. 'The ruling principle is that an employer is bound to take reasonable care for the safety of his workman and all other rules or formulas must be taken subject to this principle'. That statement made by Lord Keefe of Avonholm in *Cavanah v. Ulster Weaving Co Ltd* [1960] AC 145 at 165 was repeated and approved by the House of Lords in *Brown v. Rolls Royce Limited* [1960] 1 WLR 210. (emphasis added)

5. An employer owes to his workers an overriding managerial responsibility to safeguard them from unreasonable risks in regard to the fundamental conditions of employment – safety, plant, premises and method of work. It is also well settled that, so far as the third of those matters is concerned it is the duty of the employer to devise a suitable system of work, to warn their workers of expected risks and to instruct them how best to protect themselves from injury and, further to take steps to see that those instructions are carried out.[6]

6. While cases where an employer has been found guilty of failing to devise and enforce a safe system of work are most commonly cases relating to injuries sustained by a worker while on the employer's premises, it is well settled that the duty of care extends to devising and enforcing such a system covering activities undertaken by workers, in their character as workers, in places other than the employer's premises.[7]

7. All of this notwithstanding, the duty which an employer owes to its workers is not one of insurance or "strict liability". As Professor Fleming wrote in the *Law of Torts*[8]:

> There is an element of risk in the performance of even the most simply industrial operations, that an employer is not expected to ensure that a system of work is in fact accident proof. He need only guard against unreasonable or (in the much favoured phrase) "unnecessary" risks, having regard alike to the likelihood of danger, gravity of injury and means for avoiding it. Thus even an "extreme risk

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5 (1964) 112 CLR 316.

6 See, for example, *General Cleaning Contractors Limited –v- Christmas* [1953] AC 180, 194 per Lord Reid.

7 Further, for example, *General Cleaning Contractors Limited –v- Christmas* (above); *Chomentowski –v- Red Garter Restaurant Pty. Ltd.* (1970) 92 WN 1070; *McLean –v- Tedman* (1984) 155 CLR 306.

8 Seventh Edition (1987) 485.

> of fearful consequences" does not connote negligence unless reasonable precautions could have minimised or eliminated it: Herein there lies the crucial difference between negligence and strict liability. On the other hand, at one time it was fashionable to call upon Lord Dunedin's Apothegm that when an employer is charged with a fault of omission, there must be proof, either that he failed to adopt a precaution in common practice or that it would be "folly" not to adopt it. Valuable though this warning may be against a facile finding that a precaution is necessary in the absence of general usage, the touchstone of the common law is not "folly" but failure of reasonable care."

8. However, even if a risk of injury is reasonably foreseeable that does not amount to liability being established. A breach of the duty owed must still be established.

9. In determining whether an employer has breached its duty of care owed, the Court will have regard to the "balancing test" set out in *Wyong Shire Council v Shirt*[9]. This involves a weighing of the magnitude of the risk and the degree of probability of its occurrence, with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which may exist. A Court giving a proper consideration of these matters will give greater weight to the ease and inexpense of taking alleviating action. This will often be determinative of what remedial actions had to be taken, even if the magnitude of the risk and the probability of its occurrence are low.[10]

10. Once the worker points to a reasonable, alternative and safe system which was practicable and would have obviated the relevant risk, it is for the employer to establish that it would have been unable to enforce compliance with the suggested system because its implementation would have been resisted by the workers.[11] The onus of proof shifts.

11. An employer's obligation is not merely to provide a safe system of work; it is an obligation to establish and maintain such a system. The Court will have regard to the power of an employer to prescribe, warn, command and cause obedience to its commands. Accordingly, the employer must give appropriate supervision to enforce compliance with safety procedures.[12]

12. When an employer knows that a worker will, in the course of his work, be required to move heavy objects an employer's duty is to provide a safe system of moving such object. From the cases the following can be extracted:

    (a) A safe system of manual handling will usually require the employer to give a warning or instruction that no worker should attempt to lift excessively heavy objects alone.

    (b) Further, a safe system of manual handling will usually involve both instructing workers to seek help in order to move excessively heavy objects and instructing fellow workers to provide that help when asked.

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9 (1980) 146 CLR 40 at pages 47 to 48.
10 *Militec v Capital Territory Health Commission* (1995) 69 ALJR 675.
11 *McLean v Tedman* (1984) 155 CLR 306.
12 *Bankstown Foundry v Braistina* (1986) 169 CLR 301 at 307 to 308.

(c) The employer's duty is to take reasonable care to avoid exposing a worker to unnecessary risk for moving heavy objects, including the risk that the injury may occur because of the failure of a worker to appreciate through inadvertence, failure to apply his mind, an error of judgment or negligence, that an object is too heavy to be moved by him alone.

(d) An employer does not avoid the duty imposed on it by leaving it to the worker to work out a safe system for himself or herself; that would be an impermissible attempt by the employer to shift its duty onto the worker.[13]

13. When a worker in the course of employment will be required to manually handle objects (or people), the employer:

(a) Must instruct the worker that he or she is entitled to, and should seek, the help of co-workers.
(b) Make available co-workers.
(c) Instruct these co-workers that they are obliged and must be willing to assist co-workers in moving heavy objects.
(d) Take measures, including supervision and re-enforcement of command, to ensure that the worker, when required to lift or move the heavy object, does not do so without assistance.[14]

14. If the employer has left it to the worker to work out how to lift heavy objects when he or she has to, then it is foreseeable that the worker might essay the task of attempting to lift such a heavy object on his own, and thus be exposed to a risk of injury.15 Accordingly, it falls within the compass of the employer's duty and ability, to command and instruct workers to use mechanical or manual assistance (co workers) as the exclusive method to use when manual handling when the risk of injury the task presents so requires it.[16]

15. If however, lifting or moving heavy objects was not ordinarily part of the employer's system of work for the worker, although the duty exists, the magnitude of the risk is not as great and the duty is therefore not as high. In some cases, a worker could fail where he attempts to lift or move an excessive weight without asking for mechanical or manual assistance when it is "obvious" that he would need such help or he has been instructed to seek such help when confronted with the risk presented.[17]

16. If the system of work has changed after a worker's injury then it is permissible to draw the inference that if the new system of work or changes system of work eliminated or minimised the risk the employer had acted unreasonably in not previously adopting the new system.[18]

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13 *Electrical Transmission Pty. Ltd. v Orgaz* - Unreported – 3 November, 1989 – Supreme Court of Western Australia – Full Court appeal No. 19 of 1989.
14 *Castro v Transfield (Qld.) Pty. Ltd.* (1983) 47 ALR 715 at pages 717 to 718.
15 *Turner v State of South Australia* (1982) 42 ALR 669 at 674.
16 *Bankstown Foundry v Braistina* above at n9.
17 *Waugh v Kippen* (1986) 160 CLR 156.
18 *Nelson v John Lysaght (Aust.) Limited* (1975) CLR 201; see also *Drew v The Hobart Fire Brigade Board* (1985) Aust. Torts Reports 80-711; *Theilemann v The Commonwealth* (1982) VR 713.

17. Courts are now required to also consider these common law principles with specific statutory requirements as set out the *Workers Compensation and Rehabilitation Act* (2003) (the WCRA). These sections largely reflect common law principles.

305 Definitions for pt 8

In this part—

duty means any duty giving rise to a claim for damages, including the following—

(a) a duty of care in tort;
(b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort;
(c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b).

duty of care means a duty to take reasonable care or to exercise reasonable skill (or both duties).

305A Provisions not to apply to particular injuries

(1) The provisions of this part other than division 4, do not apply in relation to deciding liability for injury if the injury resulting from the breach of duty is or includes—

(a) an injury that is a dust-related condition; or
(b) an injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.

(2) To remove any doubt, it is declared that a breach of duty mentioned in subsection (1) includes a breach of duty giving rise to a dependency claim.

305B General principles

(1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
(b) the risk was not insignificant; and
(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against risk of injury, the court is to consider the following (among other relevant things)—

(a) the probability that the injury would occur if care were not taken;
(b) the likely seriousness of the injury;
(c) the burden of taking precautions to avoid the risk of injury.

305C Other principles

In a proceeding relating to liability for a breach of duty—

(a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and
(b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

305D General principles

(1) A decision that a breach of duty caused particular injury comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the injury (factual causation);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (scope of liability).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the worker who sustained an injury would have done if the person who was in breach of the duty had not been so in breach—

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the worker after suffering the injury about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty.

305E Onus of proof

In deciding liability for a breach of a duty, the worker always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

18. As to contributory negligence, in *Bankstown Foundry Pty. Ltd. -v- Braistina* the High Court sets it out like this:

> A worker will be guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he would expose himself to a risk of injury. But his conduct must be judged in the context of a finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risk. The question will be whether, in the circumstances and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgment or to negligence rendering him responsible in part for the damage."

This is now dealt specifically with in section 305 F and 305G of the WCRA. These sections provide:-

305F Standard of care in relation to contributory negligence

(1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the worker who sustained an injury has been guilty of contributory negligence in failing to take precautions against the risk of that injury.

(2) For that purpose—

(a) the standard of care required of the person who sustained an injury is that of a reasonable person in the position of that person; and

(b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time.

305G Contributory negligence can defeat claim

In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.

305H Contributory negligence

(1) A court may make a finding of contributory negligence if the worker relevantly—

(a) failed to comply, so far as was practicable, with instructions given by the worker's employer for the health and safety of the worker or other persons; or

(b) failed at the material time to use, so far as was practicable, protective clothing and equipment provided, or provided for, by the worker's employer, in a way in which the worker had been properly instructed to use them; or

(c) failed at the material time to use, so far as was practicable, anything provided that was designed to reduce the worker's exposure to risk of injury; or

(d) inappropriately interfered with or misused something provided that was designed to reduce the worker's exposure to risk of injury; or

(e) was adversely affected by the intentional consumption of a substance that induces impairment; or

(f) undertook an activity involving obvious risk or failed, at the material time, so far as was practicable, to take account of obvious risk; or

(g) failed, without reasonable excuse, to attend safety training organised by the worker's employer that was conducted during normal working hours at which the information given would probably have enabled the worker to avoid, or minimise the effects of, the event resulting in the worker's injury.

(2) Subsection (1) does not limit the discretion of a court to make a finding of contributory negligence in any other circumstances.

(3) Without limiting subsection (2), subsection (1)(f) does not limit the discretion of a court to make a finding of contributory negligence if the worker—

(a) undertook an activity involving risk that was less than obvious; or

(b) failed, at the material time, so far as was practicable, to take account of risk that was less than obvious.

305I Meaning of obvious risk for s 305H

(1) For section 305H, an obvious risk to a worker who sustains an injury is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the worker.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

(5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

305J Presumption of contributory negligence if person who suffers injury is intoxicated

(1) This section applies if a worker who sustained an injury was intoxicated at the time of the breach of duty giving rise to a claim for damages and contributory negligence is alleged against the worker.

(2) Contributory negligence will, subject to this section, be presumed.

(3) The worker may only rebut the presumption by establishing on the balance of probabilities—

(a) that the intoxication did not contribute to the breach of duty; or
(b) that the intoxication was not self-induced.

(4) Unless the worker rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the worker would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.

(5) If, in the case of a motor vehicle accident, the worker who sustained an injury was the driver of a motor vehicle involved in the accident and the evidence establishes—

(a) that the concentration of alcohol in the worker's blood was 150mg or more of alcohol in 100mL of blood; or
(b) that the worker was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle;

the minimum reduction prescribed by subsection (4) is increased to 50%.