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Recent cases and developments for liability apportionment in labour hire claims

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11 October 2016

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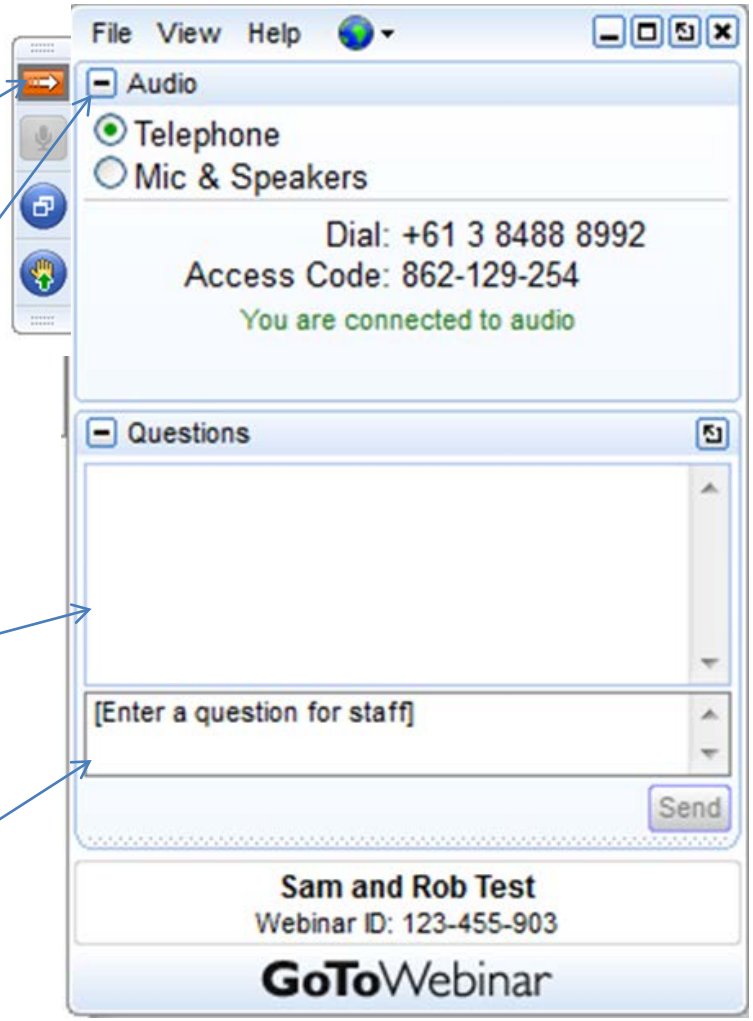

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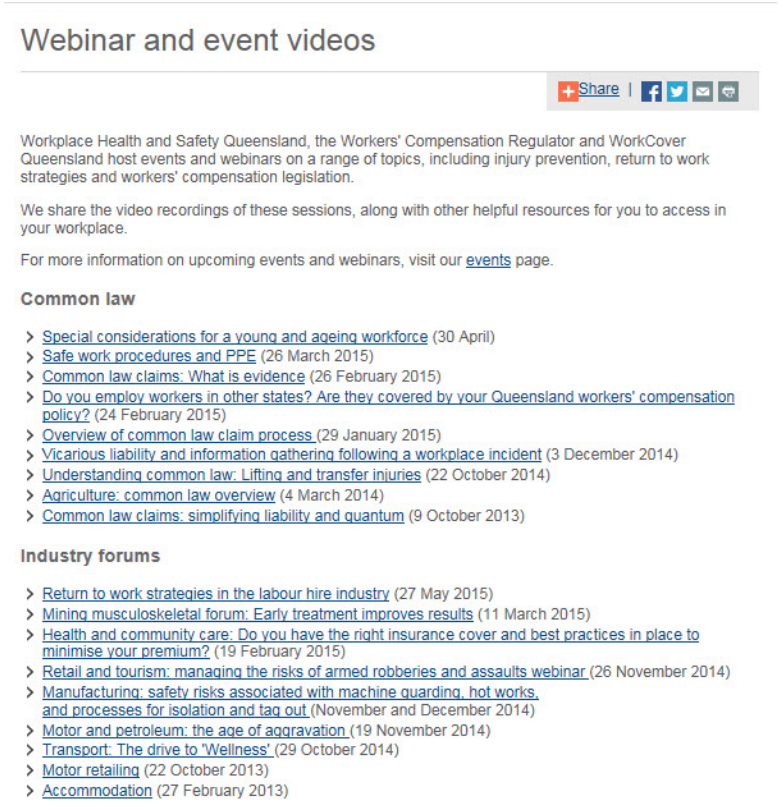

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For more information on upcoming events and webinars, visit our events page.

Common law

- Special considerations for a young and ageing workforce (30 April)
- Safe work procedures and PPE (26 March 2015)
- Common law claims: What is evidence (26 February 2015)
- Do you employ workers in other states? Are they covered by your Queensland workers' compensation policy? (24 February 2015)
- Overview of common law claim process (29 January 2015)
- Vicarious liability and information gathering following a workplace incident (3 December 2014)
- Understanding common law: Lifting and transfer injuries (22 October 2014)
- Agriculture: common law overview (4 March 2014)
- Common law claims: simplifying liability and quantum (9 October 2013)

Industry forums

- Return to work strategies in the labour hire industry (27 May 2015)
- Mining musculoskeletal forum: Early treatment improves results (11 March 2015)
- Health and community care: Do you have the right insurance cover and best practices in place to minimise your premium? (19 February 2015)
- Retail and tourism: managing the risks of armed robberies and assaults webinar (26 November 2014)
- Manufacturing: safety risks associated with machine guarding, hot works, and processes for isolation and tag out (November and December 2014)
- Motor and petroleum: the age of aggravation (19 November 2014)
- Transport: The drive to 'Wellness' (29 October 2014)
- Motor retailing (22 October 2013)
- Accommodation (27 February 2013)

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Meet your presenters

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Meet your presenters

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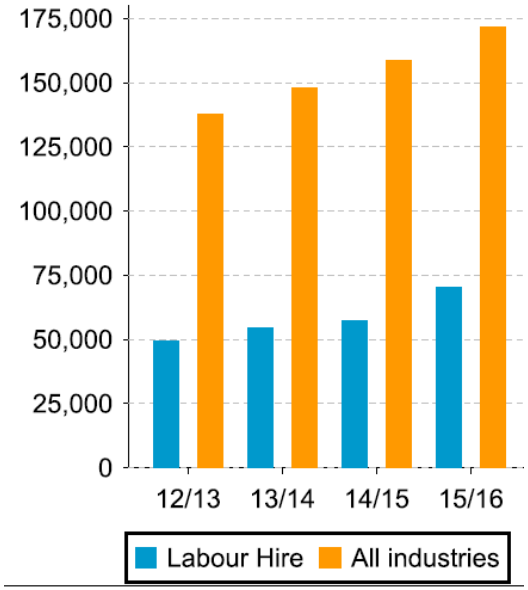
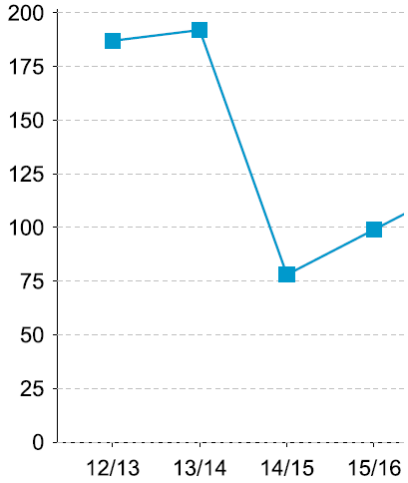
Trends



Average claim cost (common law)		
Year	Labour Hire	All industries
12/13	$49,332	$137,499
13/14	$54,629	$147,916
14/15	$57,092	$158,428
15/16	$70,469	$171,553



Average claim cost (common law)

New claims (common law)

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Recent cases and developments for liability apportionment in labour hire claims

HopgoodGanim
LAWYERS

Agenda

1. The starting point – *TNT v Christie*
2. Labour hire employer found greater than 25% liable
3. Labour hire employer found less than 25% liable
4. General principles for determining liability apportionment
5. The labour hire employer's contractual obligations and responsibilities
6. Is there a contract for labour hire or a contract for a "whole service"?
7. Why the labour hire employer and the host sometimes reach a private agreement on apportionment

Duty of care owed to labour hire employees

- Labour hire employers owe their employees a non-delegable duty of care
- This duty extends to ensuring that host employers to whom their labour hire employees are entrusted exercise reasonable care for those employees' safety
- The duty of care owed by a host employer to labour hire workers is the same as the duty owed by an employer to its own employees

TNT Australia v Christie & Ors [2003] NSWCA 47

- Facts
  - Plaintiff hired by his employer Manpower to work at premises of client, TNT
  - Plaintiff injured whilst operating a pallet jack which malfunctioned
- Decision
  - Labour hire employer liable for failing to properly instruct the plaintiff and failing to supply appropriate equipment, e.g. properly functioning pallet jack
  - TNT found liable for failing to properly train the plaintiff in safe operation of pallet jack and for failing to identify the defect in the pallet jack and/or repair it
  - Liability apportioned 25/75 in labour hire employer's favour
- Implications
  - This is the land mark case and 25/75 is the starting point or general yardstick for determining liability apportionment
  - However each case turns on its own facts which may result in significant deviations from the 25/75 ratio

Glynn v Challenge Recruitment Australia Pty Ltd [2006] NSWCA 2003

- Facts
  - Plaintiff sent by labour hire company to clean up the host employer's disused warehouse
  - Host foreman directs the plaintiff to climb a ladder to release two metal bolts which prevented a roller door from opening
  - The plaintiff fell off the ladder which was unsecured
- First Instance
  - Labour hire employer held liable for its failure to train its employee in the safe use of ladders

Glynn v Challenge Recruitment Australia Pty Ltd [2006] NSWCA 2003

- Court of Appeal
  - The cause of the accident and responsibility for it was multifactorial
  - The ladder should have been secured and this flaw in the system of work was within the host employer's control
  - However the accident may not have occurred had the labour hire company properly trained the plaintiff
  - Liability apportioned at 40% to labour hire employer and 60% to the host. Court observed the labour hire employer had done nothing to respond to the risk of injury, e.g. it had not inspected the working conditions at the site

Victorian WorkCover Authority v Carrier Airconditioning Pty Ltd [2006] VSCA 63

- Facts
  - Forklift driver hired out to Carrier Airconditioning by Workforce on Tap, a labour hire firm
  - Plaintiff injured when he fell whilst descending a makeshift platform he had erected
- Decision
  - Host employer primarily liable for failing to instruct or warn plaintiff about the task at hand and its failure to provide suitable equipment
  - Labour hire firm also culpable for its omissions to undertake a site assessment, enquire as to the nature of the work its employee would undertake and insist the worker perform site induction before commencing work
  - Liability apportioned at 35% to labour hire employer and 65% to host employer

Van Duong v Versacold Logistics Limited & Ors [2010] QSC 466

- Facts
  - Plaintiff operating a ride-on pallet jack at host's premises
  - The pallet jack ran over a stray piece of debris on the floor causing the machine's handle to jerk suddenly
  - The plaintiff lost his balance and fractured his right arm
- Decision
  - Host employer liable because its system of work for monitoring and cleaning its floors was insufficient
  - Labour hire employer liable too because it should have taken further steps to ensure the host maintained a sufficient cleaning regime
  - Liability apportioned at 30% to labour hire employer and 70% to host employer
  - Relevant considerations included that the labour hire employer had a site office at the host's premises and was aware of the cleaning issues at the host's premises

Dib Group Pty Ltd trading as Hill & Co v Cole [2009] NSWCA 210

- Facts
  - Plaintiff sustained a complex fracture to his left ankle when he stood on a cover over an inspection pit, which was unstable, thereby causing him to fall into the pit
  - Over time employees had chipped away the concrete at the corners of the rim to allow the cover to be more readily lifted
- First Instance
  - It would not have been reasonable for the plaintiff's employer to have lifted the pit cover to see that the corners had been chipped away.
  - Even if there had been a site inspection, it was beyond any reasonable expectation that the defect in the concrete edges would have been discovered on inspection

Dib Group Pty Ltd trading as Hill & Co v Cole [2009] NSWCA 210

- Court of Appeal
  - The employers duty to adopt safe systems of work and to provide proper plant and equipment will operate differently on premises over which it has full control, as opposed to those which are under the control of others
  - The duty of the plaintiff's employer included an obligation to carry out a site inspection
  - The plaintiff's employer breached its duty of care by not carrying out a site inspection
  - However, there was NO causal connection between the breach of duty and the injury because a reasonable inspection would not have disclosed the risk of injury
  - 100% to host employer

Hodge v CSR Limited [2010] NSWSC 27

- 100% liability to host employer
- Facts
  - The plaintiff sustained an injury to his cervical spine from using a 25kg jackhammer to remove concrete which had solidified in the barrel of a concrete agitator truck
  - He performed this work for approximately 3 hours
  - The task was usually performed using a Kanga jackhammer (10-11kg) but it had been stolen
  - The host employer then hired jackhammers to undertake the work
- Decision
  - Both defendants were liable for the plaintiff's injury
  - The labour hire employer was liable for breach of the non-delegable duty of care

Hodge v CSR Limited [2010] NSWSC 27

- Decision cont'd
  - The labour hire employer should be completely indemnified by the host employer because the labour hire employer:
    - Had no direct involvement in the site
    - Had no control over the site
    - Did not have a supervisor on site
    - Was not involved in the plaintiff's day-to-day work
    - Was not aware of the use of a full sized jackhammer
    - Was aware that de-dagging was carried out from time-to-time
    - Was aware that de-dagging was performed intermittently and on dates which were not predictable (wet weather)
    - Had the labour hire employer observed de-dagging being performed prior to the theft of the kanga jackhammer, a safe system of work and appropriate equipment would have been observed.

Clarence Valley Council v Macpherson [2011] NSWCA 422

- Facts
  - The plaintiff was employed by APS and supplied to Clarence Valley Council (Council) as a spray operator to assist with eradicating weeds
  - He sustained a severe twisting injury to his right wrist and fracture of his 4th metacarpal whilst using a chainsaw
  - Expert evidence illustrated that the chainsaw should have had a torque-limiting clutch attachment and the injury would have been avoided.
  - The Council had a chainsaw with a torque-limiting clutch but it was not available for use
  - The Council provided the equipment to the plaintiff in a “spur of the moment” fashion and APS could not have prevented the provision of the unsafe chainsaw

Clarence Valley Council v Macpherson [2011] NSWCA 422

- At Trial
  - It was accepted that the chainsaw was provided in a “spur of the moment” fashion
  - It was difficult to see how APS would or could have prevented the provision of the unsafe chainsaw
  - However, despite this, APS could not abdicate its continuing responsibilities to its employees with respect to the provision of safe plant and equipment and found APS liable to the extent of 15%
- Court of Appeal
  - Was not prepared to overturn the 15% apportionment as decisions on apportionment are discretionary by trial judges and there was no demonstrable error.

Shoalhaven City Council v Humphries [2013] NSWCA 390

- Facts
  - The plaintiff was employed by Campbell Page Labour Hire and supplied to Shoalhaven City Council to undertake sewerage maintenance duties
  - He sustained injuries to his back and shoulder when he attempted to manually lift a manhole cover weighing between 75-85kgs
  - He used a lifting tool known as a T-bar despite a mechanical lifting device being attached to the rear of the truck they were driving
  - He was instructed to carry out the task by his supervisor

- At Trial
  - The Council was liable for the plaintiff's injuries due to the casual act of negligence by the plaintiff's supervisor (Mr Gillard)

Shoalhaven City Council v Humphries [2013] NSWCA 390

- Court of Appeal
  - The employer was aware or ought to have been aware that the plaintiff, if required to work in confined spaces in a sewer main, would also be required to remove the manhole cover to the sewer main
  - These covers are often constructed of concrete and are of considerable weight
  - The employer should have ascertained from the Council the system of work in place to remove the covers without risk of injury
  - However, if those inquiries had been made, the employer would have been told that T-bars were used by one or two persons or mechanical lifting devices were attached to the rear of Council trucks
  - Any breach on the part of the employer in failing to make the relevant inquiry, was not causative of the plaintiff's injury
  - It is difficult to see how the employer could be held liable for the casual act of negligence by the plaintiff's supervisor
  - 100% to host employer

Wormleaton v Thomas & Coffey Limited (No. 4) [2015] NSWSC 260

- Facts
  - The plaintiff was employed by Allstate and assigned to work at Bluescope Steel's Port Kembla Steelworks
  - He sustained a severe crush injury to his right leg which was later amputated as a result of the failure of the system of work
  - Thomas & Coffey was engaged by Transfield to dismantle and relocate a sinter cooler. Part of the sinter cooler needed to be lifted by crane and Transfield engaged Allstate to undertake the crane work.
  - The plaintiff was a dogman employed by Allstate

Wormleaton v Thomas & Coffey Limited (No. 4) [2015] NSWSC 260

- Decision
  - The incident occurred because of a failure in the implementation of the system of work
  - This would not have occurred had Transfield fulfilled its obligation to direct the work and co-ordinate the activities of Thomas & Coffey and Allstate
  - It could be said that Allstate had breached its duty of care by failing to make any inquiry of Thomas & Coffeey about the system it devised for lifting the frame
  - However, if that inquiry had been made, a reasonable employer in the position of Allstate would have been satisfied with the response
  - If there was any breach on the part of Allstate, it was NOT causative of the plaintiff's injury

Wright by his tutor Wright v Optus Administration Pty Limited [2015] NSWSC 160

- Facts
  - The plaintiff suffered physical injuries to his head and mental harm when another co-worker attempted to murder him by throwing him off a 4th floor balcony
  - The plaintiff was employed by IPA and supplied to Optus
  - The co-worker was employed by another labour hire agency but was undertaking the same training course as the plaintiff

Wright by his tutor Wright v Optus Administration Pty Limited [2015] NSWSC 160

- Decision
  - Claim against IPA dismissed as:
    - Pursuant to contract Optus exercised control and direction over the plaintiff
    - Optus controlled the premises
    - Optus controlled the activities
    - Optus co-ordinated the activities of employees from different employers
    - The circumstances were entirely within the control and management of Optus and they were entirely unknown to IPA

South Sydney Junior Rugby League Club v Gazis [2016] NSWCA 8

- Facts
  - The plaintiff was employed by MPS as a security guard
  - South Sydney Junior Rugby League Club (Club) contracted with Sermacs to provide security on site
  - Sermacs obtained the services of the plaintiff from MPS
  - The plaintiff was injured when he attempted to move a trolley which was used to transport money from poker machines. He lost his grip on the trolley, fell backwards and injured his back
  - This was not part of his normal duties and he was not instructed nor required to move trolleys

- At Trial
  - The Club was found 75% liable and MPS was found 25% liable
  - Sermacs were not liable

South Sydney Junior Rugby League Club v Gazis [2016] NSWCA 8

- Court of Appeal
  - Neither the Club or MPS were liable to the plaintiff
  - In relation to MPS
    - MPS owed the plaintiff a non-delegable duty of care to take reasonable care to avoid exposing him to unnecessary risks of injury
    - MPS breached its duty of care by not taking reasonable steps to investigate the plaintiff's working environment
    - However, the breach was not causative of the plaintiff's injury, as any inspection would not have revealed the risk of injury

Kelly v Bluestone Global Ltd (in liq) [2016] WASCA 90

- Facts
  - Plaintiff was employed by Ngarda Mining (Ngarda)
  - He sustained neck and back injuries when another co-worker (Mr Scanlan) dropped a fully loaded bucket onto the tray of the plaintiff's dump truck
  - Mr Scanlan was employed by TSS Recruitment (TSS) and supplied to Ngarda
  - The plaintiff claimed that TSS was vicariously liable for the actions of Mr Scanlan
- At Trial
  - Plaintiff was unsuccessful
  - Mr Scanlan operated the excavator within the usual and accepted practice to which he was appropriately trained
  - Plaintiff failed to establish Mr Scanlan breached his duty of care

Kelly v Bluestone Global Ltd (in liq) [2016] WASCA 90

- Court of Appeal
  - Plaintiff was unsuccessful again
  - Control over Mr Scanlan was completely transferred to Ngarda and accordingly, TSS could not be found vicariously liable for Mr Scanlan's negligence (if any)
  - In relation to Control, the Court held:
    - Ngarda provided all inductions and training, co-ordinated all works, conducted safety inspections, arranged transport and on-site accommodation for Mr Scanlan
    - Terms of the contract between TSS and Ngarda stated that Mr Scanlan would submit to the directions of Ngarda
    - TSS had no involvement in the day-to-day operations on-site
    - No differentiation between TSS and Ngarda employees on-site
    - No TSS employees in supervisory roles
    - Most workers supplied by TSS were made permanent Ngarda employees within 3 months
    - Role of TSS confined to payment of wages only

Kelly v Bluestone Global Ltd (in liq) [2016] WASCA 90

- Court of Appeal con’td
  - Dissenting judgment by Justice Mitchell
    - The burden on an employer who seeks to transfer control is a heavy one and should only be done in exceptional circumstances
    - Justice Mitchell did not believe the burden had been discharged by TSS in the circumstances

Jurox Pty Ltd v Fullick [2016] NSWCA 180

- Facts
  - Plaintiff was employed by Integrated and assigned to work at Jurox's factory
  - She was injured when emptying a 25kg bag of dextrose into a hopper

- At Trial
  - Plaintiff was successful
  - Jurox's system of work was safe
  - The plaintiff "*adopted an unsafe work practice, and that work practice continued, uncorrected, until the day of her injury*"

Jurox Pty Ltd v Fullick [2016] NSWCA 180

– Court of Appeal

- Upheld trial judge's decision that claim against Integrated failed on causation grounds
- Any audit of the system of work would have revealed the safe system of work and not a failure of the Jurox's supervision
- The employer's duty does not extend to supervising the host employer's supervisory regime

Takeaway points from cases where labour hire employer's share of the liability is less than 25%

- The labour hire employer may escape liability altogether even if it was in breach of its duty so long as that breach did not cause the plaintiff's injury

- Where the plaintiff's injury results from a sudden, unexpected departure from the host's system of work such that the labour hire employer has no reasonable opportunity to intervene, the labour hire employer may not be liable

- In most instances labour hire employers may not be found liable for injury to their employees arising from concealed or minor defects at the host's workplace if a reasonable system of inspection would not have revealed it

Takeaway points from cases where labour hire employer's share of the liability is less than 25%

- Whilst the labour hire employer should make appropriate enquiries of the host to ensure it has a safe system of work, absent prior knowledge of any shortcomings, the labour hire employer's duty of care does not normally extend to assessing the effectiveness of measures put in place by the host to enforce its safe system of work

General principles for determining liability apportionment in labour hire cases

- What was the level of access to the premises as between the labour hire employer and the host and what was the labour hire employer's opportunity to inspect them?
- What were the labour hire employer and the host's respective state of knowledge of the hazard?
- How long had the labour hire employee been working at the host's premises?
- Did the labour hire employer have the capacity, independent of the host, to address a hazard by itself or only with the consultation/ approval of the host?

General principles for determining liability apportionment in labour hire cases

- How long had the problem or hazard existed at the host's workplace?
- Had any prior incidents or injury arisen from the same hazard?
- Was the hazard at the host's workplace a one-off occurrence or a constant occurrence?
- Was the labour hire employee injured whilst performing his or her normal duties or did those duties vary from what he or she would normally perform at the host's premises

General principles for determining liability apportionment in labour hire cases

- Was there any significant difference between the labour hire employee's ability to notify the host about a workplace hazard or issue as opposed to that employee informing the labour hire employer?

- Which party was responsible for training the labour hire employee?

- Did the labour hire employee's injury arise as a result of a casual, momentary and unforeseeable act or negligence on the part of the host?

General principals for determining liability apportionment in labour hire cases

- What contributions did the labour hire employer and the host make in devising, implementing and maintaining the unsafe system of work that was responsible for the employee's injury?
- Which party was in control of the premises?
- Which party supplied any plant or equipment to the labour hire employee for use in carrying out his or her duties?

Labour hire employer's contractual obligations and responsibilities

- When apportioning liability the court will have regard to any applicable documented agreement entered into by the labour hire employer and the host

- Labour hire agreements often stipulate the respective obligations and responsibilities of the labour hire employer and the host for matters relevant to the labour hire employee's placement, e.g. who is responsible for providing supervision, training, equipment etc.

- Labour hire employers may potentially increase their exposure to liability if the relevant agreement provides for them to be responsible for matters which are typically within the host's sphere of control, e.g. day to day supervision of the labour hire employee's duties and training of the employee in the host's plant and equipment.

Labour hire employer’s contractual obligations and responsibilities

- It is important labour hire employers are fully aware of the nature and extent of their contractual obligations and legal advice should be sought if any doubts or uncertainties arise.

Does the agreement provide for a labour hire service or a “whole service”

- If a labour hire firm contracts with its clients to provide additional services above and beyond labour hire services then that state of affairs may give rise to a relationship of subcontractor and principal between the labour hire employer and its client

- In these circumstances the labour hire employer’s exposure may increase significantly

Unilever Australia Limited v Pahi & Anor; Swire Cold Storage Pty Ltd v Pahi & Anor [2010] NSWCA 149

- Facts
  - The labour hire employee in that case developed carpal tunnel syndrome from performing repetitive work on a production line for repackaging of goods

- Decision
  - The labour hire employer, the occupier of the premises and another party which the occupier had contracted with to repackage the goods were all found equally liable

Unilever Australia Limited v Pahi & Anor; Swire Cold Storage Pty Ltd v Pahi & Anor [2010] NSWCA 149

- On Appeal

  - Only the labour hire employer was found liable
  - The labour hire employer in this case designed the system of work and retained supervision over the labour hire employee's daily duties whilst the occupier gave no instructions on how the labour hire employee should carry out his duties
  - A section of the occupier's workplace was designated for the labour hire company's employees to work
  - Having engaged a competent contractor the occupier was not obliged to provide or supervise the safe system of work to the labour hire firm or its employees

Why does the labour hire employer and the host reach agreement on liability ahead of trial?

- To avoid an unexpected, adverse decision being made by the court the workers' compensation insurer to the labour hire company may negotiate and reach a private agreement with the host employer on liability apportionment

- This occurred in *Thomas v Trades & Labour Hire Pty Ltd & Anor* [2015] QSC 264.

- In that case HopgoodGanim, acting for WorkCover Queensland and its insured labour hire employer, were successful in defending liability

Why does the labour hire employer and the host reach agreement on liability ahead of trial?

- Enables the labour hire employer, its insurer and the host the opportunity to share intelligence on the merits of the plaintiff's case and to pool their resources

- Significant savings in costs, resources and the duration of the trial can be achieved because the number of issues in dispute for the trial judge to consider is reduced

Thank you

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