

# WorkSafe Western Australia Commission of Western Australia

## Liability for health and safety at workplaces

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I am very pleased to have been invited to give the keynote address to the 1999 WorkSafe Week Commission Function. Safety and health issues in the workplace and in particular, the standards to be met in maintaining a safer working environment, are of fundamental importance, not to the relationship between workers and employers but to the community as a whole.

### The cost and extent of occupational injury

The figures that have been released over the past five years recording the extent and cost of workplace injury and illness reveal a relatively bleak picture of the Australian workplace. For example, in 1994 the Australian Industry Commission published the results of its *Inquiry into Occupational Health and Safety*. In order to provide a complete picture of the extent of workplace injuries, the Australian Bureau of Statistics was commissioned to undertake a survey of some 9,200 households. The Commission also drew on a number of State resources, including the 1995 report of the Western Australian Department of Occupational Health, Safety and Welfare entitled *Work, Health and Safety*. The Industry Commission reported that each year in Australia:

- There are over 500 fatalities as a result of traumatic injuries at work.
- Between 650 and 2,200 workers die of occupational cancers. The vast majority of those cancers are caused by exposure to hazardous chemicals or other substances.
- Up to 650,000 workers, or 1 in every 12 workers, suffer an injury of illness at work.

In the context of fatalities due to exposure to hazardous substances, Worksafe Australia has reported that for the period 1989-1992, an average of 2,239 Australians died from occupational exposure to hazardous substances compared to 2,294 by suicide, 2,066 from motor vehicle accidents and 643 from AIDS-related illnesses.

The extent of workplace injuries and illness has had a dramatic effect on Australian Industry. The estimates provided by the Industry Commission suggest that in 1994, at any time:

- Up to 140,000 workers could not work at full capacity.
- Over 270,000 workers had to permanently reduce their working hours.
- About 200,000 were prevented from working at all due to a work-related injury or illness.

The total cost of work-related illness and injury in Australia is difficult to estimate. A number of attempts have been made to quantify the total cost to Australian industry. For example, in 1994, Worksafe Australia quantified the direct cost of workers' compensation in the financial year 1992/1993 at \$4.8 billion, or, 1.2% of non-farm Gross Domestic Product. This figure however only captures the cost of compensation payments and legal, administrative and accounting costs incurred by self-insurers. In order to understand the total cost of work-related injury and illness, one would need to include issues such as loss of productivity, overtime paid to other employees in order to cover the injured worker, the cost of recruitment of new staff in the event that the worker is permanently injured, the costs to the community in terms of social security and Medicare benefits in addition to the direct effect of the injury on the worker including loss of income and the monetary value of the worker's pain and suffering. In 1995 it was estimated that the average "unit cost", (the cost of an individual incident), was between \$27,000 and \$28,000. Naturally the actual costs of individual accidents will vary greatly according to the severity of the incident. Worksafe Australia went on to estimate that employers bear about 40% of this cost, the employee about 30% and the community about 30%. These percentages are also subject to wide variation according to the severity of the accident. For example, where the injury required an absence from work of five days or less, the employer could bear as much as 90% of the cost. In the event of a fatality, that proportion changes significantly and the family of the employee may bear as much as 60% of the cost.

The Industry Commission has estimated, taking into account a number of these factors, that total cost of workplace injury and illness nationally is more than \$20 billion each year. The Commission went on to suggest that a 10% reduction in workplace injuries and illness would see Gross Domestic Product increase by about \$340 million.

## **Background to the development of a statutory regime**

The development of a statutory regime establishing systems of work to prevent injuries and illness in the workplace is relatively new compared to an employer's liability at common law for an employee's injuries. The first statute dealing with working conditions in factories in Great Britain was enacted as early as 1802. The *Health and Morals of Apprentices Act 1802*. The act dealt with the hours and conditions of children working in cotton mills and was essentially an extension of the Elizabethan Poor Laws. The Act limited the number of hours children could be asked to work and provided a guarantee of certain conditions of employment including adequate accommodation. It did not however impose standards in terms of the safety of machinery utilised in the mills.

Standards for the maintenance and proper enclosure of factory machinery were not included in legislation until 1844. The *Factories Amendment Act 1844* provided for the fencing in of moving or dangerous parts of factory machinery. For the first time employers were required to report accidents causing physical injury to employees. In 1878 the provisions that had originally been applied to the cotton milling industry were extended to industries such as pottery, matchmaking, foundries, blast furnaces and copper mills. These obligations were consolidated in the *Factory and Workshop Act 1878*. This Act was to form the model for the first Australian statute dealing with the prevention of work-related injuries in Victoria. By the 1870's, Victoria was the only Australian colony with any significant manufacturing industry. The *Supervision of Workrooms and Factories Statute 1873 (Vic)* only dealt with the hours and conditions of employees, much in the same way as the early English Statutes had. Community pressure to institute reform in the workplace and improve working conditions

generally led to the enactment of the *Factories and Shops Act 1885*. The occupational health and safety provisions of the Act were lifted almost *verbatim* from the English statute.

Almost 20 years later Western Australia enacted its first legislation dealing with the regulation of health and safety in the workplace. As in Victoria, the Western Australian *Factories Act 1904* (WA) lifted a number of provisions directly from the English Act. The 1904 Act was not reviewed until 1920 when it was repealed and replaced by the *Factories and Shops Act 1920* (WA). The new Act was intended as an amalgamation of the earlier *Factories Act* and the legislation regulating opening and closing hours for retail stores. The provisions relating to occupational health and safety remained largely unchanged.

Occupational health and safety legislation remained largely unchanged in most Australian States for another 50 years. The impetus for review and reform since the 1980s finds origins in the publication of the highly influential *Report of the British Committee on Safety and Health at Work*, "the Robens Report", in the United Kingdom in 1972. The Robens Report identified a number of weaknesses in occupational health and safety legislation then in place. The four principal problems identified by the Report were:

"(a) The unco-ordinated proliferation of statutory standards, with the result that in 1969 [in the United Kingdom] there were 9 different legislative regimes,... and some 500 sets of regulations.

(b) The excessive complexity of many of the statutory standards.

(c) A failure to keep pace with technological, social and economic change both as to the content of standards and as to the range of matters which were subject to statutory regulation.

(d) A failure to formally and consistently involve those most directly affected by the statutory standards - employers and (especially) workers - in the standard setting process."

As the Australian statutory regime had used the English regime as a model, the same criticisms were applicable to the legislation in this country. The two key reform objectives identified by the Robens Report were:

"[T]he creation of a more unified and integrated system to increase the effectiveness of the [sic] state's contribution to safety and health at work...[and] more importantly, creating the conditions for more effective self-regulation."

The recommendations of the Robens Report were incorporated into Convention Nos. 155 and 164 of the International Labour Organisation in 1980. Throughout the early 1980s, all Australian States moved to implement the recommended reforms. In Western Australia, the *Occupational Health, Safety and Welfare Bill 1984* was introduced both to implement the Robens Recommendations and to comply with the ILO Convention in order to allow for its ratification.

## Liability for injuries and illness in the workplace

Many of you will be aware that in the context of liability for workplace injuries or illness, the most commonly referred to statements of the duties of those in the workplace are contained in the *Occupational Safety and Health Act 1984 (WA)* and the *Workers Compensation and Rehabilitation Act 1981 (WA)*. They are not, however, either the only or the primary source of liability for employers or employees. More than 100 years before the enactment of the present statutory regime, in *Priestly v Fowler* the English High Court had recognised that employers owed a duty at common law to compensate employees for injuries suffered in the course of their employment. This duty was however subject to an exception that limited the employer's liability significantly. The doctrine of "common employment" held that an injured employee could not sue his or her employer if the injury was caused by a fellow employee. In *Bartonshill Coal Co v Reid*, the House of Lords attempted to rationalise the exception on the basis that the contract of employment contained an implied term that the worker agreed to run the risks which were a natural consequence of employment, including injury as a result of the negligence of a fellow employee. The exception was eventually abolished by statute in England and in every Australian State.

The Courts had also acknowledged a duty on the part of an employee to act in a manner so as to advance the interests of his or her employer at all times. That duty extends to an obligation on the negligent employee to indemnify the employer, in certain circumstances, for a claim for damages against the employer by a third party.

## The employer's duty under the Occupational Safety and Health Act 1984 (WA)

I would like to start by outlining the duties imposed by the *Occupational Safety and Health Act* on the employer. The principles applicable in determining the liability of an employer both pursuant to the Act and at common law are generally applicable across the categories of liability in relation to employees and self-employed persons.

In the context of employer's duties, s. 19(1) of the Act provides that:

"(1) An employer shall, so far as is practicable, provide and maintain a working environment in which his employees are not exposed to hazards..."

Having set out this overarching general duty, the section then goes on to provide a number of specific duties. For example, s. 19(1)(a) provides that:

"[The employer shall] provide and maintain workplaces, plant and systems of work such that, so far as it practicable, his employees are not exposed to hazards."

Pursuant to s. 19(6), an employer found to have contravened s. 19(1) is deemed to have committed an offence and is liable to a fine of up to \$100,000.

In terms of the enforcement of the duties set out in this section, it is necessary to identify and define a number of terms utilised in the section. An "employer" is defined in s. 3 of the Act as:

"(a) a person by whom an employee is employed under a contract of employment; and

(b) in relation to an apprentice, or industrial trainee, the person by whom the apprentice or industrial trainee is employed under an apprenticeship or industrial training agreement;"

An "employee" is defined in the same section as:

"(a) a person by whom work is done under a contract of employment; or

(b) an apprentice or industrial trainee;"

The section and definitions would therefore exclude an individual's liability for prosecution under the Act if he or she does not stand in an employer/employee relationship with the victim. The use of the phrase "contract of employment" has been criticised as imprecise. The concept of "employment" is the subject of considerable discussion in the case law. One could be said to be employed, as we ordinarily use the term, if engaged as an employee, agent or independent contractor. Each category of employment gives rise to different rights and responsibilities on the part of both parties to the contract. The Full Court of Supreme Court of Western Australia suggested in 1998 that there are two principal bases for the difficulties faced over determining the category into which a worker falls. Ipp J, with whom Kennedy and Pidgeon JJ agreed, said:

"Firstly,... the relationship of master and servant 'remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances.' Secondly, apart from the amorphousness of the legal concept, persons sometimes - for economic reasons - cloak their relationship in the form of a contract for services rather than of a contract of service;"

This is a reflection of the common practice of engaging workers or independent sub-contractors when for all practical purposes they are employees. It has been suggested that the definitions employed in the Act are in fact designed to incorporate the relevant case law in determining whether a worker is engaged as an employee or by some other means. Interestingly, the debates on the passage of the Bill through the Western Australian Parliament throw no light on the question whether that was in fact the intention of the legislature.

The question of whether a worker is in fact an "employee" is fundamental to the determination of a number of issues both under the provisions of the Act and at common law. The leading decision in Australia is that of the High Court of Australia in *Stevens and Gray v Brodribb Sawmilling Co Ltd*. In that case, Stevens and Gray were engaged by Brodribb to assist in the felling of timber. Gray was employed as a "snigger" to move the logs from the site to loading ramps. Stevens was employed as a truck driver to transport the logs from the loading ramp to the sawmill. Both Gray and Stevens provided their own bulldozer and truck respectively. Each maintained their own working hours and retained a significant degree of discretion in the performance of their duties. Neither was guaranteed ongoing work by Brodribb. Both Stevens and Gray were paid according to the amount of timber delivered to the sawmill and PAYE tax was not deducted from the amounts paid. While loading logs, Gray negligently injured

Stevens. Stevens sued both Gray and Brodribb, arguing that Brodribb was vicariously liable for Gray negligence as Gray was Brodribb's employee.

The High Court unanimously rejected the plaintiff's claim that Gray was an employee of Brodribb. The majority of the High Court agreed with the decision of Mason J insofar as it dealt with the test to be applied in determining whether an employee/employer relationship existed. Mason J pointed out that the degree of control by the alleged employer was a prominent factor. After noting that the importance of control lay not so much in its actual exercise as in the right of the employer to exercise it, his Honour stated:

"The existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question. ... Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

Beyond this general set of criteria to be taken into account, a determination of the nature of the employment relationship must be determined on a case by case basis.

Section 19 of the Act also refers to a determination of the extent to which it is "practicable". The use of the phrase "so far as is practicable" in the Western Australian legislation has been judicially interpreted as not imposing "an absolute duty on an employer to provide and maintain a safe working environment". In *Holmes v RE Spence & Co Pty Ltd*, when speaking of the equivalent Victorian legislation, Harper J said:

"The Act does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment. The courts will assist the attainment of this end by looking at the facts of each case as practical people would look at them: not with the benefit of hindsight, nor with the wisdom of Solomon, but nevertheless remembering that one of the chief responsibilities of all employers is the safety of those who work for them."

The standard to be applied in determining what is "practicable" as set out by Harper J has been adopted and applied in Western Australia in *McCarron v Future Engineering and Communication Pty Ltd*

## **Common law liability of employers to employees**

As I noted earlier, apart from the statutory responsibilities of employers toward their employees, employers bear considerable responsibility at common law. Regardless of the existence of various occupational health and worker' compensations schemes, employers remain liable in negligence for injuries to employees. This liability has been limited in recent years by s. 93D of the *Workers Compensation and Rehabilitation Act*. This provision limits the right of recovery by employees at common law to those circumstances in which the employee has died or suffered a "serious disability". This term is defined in s. 93D(2) as follows:

"A disability is a serious disability if, and only if ... the degree of disability would, if assessed as prescribed in subsection (3), be 30% or more"

Schedule 2 of the Act provides a table of types of injury and the correlative degree of disability. For example, the total loss of sight is prescribed at 100% disability. The loss of a finger, dependant upon which finger, may be as low as 6%.

Stated broadly, in order for an employee to be successful in a common law claim against his or her employer, he or she must demonstrate that the employer owed the employee a duty of care; the employer's act or omission breached the standard of care required to discharge that duty; that the breach in fact caused the employee's injury; the injury amounted to a "serious disability"; and that the injury was not too remote, or, was reasonably foreseeable as a result of the employer's negligent acts or omissions.

Despite the rapid changes in industry, technology and the way in which we work, the extent of an employer's duty at common law is determined according to principles which are well settled. In *Bankstown Foundry Ltd v Braistina* for example, Mason, Wilson and Dawson JJ followed the High Court's 1956 decision in *Hamilton v Nuroof (WA) Pty Ltd* and said:

"It is as true today as it was thirty years ago to say that the duty 'is that of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing the employees to unnecessary risks of injury'"

The standard of care expected of employers is not, however, "a low one". In relation to the physical injury of an employee, the duty owed at common law by an employer to employee is heavier than that owed by one individual to another. Whether that standard is satisfied is a question of fact that must be determined in light of the circumstances of each case. No single principle can be distilled from the case law. What constitutes the standard will also change according to changes in technology and increasing community concern for the welfare of employees. In *Bankston Foundry* for example, Mason, Wilson and Dawson JJ referred to the enactment of occupational health and safety legislation as being a significant issue to be taken into account in determining the extent of an employer's duty:

"[T]he 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 on employers, this must have its impact on community expectations of the reasonably prudent employer."

The onus of establishing that the defendant employer failed to take reasonable precautions is on the plaintiff employee. This means that the employee must demonstrate, in order to meet the requirement that the precautions are "reasonable", that the precautionary measures were available and "practicable" in all the circumstances.

Although the specific content of the employer's duty cannot be stated in isolation from the specific circumstances in which it falls to be determined, the specific duties set out in s. 19(1)(a) of the *Occupational Safety and Health Act* reflect those aspects of the workplace to which the employer must have regard.

The employer's duty at common law to employees also extends to injuries caused to employees by independent contractors under contract to the employer. In *Kondis v State Transport Authority*, the plaintiff employee was injured when a crane, operated by an independent contractor engaged by the employer, dropped part of its jib. The High Court found that the employer's duty to maintain a safe working environment could not be delegated. The employer could not avoid liability by claiming the contractor was beyond its control, the duty being personal to the employer. Mason J in particular found that the nature of the relationship between an employer and his or her employee carried with it an added element of responsibility:

"The principal objection to the concept of a personal duty [on the part of an employer] is that it departs from the basic principles of liability in negligence by substituting for the duty to take reasonable care a more stringent duty, a duty to ensure that reasonable care is taken... [W]hen we look to the classes of cases in which the existence of a non-delegable duty has been recognised, it appears that there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable skill and care is taken or the safety of persons to whom the duty is owed."

Mason J went to review those circumstances in which this special relationship was said to exist, for example, between a hospital and its patients or a school authority and its students. He then continued:

"That such an element exists in the relationship of employment is beyond serious challenge. The employer has the exclusive responsibility for the safety of appliances, premises and the system of work to which he subjects his employee... In the case of an employer there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe system of work."

## **Statutory duties to employees giving rise to civil liability**

I have already outlined the general and specific duties of employers to employees pursuant to the provisions of the *Occupational Safety and Health Act*. As I have already noted, the specific duties outlined in s. 19(1)(a) mirror the earlier formulation of the employer's duties at common law. Where legislation deals with the duties of one individual to another, a breach of those duties may give rise to a claim for damages at common law, in addition to any criminal penalty, for what is termed a "breach of statutory duty".

The Commonwealth and some States have legislated to remove or restrict an employee's right of action arising out of a breach of statutory duty. For example, s. 79 of the *Occupational Health and Safety (Commonwealth Employees) Act 1991* (Cth) provides that:

"[N]othing in the Act confers a right of action, in any civil proceedings in respect of any contravention of the Act or regulations..."

In Western Australia there is no such statutory restriction, other than that contained in s. 93D of the *Worker's Compensation and Rehabilitation Act*. In many respects, a claim based on a



breach of a statutory duty is easier to establish than a claim based on the common law duty of care. It is not necessary to prove negligence as such. The plaintiff need only demonstrate that the statute was breached and his or her injuries were the direct result of that breach. The threshold question is whether the statutory provision was intended to give rise to a civil right of action in addition to any criminal liability that may already be attached to it. The classic formulation of that question is that of Dixon J in *O'Connor v SP Bray Ltd* in which he said:

"[A] provision describing a specific precaution for the safety of others in a matter where the person upon whom the duty is laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation... a contrary intention appears"

O'Conner has been adopted and applied in Western Australia in relation to a breach of the employer's statutory duties pursuant to s. 19(1) of the *Occupational Safety and Health Act*.

## Employers duties to non-employees

Apart from the duties owed directly to employees, employers have both a statutory and common law duty to non-employees. These duties essentially fall outside the scope of s. 19 of the *Occupational Health and Safety act* by virtue of the absence of the employer/employee relationship. In terms of the principles applicable in determining whether a worker is an "employee" which I examined earlier, non-employees would include independent contractors and agents in addition to individuals who have no connection with the workplace.

Section 21 of the *Occupational Safety and Health Act* provides that:

"(1) An employer or self-employed person shall-

(a) ...

(b) so far as is practicable, ensure the health and safety of a person not being his employee is not adversely affected wholly or in part as a result of the work in which he or any of his employees are engaged."

Section 21(2) provides that an employer or self-employed person in breach of this section commits an offence and may be subject to a fine of up to \$100,000. Sub-section (3) also provides that where the act or omission causes the death of another person, the maximum fine is \$200,000.

In terms of whether a precaution is "practicable", the standard which has been adopted in Western Australia is that set out in *Holmes v RE Spence & Co Pty Ltd*, to which I have already referred.

There is little case law on the extent of the duty established by s. 21. In the United Kingdom a number of decisions have considered an employer's duty to non-employees and members of the public in the context of s. 3 of the *Health and Safety at Work etc. Act 1974*. That provision is cast in different terms to the equivalent Western Australian legislation and the case law is not strictly relevant. What is significant, however, is that the duty of employers and self-

employed persons to avoid harm to others has been interpreted very broadly. For example, in *R v Board of Trustees of the Science Museum*, the Board of Trustees was convicted of a breach of s. 3 by permitting legionnaires' disease to develop in the Museum's air-conditioning system. The allegation was not however that this endangered staff and visitors at the museum, but that the cooling system allowed the bacterium to escape, thereby endangering members of the public outside the Museum within a radius of 500 yards.

At common law, the duty of employers to prevent harm to non-employees extends to ensuring that their employees do not harm others. In the event that an employee's negligence harms a non-employee, and the negligent act or omission was within the ambit of the employee's duties, the employer may be held vicariously liable. The plaintiff must prove that the negligent party was in fact an employee, in accordance with the principles I outlined earlier. The general rule was stated by Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co. of Australia* in which he said:

"In most cases in which a tort is committed in the course of the performance of work for another person, he cannot be held vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorised the doing of an act which amounts to a tort. The work, although done at his request and for his benefit, is considered the independent function of the person who undertakes it... The independent contractor carries out his work, not as a representative but as a principal."

On its face, this would appear inconsistent with the nature of the employer's duties being non-delegable and personal to the employer. The general rule stated by Dixon J applies only to the employer's common law duty to non-employees rather than employees.

The common law duty to provide a safe working environment would appear to have overtaken this aspect of vicarious liability. For example, in *Stevens v Brodribb Sawmilling Co Ltd* that I referred to in the context of determining whether an employee/employer relationship existed, the High Court went on to determine whether Brodribb had a common law duty to ensure a safe system of work. Mason J said:

"Although the obligation to provide a safe system of work has been regarded as one attaching to any employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work, and where there is a need for him to give directions as to when and where the work is to be done, ... he has an obligation to prescribe a safe system of work."

## Employees duties

I have already outlined the nature of the relationship at common law between employers and employees. Section 20 of the *Occupation Health and Safety Act* imposes the following duties on an employee:

"(1) An employee shall take reasonable care -

(a) to ensure his own safety and health at work; and

(b) to avoid adversely affecting the safety or health of any other person through any act or omission at work."

The section imposes a general duty of care on an employee in a similar manner to s. 19. The sub-sections then provide more specific duties peculiar to the nature of the role of employees. Sub-sections (4) and (5) provide that contravention of the duties on an employee render the employee liable to a fine of up to \$10,000 or \$20,000 in the case of a fatality.

At common law, the employee's duties to the employer are considered in the context of the employee's contract of employment. A number of duties have been implied into the contract of employment over time giving rise to causes of action against an employee for both breach of a tortious duty, or negligence, and breach of contract. The House of Lords has made it clear that the breach of the employee's duty gives rise to an action for damages for breach of contract, rather than for negligence.

In the context of occupational injuries, the principal duty that has been implied is a duty to work in a competent and skilful manner. The level of competence to be expected of an employee is a question of fact, according to the circumstances in each case. The classical test is that in *Harmer v Cornelius* in which Willes J said:

"When a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. Thus, if an apothecary, a watch-maker or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts... An express promise or express representation is not necessary."

In *Lister*, Viscount Simonds approved the test formulated by Willes J as the test to be applied in determining the extent of an employee's duty. Lord Radcliffe, however, proposed a different general standard:

"[T]he law does impute to an employee a duty to exercise reasonable care in his handling of an employer's property. It is the fact of such employment that places the property within his control; ..., he owes a general duty to all concerned not be negligent in the exercise of that control."

A similar test to that applied by Lord Radcliffe has been adopted and applied in Australia. In *Bolton Gems Pty Ltd v Gregoire*, the defendant employee was employed as a sales manager with the plaintiff employer's gem business. The employee left one of the plaintiff's gem cases with more than \$300,000 unattended in her car that was subsequently stolen. The gems were never recovered. Young J found that the standard of care expected of the employee was that same as that which she would be expected to exercise in respect of her own property.

The same issues in relation to the creation of a statutory duty on the part of employer arising out of the provisions of the *Occupational Safety and Health Act*, to which I referred earlier, also arise in relation to employees.

## Occupiers of workplaces

Section 22 of the *Occupation Health and Safety Act* provides that:

"(1) A person who has, to any extent, control of -

(a) a workplace where persons who are not employees of that person work or are likely to be in the course of their work; or

(b) the means of access to and egress from a workplace,

shall take such measures as are practicable to ensure that the workplace, or the means of access to or egress from the workplace, as the case may be, are such that persons who are at the workplace or use the means of access to and egress from the workplace are not exposed to hazards."

The terms of the section are extremely broad. Sub-section (2) provides that any person who has:

"... an obligation of any extent in relation to the maintenance or repair of a workplace or the means of access to and egress from the workplace, the person shall be treated for the purposes of subsection (1) as being a person who has control of that workplace or that means of access or egress."

As the section suggests, the duty extends beyond the workplace itself to create a duty to ensure that the entry and exit from the workplace is also safe.

In determining whether the workplace meets the standard established by s. 22, it has been suggested that the Court must also look to the nature of the work being carried out in the premises at the time of the injury, rather than at the time the premises were provided or established. In *Austin Rover Ltd v Inspector of Factories*, the House of Lords was called upon to determine the approach to be taken in the interpretation of the equivalent section under the *Health and Safety at Work etc Act 1974* (UK). Lord Jauncey, with whom Lords, McKay, Bridge and Brandon agreed, said:

"Safety of premises is not an abstract concept. It must be related to the purposes for which the premises are being used at any one time. Some premises may be unsafe for any normal use... Other premises may be completely safe for the purpose for which they were designed but completely unsafe for other purposes.

The adoption of such an interpretation in respect of s. 22 would broaden the interpretation of the section yet again. The person "in control" of the premises for the purposes of the section would be expected to inspect the premises on a regular basis in order to discharge his or her duty and thereby limit his or her liability under the Act.

Apart from the statutory duties which may arise under this section, the liability of occupiers in Western Australia is governed by the *Occupiers' Liability Act 1985* (WA). An "occupier" for the purposes of the Act is defined in s. 2 as "a person occupying or having control of land or other premises". In a similar manner to the *Occupational Safety and Health Act*, the concept of "occupation" utilised in the *Occupiers' Liability Act* places the emphasis on control rather than ownership. Control or occupation need not be exclusive and may therefore include a licensee, building contractors sharing a construction site with the owner or a local shire hiring out a hall

for a dance. A determination of whether a particular defendant is the "occupier" is a question of fact to be determined according to the circumstances.

The *Occupier's Liability Act* also defines the scope of the duty of care owed by occupiers to individuals entering onto their premises. Section 5(1) provides that:

"... [T]he care which an occupier of premises is required ... to show towards a person entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier is by law responsible shall, ... , be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger."

The common law is excluded by s. 4 of the Act insofar as it applies to circumstances that fall within s. 5(1). Section 5(4) sets out a number of factors to be taken into account in determining whether the occupier has discharged the duty in s. 5(1) including the gravity and likelihood of the probable injury, the circumstances of the entry onto the premises and the nature of the premises. In *Bartlett v Jones*, Murray J expressed the opinion that:

"As has been seen, by s4(1) the duty of care [in s. 5(1)] is applied in place of the rules of the common law, although as those rules are now expressed it is difficult to discern that the duty of care imposed in negligence at common law would have a materially different content from the statutory duty in the circumstances of this case."

## **Liability of manufacturers and suppliers**

In 1993, a study published in the *Journal of Occupational Health and Safety* reported that a majority of the businesses surveyed had failed to develop policies and procedures to ensure that hazards were not introduced into the workplace through the purchase of new items of plant or machinery. The objects of the *Occupational Safety and Health Act* include the removal or reduction of occupational health and safety hazards. If that object is to be achieved, it makes sense that the Act should impose a duty on all individuals or organisations whose action or inaction may have an effect on safety in the workplace. Section 23(1) of the Act provides that:

"A person who designs, manufactures, imports or supplies any plant for use at a workplace shall, so far as is practicable -

(a) ensure that the design and construction of the plant is such that persons who properly install, maintain or use the plant are not in doing so, exposed to hazards"

Subsection (1) provides that there is an obligation to test and examine the plant or machinery to ensure it complies with the requirements in paragraph (a) and to provide all necessary information on potential hazards posed by the machinery. The duty is extended in s. 23(2) to include a person who erects or installs machinery or plant. Section 23(3) provides that a manufacturer, supplier or importer of a substance for use in a workplace must ensure that sufficient information is provided on the substance as is relevant to the safe storage or use of the substance. Section 23(3a) also imposes a duty on any person who designs or erects a

permanent or temporary structure to ensure that use of the structure does not create a hazard.

Historically, employees who suffer a work-related injury or disease have tended to sue their employer. Where a fault or defect in the machinery or plant used by the employee caused the injury, the employer could seek to join the supplier or manufacturer as a co-defendant and seek contribution toward any award of damages. The primary liability of manufacturers or suppliers has the potential to become one of the more significant areas of civil action by employees. It has been suggested that the restriction or abolition of common law rights for recovery against employers in many jurisdictions will encourage employees to look for other sources of recovery for negligence in the design, manufacture or erection of plant or machinery in the workplace. There is little doubt that an employee injured as a result of negligence on the part of a manufacturer or supplier of plant or machinery or the supplier of a substance would have a cause of action. In such circumstances the manufacturer or supplier could well claim contribution from the employer.

More recently, the Commonwealth Government has moved to establish a statutory regime for the protection of consumers or purchasers of goods. For example, Part V, Division 2A and Part VA of the *Trade Practices Act 1974* (Cth) incorporates a number of provisions which impose strict liability on the manufacturers and supplier of faulty goods. It would appear however that the legislation has little significance for employees. Part V, Division 2A for example provides "consumers" with a right of action against manufacturers. A "consumer" is defined as a person who acquires "goods" other than for the purposes such as resupply or transformation in trade or commerce. "goods" are in turn defined as items "*of a kind ordinarily required for personal, domestic or household use of consumption*". The Division has little application therefore in terms of employees using industrial machinery or substances in the workplace. Part VA does not have the same limitations but s. 75A1 of the *Trade Practices Act* provides that the key provisions in that part do not apply to loss in respect of which an employee may recover worker's compensation.

## Conclusion

The *Occupational Safety and Health Act* provides strong statement of the rights and responsibilities of every individual involved in the workplace. That statement is backed by significant criminal penalties. My comments this evening have also served to highlight the extensive civil liabilities arising out of both the Act and at common law.