CROWN LAW DIVISION

M E M O R A N D U M

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QUEENSLAND COAL INDUSTRY SAFETY CONFERENCE

DUTY OF CARE - LEGAL OBLIGATIONS

The "duty of care" with regard to the Tort of Negligence may be defined as follows:-

> "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think, would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

A person who has suffered a physical injury to person or property and who wishes to take legal action to shift the loss to another by means of the law of torts, will today rely more frequently on the tort of negligence. To succeed in an action for negligence, a person must show the following:-

1. That there was a duty of care owed to them by an alleged tortfeasor;
2. That there has been a breach of that duty; and
3. That as a result of that breach they have suffered damage which is not too remote.

Historically the principle of the "duty of care" has developed through the court system at common law.

The modern requirements relating to the principle of the "duty of care" is stated to by Mr. Justice Deane (High Court) in Jaensch -v- Coffey (1984) 155 CLR 549 at 578-9 as follows:-

"It is an incident of human society that action or inaction by one person may have a direct or indirect effect on another. Unless there be more involved than mere cause and effect, however, the common law remains indifferent. A person's action or inaction may be a cause of another's injury or discomfort; unless there be some particular relationship, personal or proprietary right or other added element, the common law imposes no liability to make payment of compensation for other damages. In a society where material success, commonly measured in comparative terms, is accepted as a legitimate objective and the preservation of individual freedom of action or speech is acknowledge as a legitimate goal, the law must be so restrained if it is to be attuned to social standards and reality. If material success were to be accompanied by legal liability to all who have suffered emotional chagrin or physical or material damage as a consequence along the way, it would be largely self destructive. In that regard, a common law has neither recognised fault in the conduct of the feasting Dives nor embraced the embarrassing moral perception that he who has failed to feed the man dying from hunger has truly killed him.

The closest that the common law has come to providing a general remedy in respect of injurious conduct is the modern law of negligence with its hypothetical "neighbour" and associated test of "reasonable forseeability". The common law duty to a "neighbour" has, however, scant in common with its new testament equivalent; both priest and Levite ensure performance of any common law duty of care to the stricken traveller when, by crossing to the other side of the road, they avoided any risk of throwing up dust in his wounds ...."

Dean J. in Jaensch -v- Coffey (supra) went on to say:-

"The formulation of a duty of care merely in the general terms of reasonable foreseeability would be too wide unless it was "limited by the notion of proximity" which was embodied in the restriction of the duty of care to one's 'neighbour'."

The components of a negligence action are:-

(i) a relevant duty owed by the Defendant to the Plaintiff to take reasonable care resulting from the combination of (a) reasonable forseeability of a real risk that injury of the kind sustained by the Plaintiff would be sustained either by the Plaintiff, as an identified individual, or by a member of a class which included the Plaintiff, (b) existence of the requisite element of proximity in the relationship between the parties with respect to the relevant act or omission and the injuries sustained, (c) absence of any statutory provision or other

common law rule ... which operates to preclude the implication of such a duty of care to the Plaintiff in the circumstance of the case.

(ii) a breach of that duty of care in that the doing of the relevant act or the doing of it in the manner in which it was done was, in the light of all relevant factors, inconsistent with what a reasonable man would do by way of response to the foreseeable risk.

(iii) injury (of a kind which the law recognises as sounding and damages) which was caused by the Defendant's carelessness and which was within the limits of reasonable foreseeability.

An employer has a duty at common law and under statute (s.9(2)(A) of the Workplace Health and Safety Act 1989-1990) to provide a safe system of work, and the measure of the duty does not change with the character of the proceedings taken to enforce it.

In the decision of General Cleaning Contractors Limited -v- Christmas (1953) AC 180 at 189 Lord Oaksey stated:-

> "In my opinion, it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the Appellants, that their work people are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonable safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger, and in circumstances in which dangers are obscured by repetition."

A system of work refers to the usual method adopted by the employer of carrying out the operations in which the employee is engaged. It extends to all facets of the employment situation including the manner in which the job is laid out, the method of utilisation of

machinery, plant and equipment, the supply of sufficient employees and mechanical assistance, the giving of proper and adequate instructions on how the job is to be carried out and the provision of adequate warnings of any likely areas of danger.

There are several matters to be considered when determining whether an employer has provided a safe system of work. They include:-

1. The individual experience and peculiarities of each and every employee.

2. The forseeability of the danger.

3. Whether the danger was preventable.

4. Whether the steps required to prevent the danger were such that it was reasonable for the employer not to take them.

5. The usual practices in the industry.

The employers duty to maintain a system of work is a continuing one and it is not sufficient that an employer has established a system of work on a safe basis, if it allowed to become unsafe. The employer is under an obligation to constantly supervise, instruct and warn employees in order to maintain a safe standard, and failure to do so constitutes a failure on the part of the employer to exercise due care for the safety of employees.

If it is shown that a system has been followed regularly, then a deviation from that system by an employee, causing injury to that employee, will not give rise to liability in the employer. However, if there is a deviation from the system by an employee and the negligence by that employee causes injury to another employee, the employer is liable for that injury.

Whether an employer has breached the duty to provide a safe system of work is a matter to be decided on the facts of each case, and the courts have indicated that caution must be exercised in finding a duty passed on "the much vaguer obligation of encouraging, exhorting or instructing workers or a particular worker to make regular use of what is provided."

Employers are not exempted from this duty by the fact that their employees are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Nor can they delegate the duty to provide a safe system of work to a manager or supervisor.

As stated above, each case is to be decided on its own facts and the question of whether a system of work is a question of fact and the question of what is a system of work is a question of fact. The extent of that "duty" is difficult, if not impossible to calibrate. An indication of the extent of the duty referred to herein is highlighted in the case of McLean -v- Tedman where the fullbench of the High Court held:-

> "The employers obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer. And in deciding whether an employer has discharged (the) common law obligation to (the) employees, the court must take into account the power of the employer to prescribe, warn, command and enforce .... commands."

In McLean -v- Tedman (1983-84) 155 CLR 306 the employer of a garbage collector was held liable for failing to provide a safe system of work. The system of work involved running to both sides of a road, collecting bins of garbage and returning to a garbage truck travelling on one side of a road. The system was unsafe because it took no precautions against the risks of crossing the line of traffic. This could have been avoided by driving the truck up and down the road collecting the bins from the side of the road the truck was travelling and not the opposite side.

As the Queensland Coal Industry is proposing to incorporate the principle of the "duty of care" in the new Coal Mining Act, it is appropriate to consider the Workplace Health and Safety Act (supra).

The provisions of the Workplace Health and Safety Act encourage and provide a basis for industry to regulate its own health and safety affairs. However, provisions also exist in the Act for appropriate and necessary intervention by Government Inspectors when it is recognised that self-regulatory processes cannot operate effectively. As the Honourable the Minister said in his second reading speech when the Act, in Bill form, came before

Parliament,

> "Whilst this Bill has been structured to allow industry to self-regulate where practical, and all persons within the workplace to be involved in the management of their health and safety requirements, the Government is in no way abrogating its responsibilities. The Bill provides for the appointment of Inspectors with wide-ranging and enhanced powers who will be able to stop work processes in very dangerous situations, or order improvements to safety procedures and in workplaces and plant, to ensure they are safe for workers and the general public to use. Substantial penalties are provided for with the maximum penalty being $120,000 if serious bodily injury eventuates from a workplace accident caused by a breach of the legislation."

The objects of the Act are outlined in Section 7 and include promoting and securing the health and safety of persons performing work; protecting persons other than employees, and members of the public from danger to health and safety in respect of any undertaking conducted, work performed or substance manufactured, stored, kept, supplied, used or produced at or from that workplace; to assist in securing safe and hygienic work environments; and providing for a work environment, for persons performing work, that is adapted to their physiological and psychological needs.

Before considering the substantive provisions of the Act the question arises as to whether or not the Act binds the Crown. This is important because not all legislation applies to the Crown. Some legislation in this field in the past has not applied to the Crown. Turning to Section 5 of the Act, one sees that the Act generally binds the Crown with an exception. Section 5 reads as follows:-

> **"5. Extent to which Act binds the Crown.** Subject to Section 4, this Act binds the Crown not only in right of Queensland but also, so far as the legislative power of Parliament extends, the Crown in all its other capacities, except to the extent that this Act relates to, or could be construed as requiring, the provision, alteration, replacement or dealing with amenities in premises that existed prior to the commencement of this Section."

The "Crown" is defined in Section 6 as, without limiting the generality of that term, including, "any commission, board, instrumentality, corporation, or person representing the Crown and any person representing the Crown and any person or body specified by the Governor in Council, by notification published in the Queensland Government Industrial

Gazette, as representing the Crown for the purposes of this Act only."

The legislation imposes duties of care upon specified classes of persons. I shall now deal with the duties of care which would be applicable to Government Departments.

The first duty is that placed upon employers to ensure the health and safety of their employees. This duty is to be found in Section 9 which provides in sub-section 1 that an employer who fails to ensure the health and safety at work of his employees, save where it is not practicable for him to do so; commits an offence against the Act. The Section goes on to provide that without in any way limiting the generality of sub-section 1 any one or more of a series of different types of particulars shall represent particulars of the offence created by sub-section 1. The relevant types of particulars are:-

(a) particulars of failure to provide and maintain plant and systems of work that are so far as is practicable and without risks to the health and safety of any person;

(b) particulars of failure to make arrangements for ensuring so far as is practicable safety and absence of risks to health and safety in connexion with the use, handling, storage and transport of plant and substances;

(c) particulars of failure to maintain so far as is practicable any workplace under the control and management of the employer in a condition that is safe and without risks to the health and safety of any person;

(d) particulars of failure to provide so far as is practicable adequate facilities for the health and safety of employees at any workplace under the control and management of the employer;

(e) particulars of failure to provide so far as is practicable such information, instruction, training and supervision to such persons as are necessary to enable the employees to perform their work in a manner that is safe and without risks to their health and safety; and

(f) particulars of failure to provide personal protective equipment where it is not practicable to control hazards at the workplace by other means.

It is noted, however, that there is a saving in the Section for employers in that an employer does not commit an offence against the Act if it is not practicable for him to adopt measures

to ensure the health and safety for his employees. The word "practicable" is again defined in Section 6 of the Act. The definition is not an attempt to define the word "practicable" as such, but states that where the context permits, the word "practicable" in the Act means practicable having regard to a series of factors. To start with the word "practicable" means, according to the Shorter Oxford Dictionary, "capable of being carried out in action; feasible". The word is defined in the Webster's Dictionary as meaning "possible to be accomplished with the known means of resources."

What one has to do when searching for a meaning for "practicable" in the Act is to take the basic meaning and have regard to the following factors:-

(a) the nature of the employment or, as the case may be, the particular aspect of the employment concerned;

(b) the severity of any potential injury or harm to health or safety that may be involved, and the degree of risk that exists in relation thereto;

(c) the state of knowledge about the injury or harm to health or safety that may be involved, about the risk of that injury or harm to health or safety occurring and about any ways of preventing, removing or mitigating that injury, harm or risk;

(d) the availability and suitability of ways to prevent, remove or mitigate that injury, harm or risk;

(e) whether the cost of preventing, removing or mitigating that injury or harm to health or safety or that risk is prohibitive in the circumstances.

These factors have always been considered by the civil Courts in deciding what is reasonable when determining negligence.

There are a number of other duties of care contained in the Act. Section 10 of the Act deals with the duty of employers to ensure the health and safety of themselves and persons other than employees. Section 10(1) provides that an employer who fails to conduct his undertaking in such a manner as to ensure that his own health and safety and the health and safety of persons not in his employment and members of the public who may be affected thereby are not exposed to risks arising from the conduct of his undertaking, save where it is not practicable for his to do so, commits an offence against the Act. Again, measures that

are not practicable are excluded.

Section 11 of the Act deals with persons who have control of premises (not being his employees) as a place of work, or the means of access thereto or egress therefrom. A similar duty to ensure the health and safety of the persons using the premises is imposed by this Section. The Section also imposes the same duties upon persons who have control of any plant and any substance in any such premises. The Section is designed to apply to persons who have control over premises or plant or substances but who are not in an employment relationship with the persons using such things.

Section 13 of the Act imposes a duty upon employees. An employee who, while at his workplace, wilfully acts in a manner that endangers the health and safety of himself and any other person, commits an offence against the Act. An employee who fails to comply, so far as is practicable, with instructions given by his employer for the health and safety for the employee or for the health and safety of other persons or fails to use protective clothing and equipment in a manner in which he is properly instructed to use it wilfully or recklessly interferes with or misuses anything provided in the interests of health and safety pursuant to any provisions of this Act or wilfully places at risk the health or safety or any person at the workplace commits an offence against this Act.

The duties I have just referred to have always existed under the common law. (The Common Law is that body of law which has evolved by judicial decisions and from the general custom of the land. It is separate and distinct from the law to be found in the Statutes). At common law, if one is found not to have acted reasonably in providing, for example, safe plant and systems of work, then one can be found negligent which would result in a finding of liability for damages. If one breaches the same duties under the Act, one commits an offence against the Act.

There is also in addition a liability imposed on every employer for a breach of statutory duty, ie., for failure to comply with the duty imposed by an Act of Parliament or by legislation. This liability on the employer is a liability to pay damages for an injury suffered by a person as a result of a breach of duty. For this duty to exist, there does not have to be a specific provision in the legislation allowing for an action for damages to lie.

The law recognises the right to bring an action based on statutory breach where the following conditions have been complied with:-

1. A legislative provision has imposed a requirement relating to the health and/or safety of a particular class or members of the community (employees generally are recognised as being a distinct class for this purpose).

2. An obligation is imposed on the employer by the enactment (whether specified as such or because he is the occupier of a factory, or a person engaged in building work etc.).

3. The enactment may either be in the form of a provision of an Act of Parliament or in the form of regulations made under the act (see Darling Island Stevedoring and Lighterage Co. Ltd. -v- Long (1956-1957) 978 CLR 36).

4. There has been a breach by the employer of the terms of the statutory enactment.

5. As a result of that breach, the worker has been injured.

It is a question in each case of analysing the terms of a particular enactment to ascertain whether it can be said that the legislature intended that a claim for damages should arise if that enactment is broken. The difficulty in this regard is that most of the enactments involved are silent on claims for damages.

There will be a prima facie presumption in the case of safety legislation for employees that a cause of action in damages will arise upon breach and injury, unless the contrary intention applies.

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Therefore, any provision in the Act which imposes a requirement relating to the health and/or safety of employees, may be a basis for an action based on statutory breach if there

has been a breach by the Department of the terms of the enactment and a person has been injured as a result. One cannot be more specific on this point, for liability for damages depends upon the provisions involved and the facts surrounding the matter.

The fact that the Workplace Health and Safety Act 1989-1990 has been enacted, resulting in possible actions for civil damages for breach of statutory duty does not mean that an employee cannot still bring an action for damages for personal injuries sustained during the course of his employment based upon negligence at common law. Of course, proof of negligence is required to establish liability at common. An action based on statutory breach may be easier to prove in certain circumstances, because it merely requires proof of a breach of the statutory application to found the action. However, as I have commented earlier, many of the considerations present when determining negligence are now reflected in the Workplace Health and Safety Act.

In essence, the principle of "duty of care" is maintained at common law and also in statute. The inclusion of the principle of "duty of care" in the new Coal Mining Act will place a high onus on both employers and employees to create and maintain proper safety measures.