SECTION 151Z:
LEGISLATIVE OGRE

Simon Harben SC 2004

INTRODUCTION

1. In ***STATE OF NEW SOUTH WALES v. KENNELLY*** (2001) NSWCA 71 (**KENNELLY**), His Honour Mr Justice Meagher said in commencing his judgment:

> ***"In this case I have had the privilege of reading the judgment of Young AJA. Unfortunately I find myself unable to agree with it. This is not wholly surprising, however, in view of the fact that anyone who plunges into the murky waters of s151Z of the Workers Compensation Act 1987 (New South Wales) might well be expected to reach a different destination from other explorers of those waters".***

As it will be seen later His Honour's words proved to be truly prophetic.

2. The provisions of State and Territorial Workers Compensation Legislation providing for the adjustment of the rights of workers, employer and tortfeasor were derived from section 6 of the Workman's Compensation Act, 1906 (UK) [**1906 ACT**]. Section 64 as enacted in the Workers Compensation Act, 1926 [**1926** ACT] was, with irrelevant exceptions, in identical terms to section 6. It provided:

> ***"Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof –***
> ***(a) the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation;***

and

> ***(b) if the workers has recovered compensation under this Act, the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions relating thereto shall, in default of agreement, be settled by action, or, with the consent of the parties, by the commission".***

3. In 1942, section 64 was amended to enable a worker to recover both compensation from his employer and damages from the tortfeasor but on terms that he could not retain both damages and compensation.

4. In the Workers Compensation Act, 1987 [**1987 ACT**] section 151Z was incorporated to do the same work as section 64 had. That section applies to many different factual circumstances and has spawned literally hundreds of cases. The language is difficult and when one visits it from time to time it is at least for me as if it is the first time. The language does truly represent the murky waters described by His Honour although I note with some embarrassment His Honour Mr Justice Handley described the statutory scheme represented by s151Z as being clear and rational: ***GRLJAK v. TRIVAN PTY LIMITED*** (No. 2) NSWCA 19 April 1996 [**GRLJAK 2**]

5. Section 151Z(1)(d) was amended in 1990 to add the words in brackets as follows:

> ***"Section 151Z(1) if the injury for which compensation is payable under this Act was caused under***

circumstances creating a liability in some person other than the worker's employer to pay damages in respect of the injury, the following provisions have effect:

(a) …….

(b) ……..

(c) …….

(d) If the worker has recovered compensation under this Act, the person by whom the compensation was paid is entitled to be indemnified by the person so liable to pay those damages (being an indemnity limited to the amount of those damages);"….

INDEMNITY PROCEEDINGS

6. There are a number of ways in which the section comes into play. Section 151Z(1)(d) provides, inter alia, a mechanism for "the person by whom the compensation was paid" (the employer) to recover from a tortfeasor compensation paid by it. A claim for indemnity under section 151Z(1)(d) is not a claim for damages for example under the Motor Accidents Act [**MAA**]: ***WESTPAC BANKING CORPORATION v. TOMASSIAN*** (1993) 32 NSWLR 207. In such an action the employer seeks to recover compensation payments made and to be made to the injured worker. However that simple explanation can be quite misleading.

7. The action for recovery as it is often called requires an assessment of damages. The damages to be assessed are notional damages which the worker would be entitled to had

he or she brought proceedings against the tortfeasor. That notional assessment becomes the maximum amount recoverable by the employer in the recovery action: ***GRANT v. ROYAL REHABILITATION CENTRE SYDNEY*** (1999) 47 NSWLR 263 [**GRANT**]. In effect the action is run in an identical way to an ordinary action for damages for personal injury but the orders are somewhat different.

8. On conclusion of the hearing findings are made with respect to the notional damages which as I said above represents the ceiling. Judgment is then entered (assuming the employer is successful) for the amount properly paid as workers compensation which must have been proved in the case. If the amount paid is less than the notional assessment of damages in effect a declaratory order is made authorising reimbursement of further amounts properly paid up to the limit of that ceiling as set. If the amount of the notional assessment is less than the amount of compensation already paid the employer can only recover that amount which is represented by the notional assessment. So much is made clear from the words in brackets ("**being an indemnity limited to the amount of those damages**") which as I set out above were inserted into the section in 1990.

9. An example of the form of the order is set out in ***VICTORIAN WORKCOVER AUTHORITY v. ESSO AUSTRALIA LIMITED*** (2001) 75 ALJR 1513 at 1515 [**ESSO**]. The High Court in that case was considering the Victorian equivalent of section 151Z and approved the form of order as follows:

"The Court of Appeal set aside the orders and declaration made by the primary judge and in place thereof substituted the following orders and declaration:

(1) At [Esso] pay to [the authority] the sum of $116,226.22.

(2) That [Esso] pay to [FAI] the sum of $219,000.00;

(3) That [FAI] be entitled to be indemnified by [Esso]:

(a) for all further payments of compensation made under [the Compensation Act] by [FAI] to the worker, Mr Cazimer Wsol, in respect of the injury caused to him on 10 January 1989; and

(b) up to an amount not exceeding a further sum of $277,795.00.

The figure of $277,795.00 represented the 'ceiling' for the future indemnity entitlements in FAI. Whether that ceiling will be reached will depend upon future events, in particular upon further payments of compensation to Mr Wsol".

LIMITATION PERIOD

10. There can of course be only one assessment, because the indemnity is limited to the damages the injured person would be entitled to against the tortfeasor. This means that that assessment could be carried out at any time, just like a normal personal injury action. However as the law presently stands the action for recovery can be instituted at any time. The only influence the Statute of Limitations has is that anything paid

outside a six year period from the commencement of the proceedings is statute barred. The action itself does not become statute barred apparently ever: ***SOUTH EASTERN SYDNEY AREA HEALTH SERVICE v. GADIRY*** (2002) 54 NSWLR 495 [**GADIRY**].

11. ***GADIRY*** was a case in which I was involved. The point was taken at the commencement of the hearing in the District Court that because the proceedings were commenced in excess of six years from the date that the first compensation payment was made that the action was statute barred. The argument relied on section 14(1) of the Limitation Act, 1969 [**LIMITATION ACT**] which relevantly provides:

> ***"14.(1) an action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims:***
>
> ***(d) a cause of action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture".***

This argument was run at first instance before Acting Judge Gamble in the District Court (fine and wise Judge) who found the point attractive.

12. In ***GRANT*** the court confirmed that there could only be one assessment of damages. It followed therefore according to

our argument that section 14(1)(d) of the Limitation Act was triggered because once the first compensation payment was made the action first accrued to the employer. At that time all of the ingredients of the claim were present because so long as an amount had been paid then the notional assessment could be carried out and the judgment entered in the form set out in ***ESSO***. The Court of Appeal disagreed and the High Court refused a special leave application. The Court of Appeal said that each payment gives rise to a separate and distinct right to indemnification. This however ignores the point that payments made beyond the ceiling are not recoverable.

PREJUDICE WHEN NO LIMITATION PERIOD

13. Is the alleged tortfeasor prejudiced in any way by an open ended limitation period and if so should that be a relevant consideration? His Honour Mr Justice Stein in **GADIRY** was not terribly troubled by the prospect of prejudice. His Honour said at page 501:

> ***'I can appreciate that in some circumstance a gross delay by the employer in taking action may cause prejudice to the tortfeasor. But the Limitation Act still applies and a tortfeasor would be wise to make inquiries when an employee entitled to workers compensation is injured as a result of his negligence'.***

14. It is not entirely clear from His Honour's judgment how it is that a tortfeasor might be seized of this knowledge. It obviously requires a tortfeasor to be proactive in enquiring as

to the state of health of injured persons no matter what degree that is and to follow up those enquiries presumably until the indemnity question had been settled. This seems with respect to be an onerous burden.

15. His Honour Mr Justice McHugh had noted in ***BRISBANE SOUTH REGIONAL HEALTH AUTHORITY*** **v.** ***TAYLOR*** (1996) 186 CLR 541 [**BRISBANE SOUTH**] at page 551 that for nearly 400 years the policy of the law had been to fix definite time limits for prosecuting civil claims because the enactment of those time limits was driven by the general perception that where there was delay the whole quality of justice deteriorates. His Honour went on to say at page 552 that there were four broad rationales for the enactment of limitation periods and one might have thought that the application of those rationales to this scenario would have meant that there was a legitimate argument for the imposition of a limitation period giving some protection in terms of time to alleged tortfeasors. The unfairness of course operates in a way that was predicted by His Honour in ***BRISBANE SOUTH*** when he said at page 552:

> ***"The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislator to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived 4 broad rationales for the enactment of limitation periods. First, as time goes by relevant evidence is likely to be lost. Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed.***

> ***Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period.***

The mischief in having no limitation period for the commencement of the action itself is obvious.

16. An illustration of this was a case I was recently involved in where a woman was injured in 1991. The injury was to her neck and she had periods off from time to time together with some treatment from time to time. She had some unrelated problems at work but as a consequence it seems of a number of factors became less and less able to manage her work. She sneezed one day about a decade after the original injury and felt something pop in her neck. It turned out that she had a prolapsed disc and subsequently went on to a cervical fusion. The medical evidence which was led on behalf of the employer in a recovery action was to the effect that the initial accident was causative of the worker's condition which led to the fusion. Assuming that to be the case the potential tortfeasors (nominal defendant and a named person) found themselves in a difficult position because they had not received notice of the claim in over ten years. If the employer had been required to comply with a six year limitation period the action would have been statute barred. ***GADIRY*** assisted in the opposite way.

17. It follows therefore that there is often nothing (despite the suggestion in **GADIRY)** that a tortfeasor can do to

protect itself because in many instances it will be completely unaware of the potential for a claim. This means that there could be many many time bombs sitting out there which could potentially have a devastating commercial impact on "insurers, public institutions and businesses particularly limited liability companies". This is usually one of the factors that agitate courts in applications requiring strict compliance with limitation provisions.

18. In **GADIRY** the court relied on ***ATTORNEY-GENERAL v. ARTHUR RYAN AUTOMOBILES LIMITED*** (1938) All ER Vol 1 page 361 [**RYAN**]. An attempt was made to distinguish that case on the basis that the action contemplated by the English legislation was with respect to an unlimited amount for the indemnity whereas following the amendment to section 151Z(1)(d) by the addition of the words in brackets our action is limited to the amount of the damages which the worker could notionally recover from the tortfeasor. We thought that was a fairly weighty matter but their Honours on the Court of Appeal thought otherwise and the High Court in dismissing the special leave application remained similarly unconvinced. I should say however that on the day the special leave application was heard two Justices were sitting namely Gummow and Callinan. About eight or nine special leave applications were heard and then their Honours adjourned immediately before our matter was called. When they reconvened they had become a bench of three with the

inclusion of His Honour Mr Justice Heydon. Obviously there was a deadlock one all between the first two Justices and a casting vote was sought. The only thing His Honour Mr Justice Heydon said during the whole process was at the end when he obviously said *"**NO**"*.

CAN THE TORTFEASOR LIMIT ITS LIABILITY

19. The question then arises as to what it is a tortfeasor can do to protect itself on the assumption that it knows or can apprehend that an action might be brought at some stage. For example in the case that I referred to before if the tortfeasor had known then of the possibility of a claim at a time when the matter did not seem so serious what steps could it have taken to bring some finality to the potential claim. The answer it seems to me lies in the words in brackets in s.151Z(1)(b) namely '(being an indemnity limited to the amount of those damages)'. Is there something a tortfeasor can do to have those damages assessed to set the ceiling?

20. To test that water recent consideration was given to the form of the order which is set out above by the High Court in ***ESSO*.** The question is whether that order is in fact a declaration. The learned authors in "The Declaratory Judgement" Sweet & Maxwell 2002 confirm at page 1 that:

> ***"A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the***

courts……a declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the claimant is the owner of a certain property, he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position".

21. The authors continued at paragraph 1.07:

"A declaration by the court is not a mere opinion devoid of legal effect: the controversy between the parties is determined and is res judicata as a result of the declaration being granted. Hence, if the defendant then acts contrary to the declaration, he will not be able challenge the unlawfulness of his conduct in subsequent proceedings. By contrast, the claimant may then again go to court, this time for damages to compensate for the loss he has suffered or to seek a decree to enforce the rights established by the declaration".

22. Assuming that the form of the order is in fact a declaration one might ask rhetorically whether ones obligation to indemnify could be crystallised by the tortfeasor seeking a declaration so that the court would pronounce the legal position. The court could hear the evidence and make a declaration as to the notional assessment of damages which would for all time establish the ceiling for liability of the tortfeasor. What principle could there be which would prohibit such a course of conduct?

23. As I said recent consideration was given to this and in another case in which I was involved we decided to be proactive and we sought a declaration as to the notional assessment of damages in the District Court. This raised the question you might already have apprehended as to whether the District Court has power to make such a declaration. That raises the additional question as to whether it has power in any of these matters to make the form of declaratory order to which I have previously referred.

24. The application seeking the declaration was filed. This brought a somewhat predictable response from the employer's insurer who looked at it with some bemusement. We however insisted we were serious about it and relied on the provisions of s.134 of the District Court Act. Subsection (1)(h) of which provides:

> ***"134(1) the court shall have the same jurisdiction as the Supreme Court and may exercise all the powers and authority of the Supreme Court, in proceedings for:***
>
> ***(h) any equitable claim or demand for recovery of money or damages, whether liquidated or unliquidated (not being a claim or demand of a kind to which any other paragraph of this subsection applies), in an amount not exceeding $750,000.00".***

The above subsection was a recent addition to the Act. In ***COMMONWEALTH BANK OF AUSTRALIA v. HADFIELD & ANOR*** (2001) 53 NSWLR 614 [**HADFIELD**] the subsection

received the attention of the Court of Appeal. His Honour Mr Justice Bryson said this at page 624:

> ***"Legislation which confers jurisdiction without limiting any existing jurisdiction should receive an ample construction. Its own terms show that s134(1)(h) should not be seen as modifying or supplementing previous conferrals of jurisdiction, which until the enactment of s134(1)(h) were limited in amount to $20,000.00. The appearance in s134(1)(h) of the jurisdictional limit of $750,000.00 marks a wide reforming purpose . It would not accord with that purpose to construe s134(1)(h) with limiting implications based on the terms of earlier paragraphs, as if s134(1)(h) were one more increment in a connected series of conferrals. Harmony with earlier paragraphs is not to be expected. S134(1)(h) took a strikingly new direction away from earlier conferrals of equitable jurisdiction characterised by close definitions and small amounts. The parenthetical passage in s134(1)(h) shows in my view exhaustively, in what ways the early paragraphs limit s134(1)(h)".***

It is clear that His Honour was prepared to give the section a wide meaning and thus it formed the basis of our assertion that the District Court had the power to make the order sought. In the end the whole matter was defused because the employer decided to issue a statement of claim which made the hearing of the application for the declaration redundant. In effect we had forced their hand and that matter will be disposed of in a timely way (next week in fact) and the tortfeasor will not be left hanging in limbo.

25. As I indicated above a question arises as to whether the court has the power to make the form of order in ***ESSO*** in the usual case commenced by Statement of Claim. The current thinking

is that it does but it should be remembered that there are only limited provisions (of which section 134(1)(h) is one) in the District Court Act which enable the making of declarations. Perhaps the true nature of the order will be clarified in the near future but it seems to me tolerably clear that such declarations could be sought in the Supreme Court.

THE PERSON SO LIABLE TO PAY THOSE DAMAGES

26. Without s.151Z there would be no right of recovery by an employer against a tortfeasor in the circumstances described above. S.151Z(1)(d) entitles that recovery against '**the person so liable to pay those damages'.** There is presently before the New South Wales Court of Appeal cases which once again agitate the question as to whether the nominal defendant created for example by the Motor Accidents Compensation Act [**MACA**] is such a person. Authority would suggest that it is: ***NOMINAL DEFENDANT v. AUSTRALIAN ASSOCIATED PRESS*** [1982] 1 NSWLR 127 [**AAP**]. In that case Hutley JA said this at 132:

> ***'The nominal defendant is a legal person and it was liable to the injured employee to pay damages, if he had elected to pursue the claim. I was at a loss, and still am, to see what answer there is to the plain words of the statute. Counsel for the appellant took the court to the Motor Vehicles (the Third Party Insurance) Act, 1942, which provides for actions to be brought against the nominal defendant and suggested that claims by workers compensation insurers were outside the policy of***

that Act……s.64(1)(b) embodies part of the policy of the Workers Compensation Act 1926, that where a compensable injury is the result of a legally wrongful act of a third party, the ultimate financial burden should be borne by the third party. Such third party is designated as the person "liable to pay damages" for the wrongful act, not the person who did it. The nominal defendant is such a person.'

27. Recently the District Court in two cases (Sorby DCJ & Truss DCJ) reconsidered this question: ***THE NOMINAL DEFENDANT v. HI-LIGHT INDUSTRIES***; ***NEW SOUTH WALES v. NOMINAL DEFENDANT & ANOR***. The trial judges followed ***AAP***. Those cases are now on appeal and ultimately the Court of Appeal will be asked to reconsider if necessary its previous authority.

28. Central to the argument that ***AAP*** is wrong is the proposition that the nominal defendant is really created by a deeming provision and as such because it is artificial the deeming provisions should be confined to the achievement only of the purpose for which parliament had enacted it: ***COMMONWEALTH OF AUSTRALIA v. SCI OPERATIONS PTY LIMITED*** (1998) 92 CLR 285; ***MULLER v. DALGETTY & CO LIMITED*** (1902) 9 CLR 693 at 696. The argument is that the deeming provisions enable injured persons to recover damages from the nominal defendant (out of a designated fund) where certain circumstances occur namely the tortfeasor or the tortfeasor's vehicle is unidentified or the tortfeasor's vehicle is unregistered and uninsured. As that is the only purpose of the creation of the nominal defendant in **MACA** the

argument is that extending the nominal defendant's liability outside of that purpose makes it subject to a liability which was not intended.

29. Importantly in that argument there are relevant distinctions between the provisions of the **MACA** and the 1942 legislation which was considered in ***AAP***. Section 33(1) of the **MACA** provides, in part, that action for the recovery of damages in respect of injury to a person may be brought against the nominal defendant. Subsection 3 provides in respect of any such action, the nominal defendant is liable as if it were the owner or driver of a motor vehicle. Section 33 applies where the motor vehicle is not an insured motor vehicle. Further notably the 1942 legislation did not contain an equivalent of s.36 of **MACA** entitled 'Nominal Defendant as tortfeasor' which makes it clear that the nominal defendant's liability for contribution or indemnity is strictly limited. In particular that limitation is to contribution or indemnity in respect of a claim or proceedings under that Act. It has already been decided that a claim under s.151Z is not a claim for damages under the **MAA**.

30. The argument is that section 36 limits the liability of a nominal defendant for contribution or indemnity to:

    (i) a claim under **MACA**; and

    (ii) proceedings under **MACA**.

31. Strictly speaking therefore there seems to be some merit in the argument that the nominal defendant is not the person referred to in section 151Z(1). That however still seems to be against authority but no doubt the Court of Appeal will be given another say on it.

32. Perhaps it is also not without significance that recovery actions pursuant to s.151Z usually involve fights between insurers. If an employer was prohibited (because of the expiration of a six year limitation period) from pursuing the nominal defendant this would not have the unpalatable feel that it might have had were an individual prohibited from pursuing such a course. In other words the sharing of the burden amongst commercial entities might be a justifiable outcome particularly when it is fairly clear that the nominal defendant and its fund were in fact set up for a specific purpose. However at the moment authority is against that proposition and the outcome remains to be seen. The fact that this litigation however continues should be borne in mind by those of us advising in these types of actions.

CONCURRENT TORTFEASORS

33. There have been many cases where the calculation of damages eventually payable to a plaintiff are complicated by the presence of joint tortfeasors where one is a common law defendant such as an occupier and another is the employer. Several different scenarios often arise.

34. If a plaintiff has a right of action against for example an occupier and also an employer but only takes proceedings against the former then his damages are ultimately affected. This arises as a consequence of the operation of s.151Z(2). When His Honour embarked upon his analysis of the "murky waters" in ***KENNELLY*** he said of the proper calculation in this situation that it was as follows:

> ***"12. What, therefore, His Honour should have done was to take the figure he arrived at against the occupier ($297,588.75) and recalculated it as if Division 3 of the Workers Compensation Act applied. He should then have decided what proportion each of the branches of the Crown should bear of that recalculated sum. In my view, each should have been liable as to 50%; but it is not my business to decide this issue. Having arrived at the answer to that calculation, he should have deducted from Mrs Kennelly's verdict against the Crown as occupier, whatever figure represented the just and equitable percentage owing by the Crown as employer".***

35. Justice Beazley agreed with His Honour. Unfortunately they were both wrong. The correct application of the formula is that that was first described in ***LEONARD v. SMITH & ANOR*** *(*1992) 27 NSWLR 5 [**LEONARD**] by His Honour Mr Justice Allen. ***KENNELLY*** was brought back before the Court of Appeal by a motion and the parties had the temerity to want the matter re-argued. His Honour Mr Justice Meagher's response in ***KENNELLY (No. 2)*** [2001] NSWCA 472 (curiously on the internet this case appears under the heading Shoal Haven City Council v. Smith) was to say the least

succinct. He said (and I set out the whole of His Honour's judgment) the following:

> ***"I have read Beazley JA's judgment in this matter. I disagree with it. I have said all I wish to say in my judgment of 10 April 2001, and am of still of the same mind now as I was then. In my view the notice of motion dated 9 May 2001 should be dismissed with costs. I trust counsel will not continue to pester the court with applications to re-visit its judgments.***

36. Her Honour Beazley JA with whom ultimately Young CJ in equity agreed re-visited what had been said initially in ***KENNELLY*** and concluded that both she and His Honour were in fact in error. The court ultimately endorsed what had been said by His Honour Mr Justice Allen.

37. Some factual situations produce peculiarities***.*** ***GRLJAK v. TRIVAN PTY LIMITED*** (1994) 35 NSWLR 82 [**GRLJAK 1**] was such a case. The specific facts in that case meant that when the damages were calculated in accordance with the Workers Compensation Act they would have been nil. As a consequence the non-employer defendant could not recover any sum by way of contribution from the employer. Having determined that in terms of percentage liability the employer was responsible for 10% the plaintiff's damages were automatically reduced by that amount in its entirety. As Handley JA said in **GRLJAK v TRIVAN PTY LIMITED (N0 2)** :

> ***'The statutory scheme is clear and rational. Pt 5 reduces the common law damages recoverable by a worker from his employer but does not affect his rights against a third party tortfeasor who is solely responsible. Where***

the employer and the third party are concurrent tortfeasors, the worker is not to be entitled to recover more directly or indirectly from his employer than he could if the employer was solely responsible, but the net burden on the other tortfeasor was not to be increased. No part of the total burden was to be transferred from the employer to the other tortfeasor. To achieve this purpose parliament provided that the damages recoverable against the other tortfeasor are to be reduced to reflect the worker's reduced rights against the employer.'

WHERE A COMMON LAW DEFENDANT AND AN EMPLOYER ARE SUED

38. This means that in cases where both the employer and non-employer are sued and are jointly liable tortfeasors the plaintiff will ultimately recover less than it would if there was only one liable party namely the non-employer. In practical terms this sometimes creates massive confusion in cases by the requirement to assess percentages and recalculating damages both at common law and in accordance with the Act and carrying through that calculation to produce an overall result. It is permissible for a Court to enter separate judgments so long as that course of action does not have the effect of denying a plaintiff his due entitlement: ***XL PETROLEUM (NSW) PTY LIMITED v. CALTEX OIL (AUSTRALIA) PTY LIMITED*** (1985) 155 CLR 448; ***OXLEY COUNTY COUNCIL*** v. ***MacDONALD & ORS; BRAMBLES HOLDINGS v. MacDONALD & ORS*** [1999] NSWCA 126.

39. The assessment of damages that a third party is liable to pay to a worker injured in the course of employment and the contribution that the employer is liable to pay to that third party are governed by the provisions of section 151Z(2). In particular subsections (c) and (d) are critical: **LEONARD**. S.151Z(2) relevantly provides:

> ***'(2) If, in respect of an injury to a worker for which compensation is payable under this Act:***
>
> ***(a)***
>
> ***(b)***
>
> ***(c) the damages that may be recovered from the person by the worker in proceedings referred to in paragraph (a) are to be reduced by the amount by which the contribution which the person would (but for this Part) be entitled to recover from the employer as a joint tortfeasor or otherwise exceeds the amount of the contribution recoverable;***
>
> ***(d) the amount of the contribution that the person is entitled to recover from the employer as a joint tortfeasor or otherwise is to be determined as if the whole of the damages were assessed in accordance with the provisions of Division 3 as to the award of damages;'***

40. The steps involved in the calculation of the damages payable are as follows:

    (i) an assessment of the plaintiff's full entitlement to common law damages including interest is made;

(ii) an assessment of the plaintiff's full entitlement to damages as modified by the Workers Compensation Act is made;

(iii) the percentage liability of each party is assessed;

(iv) the percentage liability of the employer is applied as against the full common law value;

(v) the percentage liability of the employer is applied as against the Act calculation. This is the amount of the contribution recoverable from the employer referred to in section 151Z(2)(d);

(vi) the application of section 151Z(2)(c) is carried out by subtracting the amount determined in (v) above from the amount determined in (iv) above;

(vii) the amount produced by the subtraction referred to in (vi) above is further subtracted from the amount in (i) above and this gives the maximum sum the worker can recover from a common law defendant as set out in section 151Z(2)(c).

(viii) If the employer is not sued judgment is entered against the common law defendant for the amount in (vii) and the defendant could then recover from the employer by a cross claim the amount set out in (v).

ASSUME THE COMMON LAW DEFENDANT (CLD) IS SUED AND NOT EMPLOYER (E)

<table>
<tr><td>1 CL Assessment
$100,000.00</td><td>2 Act Assessment
$50,000.00</td></tr>
<tr><td colspan="2">3 Percentage liability for each Defendant

CLD 20% E 80%</td></tr>
<tr><td>4 CL Assessment x % for E liability

$100,000 x 80%
= $80,000</td><td>5 Act Assessment x % for E liability

$50,000 x 80%
= $40,000

Contribution recoverable from E</td></tr>
<tr><td colspan="2">6 Reduction to CL Damages
(4-5) = $80,000 - $40,000
= $40,000</td></tr>
<tr><td colspan="2">7 Maximum P can get from CLD
(1-6) = $100,000 - $40,000
= $60,000</td></tr>
<tr><td colspan="2">8 CLD Cross Claims against E & recovers
(5) = $40,000

Therefore CLD actually pays $60,000 - $40,000
$20,000</td></tr>
</table>

41 Some examples of the above calculations are

Example 1

(i) common law assessment $600,000.00;

(ii) Workers Compensation Act assessment $500,000.00;

(iii) liability as to 20% for the common law defendant and 80% for the employer;

(iv) employer's contribution assessed as per the common law assessment being 80% of $600,000.00 = $480,000.00;

(v) the employer's contribution assessed as per the Act being 80% of $500,000.00 = $400,000.00;

(vi) [(iv) – (v)] $480,000.0 less $400,000.00 = $80,000.00;

(vii) [(i) – (vi)]$600,000.00 - $80,000.00 = $520,000.00; the $520,000.00 maximum comprises $400,000.00 from the employer (80% by $500,000.00) + the common law defendant's contribution of $120,000.00 (20% of $600,000.00)

(viii) if only the common law defendant is sued verdict is entered for the sum of $520,000.00. On a Cross Claim the common law defendant could recover from the employer the amount set out in (v) namely $400,000.00.

(ix) if both the employer and the common law defendant are sued then separate judgments can be entered so long as this does not prejudice the Plaintiff. In this case there

would be judgment against the common law defendant for $600,000.00 and the employer for $500,000.00 and their respective liabilities would be crystallised via the cross claims. That crystallisation would of course result in common law defendant paying $120,000.00 (20% by $600,000.00) and the employer paying $400,000.00 (80% by $500,000.00).

Example 2

(i) common law assessment $100,000.00;

(ii) Workers Compensation Act assessment zero;

(iii) liability as to 20% for the common law defendant and 80% for the employer;

(iv) employer's contribution assessed as per the common law assessment being 80% of $100,000.00 = $80,000.00;

(v) the employer's contribution assessed as per the Act being zero;

(vi) [(iv) – (v)] $80,000.00 – 0 = $80,000.00;

(vii) [(i) – (vi)] $100,000.00 - $80,000.00 = $20,000.00;the $20,000.00 maximum comprises zero from the employer (80% by zero) + the common law defendant's contribution of $20,000.00 (20% of $100,000.00);

(viii) if only the common law defendant is sued verdict is entered for the sum of $20,000.00. On a Cross Claim the common law defendant could recover from the employer the amount set out in (v) namely nil.

(ix) if both the employer and the common law defendant are sued there would only be a verdict against the common law defendant.

Example 3

(i) common law assessment $100,000.00;

(ii) Workers Compensation Act assessment $20,000.00;

(iii) liability as to 20% for the common law defendant and 80% for the employer;

(iv) employer's contribution assessed as per the common law assessment being 80% of $100,000.00 = $80,000.00;

(v) the employer's contribution assessed as per the Act being 80% of $20,000.00 = $16,000.00;

(vi) [(iv) – (v)] $80,000.00 less $16,000.00 = $64,000.00;

(vii) ((i) – (vi)] $100,000.00 - $64,000.00 = $36,000.00;the $36,000.00 maximum comprises $16,000.00 from the employer (80% by $20,000.00) + the common law defendant's contribution of $20,000.00 (20% of $100,000.00);

(viii) if only the common law defendant is sued verdict is entered for the sum of $36,000.00. On a Cross Claim the common law defendant could recover from the employer the amount set out in (v) namely $16,000.00;

(ix) if both the employer and the common law defendant are sued then separate judgments are entered. In this case there would be judgment against the common law defendant for $100,000.00 and the employer for $20,000.00 and their respective liabilities would be crystallised via the cross claims. That crystallisation would of course result in common law defendant paying $20,000.00 (20% by $100,000.00) and the employer paying $16,000.00 (80% by $20,000.00).

SUMMARY

Section 151Z has been around in its various forms for many many years. Its interpretation and application are still a matter of considerable consternation. The language in the section itself is in my humble view difficult making interpretation fraught with danger. As we know even Court of Appeal judges have grappled with that construction and failed.

I suppose it would be heartening from a practitioner's point of view considering that work has been eroded by recent legislative change that this section itself continues to provoke such a vast amount of work. The real lesson to be learnt however in my view is that because it is a difficult construction challenge and because aspects of the section seem to be taken to the appellate level

regularly then we must be cautious in our advice on the matter and diligent in our research as to recent developments.

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