



Negligent employers face increased risk following landmark court case

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NEWS

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Employers face a rise in claims for personal injury in the wake of a little-known decision awarding \$15,000 to an accident victim.

Lawyers say that, as well as the risk of prosecution and hefty fines under the Health and Safety in Employment Act, employers may be sued for exemplary damages by injured workers or members of the public if the conduct leading to the injury can be shown to be outrageous.

In what is thought to be the first case of its type, Dunedin District Court judge Thomas Everitt awarded \$15,000 in exemplary damages to the customer of a Ranfurly garage proprietor injured in an accident in April 1992.

The customer went to the garage to have a new tyre fitted to a wheel rim of his hay conditioning machine.

The garage didn't have the right size and an employee made three attempts to fit a 'grossly' over-inflated smaller sized tyre on to the rim.

On the third attempt it exploded, causing the customer severe shock, intra-abdominal bleeding, liver injury, scalp lacerations, several bone fractures, and his left leg was almost severed at the knee.

The accident occurred before the introduction of the Health and Safety in Employment Act, and the garage proprietor was not prosecuted under the previous legislation, the Factories and Commercial Premises Act.

Judge Everitt found the garage company, McLaren Transport, was negligent on several counts, including attempting to fit the wrong sized tyre onto the rim, ignoring a sign warning against over-inflating the tyre, continuing to try and fit the tyre even when it was known or should have been known it wouldn't fit the rim, and failing to keep the customer away from the danger area.

He ruled there was nothing in principle to prevent a claim for exemplary damages arising from personal injury as a result of negligence.

Examples of the garage company's negligent conduct included a casual approach to safety in the workshop and a skepticism of and indifference to training.

Its employee disregarded the potential risk of injury, and attempted to fit the tyre knowing what he was doing was wrong.

Judge Everitt said the defendant's behaviour when looked at "in the round" was "grossly negligent and reckless ... I am satisfied that this is one of those rare and exceptional cases where the defendant's conduct can be described as outrageous and merits condemnation by the court."

The case is under appeal.

Bruce Corkill, lawyer for the injured customer, believes the case is the first claim for exemplary damages for personal injury to have gone to a full hearing.

Although there has been an increase in claims made, others have been settled out of court.

In one such case, *Akavi v Taylor Preston*, the High Court in Wellington said a common law claim for exemplary damages was barred neither by the accident compensation legislation nor by a criminal conviction for the same action. The employer, Taylor Preston, had pleaded guilty and been fined \$2000 under the Machinery Act 1950 after the worker sustained severe head injuries.

The High Court refused an application to strike out Akavi's claim for \$150,000 in exemplary damages, but the case was later settled out of court.

Corkill believes it is conceivable for employers to be prosecuted under the Health and Safety in Employment Act for injuries to workers or members of the public, and also to be successfully sued for exemplary damages by the accident victim.

Although it may be argued that the doctrine of double jeopardy would prevent someone being prosecuted twice from the same set of facts, Corkill says the principle doesn't prevent a civil claim based on the same set of facts as a criminal prosecution.

However, if the Occupational Safety and Health service successfully prosecuted a company for a workplace accident, the courts would take that into account in considering any civil claim for exemplary damages from the accident victim.

Corkill says if an OSH prosecution resulted in a heavy fine being imposed, and/or if part of the fine was awarded to the worker, that would also count as a relevant factor in any subsequent civil claim for exemplary damages.

Auckland labour lawyer Peter Kiely believes the McLaren Transport decision has fed the trend for employees to file claims for exemplary damages for personal injury, and he says increasingly the tactic is being used as a threat against employers.

Exemplary damages are intended as a punishment for outrageous behaviour, in contrast to compensatory damages which are intended to compensate for factors such as loss of income, pain and suffering. The accident compensation legislation rules out claims by accident victims for compensatory damages.

Kiely says exemplary damages claims are increasingly being used as a threat against employers, and he has files from lawyers representing injured workers whose employers have already been prosecuted under the HSE Act.

He believes employers should resist such claims, although he concedes that those who have been cavalier in their approach to health and safety are more at risk.

"You can't dismiss it because people are entitled to sue for exemplary damages and people are using it as a lever, although I would be surprised if they were successful."

Kiely says given that exemplary damages are intended to punish outrageous behaviour, not to compensate the victim, the courts are unlikely to award a civil claim for damages if the employer has already been punished under the HSE Act. However he concedes such an action is more likely to succeed if the employer has received only a small fine under the HSE Act.

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