Can a closed door to common law claims ever open?

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The Work Health regime in the Northern Territory seeks to totally replace any common law entitlements an applicant worker may previously have enjoyed at common law in relation to a personal injury sustained at, or in the course of, that person's work. The Act applies to most workers of whatever description who are employed in the Northern Territory. The exact exemptions and exclusions from the operation of the Act are another topic entirely. I do not propose to dwell on them in this article, save to observe that, as with any Act of Parliament, where government has not yet trampled the common law, there the common law must survive.

I quote from the *Work Health Act* to quickly sum up the field ostensibly covered by section 52:

"52. Abolition of certain rights to bring action:

1. Subject to section 189, no action for damages in favour of a worker or a dependent of a worker shall lie against
   (a) the employer of the worker;
   (b) any person who, at the relevant time, was a worker employed by the same employer as the deceased or injured worker; or
   (c) the nominal insurer, in respect of
   (d) an injury to the worker; or
   (e) the death of the worker -
      (i) as a result of; or
      (ii) materially contributed to by, an injury.

1.(a) In subsection (1) "injury" does not include an injury inflicted or caused by, or as the result of an action or omission of, a worker employed by the same employer as the deceased or injured worker in circumstances in which the employer of the worker would not be liable under section 22A of the *Law Reform (Miscellaneous Provisions) Act* to indemnify the first-mentioned worker in relation to any liability incurred by him or her in relation to the injury.

The long shadow of Section 52 of the Work Health Act (NT) 1986 and its inherent prohibitions on common law recovery

2. The purpose of subsection (1) is to ensure that, so far as the legislative power of the Legislative Assembly permits, no action for damages at common law shall be, in the Territory or otherwise in the circumstances described in that subsection and nothing in this Act shall be construed as derogating from that purpose."
3. Except as provided by this Act, no action for compensation or a benefit of any kind by a worker or a dependent of a worker shall lie in the Territory against the employer of the worker in respect of -
   (a) an injury to the worker; or
   (b) the death of the worker -
      (i) as a result of; or
      (ii) materially contributed to by, an injury."

In addition to section 52, other sections of the *Work Health Act* prohibit any enforcement of a settlement agreement between worker and employer/insurer unless such agreement is registered with the court, remove the normal rules of evidence and privilege in respect of the Work Health action, and establish total subrogation of the place of the employer by the employer's Work Health insurer.

This is clearly therefore a powerful Act that creates an independent legal fiefdom that uses the same Court resources as other matters, but does not at all use those resources in the same way. A codified system entirely replaces the common law entitlements to claim as for an injury sustained at work and no common law right to compensation in this circumstance subsists.

To salvage any sort of common law entitlement from a section such as section 52 would be a difficult task. However, despite the sensitivity of Northern Territory courts to the wishes of our legislature, and notwithstanding the public policy that guided the creation of the *Work Health Act*, it is submitted that there remain both direct common law entitlements to damages arising out of the Work Health context as well as indirect, tactical common law tools to use in a recovery action as against an employer or Work Health insurer.

Commonwealth pre-eminence

Consideration of whether an injured worker can use the common law, given that otherwise the *Work Health Act* and section 52 thereof would apply to that worker, is still a matter of statutory interpretation.

Firstly, the Northern Territory is subject to Commonwealth laws in a way that states are not. Thus, any intention on the part of the Northern Territory legislature to abrogate Commonwealth laws must be ignored, as there is no "states' rights" argument possible for the Northern Territory. It would therefore seem that any application of laws such as the *Trade Practices Act*, or laws implementing treaties to which

Australia is a signatory that acknowledge rights of an employee to sue his or her employer for injury, discrimination or wrongful dismissal will ground claims as against an employer by an injured employee. Although such claims take their life from a statute, in many instances the claim once brought is more in the nature of a common law action for damages, and would in any event be beyond the operation of the provisions of the *Work Health Act*. The challenge would be to find a warranty or specific duty mandated by the Commonwealth statute that the employer had breached with respect to the complainant employee.

For example, companies that manufacture equipment for use by their employees could be within the operation of the *Trade Practices Act* or other Commonwealth legislation. If so, then it is submitted that there is a separate and pre-eminent right of compensation not limited or in any way deferential to the Northern Territory legislation.

Once the Commonwealth law opens the door for a non-Work Health claim, the normal rules of court should apply.

Lawyers should also keep in mind the overlapping jurisdictions of Territory, State and Federal Courts to hear unfair or wrongful dismissal actions, which may be grounded in the dismissal of an injured worker. And some injured workers may have grounds for making a complaint to the Human Rights Commission.

Even though these latter types of claim would be beyond the Work Health system's effects in any event, if a significantly greater or even an unrestricted right of award remains in one of those other causes it is legitimate forum shopping to select the action that will properly and fully reward your client.

Torts

Torts have four areas of applicability to the *Work Health Act*: torts that are specifically mandated by Commonwealth legislation, as previously mentioned; torts that arise from the context of a Work Health action, and are therefore beyond the direct effect of the *Work Health Act*; torts that take their basis of liability from the roles imposed by the *Work Health Act*, and torts that are struck down by the *Work Health Act*.

As the *Work Health Act* of necessity creates duties incumbent on the Work Health insurer and on the court hearing the matter, it therefore follows that the insurer is open to attacks in the tort of maladministration with respect to *inter alia* the calculation and payment of benefits to a worker as well in relation to the satisfaction of any settlement as registered with the court, notwithstanding section 52. It further seems clear that the officers of the Work Health Court including whoever is *coram* for a particular hearing are able to be sued in the tort of misbehaviour in a public office. This would be an extremely serious step, but as the legislature has sought to remove all common law rights, any such rights as survive are prima facie legitimate tools of review.

Lawyers are not only legal representatives of injured persons but also activists and guardians of our democratic freedoms.

Whether certain rights of a worker are enforceable or "merely" moral rights, any misrepresentation by or on behalf of a party to a Work Health action must be separately actionable as a wrong. Such a situation is beyond the ambit of section 52, as any damages claimed will not be injuries sustained arising out of work and are beyond the definition of an "injury" for the purposes of the *Work Health Act*. Also, there are very strong policy reasons that a Court should have due recourse to when deciding the limits of the *Work Health Act* - unconscionability of agreements, duress, unjust enrichment, requirements that any bargaining or pre-contractual communications should be in good faith, and economic hardship on an applicant worker.

The Work Health insurer, who through subrogation is the effective party who answers the applicant worker's claim, can be directly sued through the use of the above torts and statutory rights. This removes the shielding the insurers usually enjoy when they hide behind subrogation and claim that it is the employer who should be sued. Whilst the employer, in name, is the party to whom a Work Health application is made, outside the operation of the *Work Health Act* there is every reason why, and no cogent argument against, the insurer being directly liable to the worker in misrepresentation, maladministration, or any other tort that lies. Subrogation as under the *Work Health Act* presupposes the operation of that legislation and once one moves beyond it how can its provisions possibly remain in effect?

Summary - why the door should be opened

The Work Health system offers advantages over the common law to nearly everyone other than an injured worker, and the court must consider why a particular common law or equitable principle should be excluded. Even though section 52 is in broad and sweeping terms, it surely cannot be the legitimate intent of a parliament to remove the underlying principles of equity and the common law from an area of endemic human suffering, even if this is one possible reading of that section. Any removal of accountability is a negative and the courts should be directed towards alternative readings and if necessary academic views in support of the jurisprudential basis for preserving common law rights of claim.

Lawyers, and particularly "plaintiff lawyers", are not only legal representatives of injured persons but also activists and guardians of our democratic freedoms. Acquiescence in an oppressive or inequitable regime of any kind demeans us and our system of justice. Even unsuccessful attempts to push the envelope of provisions like section 52 of the *Work Health Act* 1986 (NT) can only be of long-term benefit to the administration of justice. It would be more than a shame to see rights and entitlements that men and women literally died to obtain simply wither and fade away through apathy in the face of autocratic legislative action. ■

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