

## Swain v Waverley Municipal Council

February's 3-2 High Court decision in *Swain v Waverley Municipal Council* has put the spotlight back on to personal injury payouts and tort law reforms.

The High Court decision reinstated a \$3.75 million negligence payout awarded to Mr Swain in 2002 after a swimming accident five years earlier left him a quadriplegic. The 2002 decision was one of a series of high-profile cases at the time, which led to nationwide reforms in tort law.

In 2002 Mr Swain successfully sued Waverley Municipal Council for negligence after he jumped into the waves at Bondi Beach and suffered spinal injuries after striking a sandbank. Mr Swain successfully argued the council was negligent in not warning of the sandbank running through the designated swimming area that had been marked out by flags.

The decision was overturned on appeal a year later. The majority decision of the Court of Appeal determined that there was insufficient evidence for the jury to find that the Council had been negligent.

Mr Swain then took his case to the High Court of Australia, with the majority deciding that the Court of Appeal decision was incorrect. The High Court decided there was sufficient evidence for a jury to be reasonably satisfied that Waverley Council had been negligent.

The 2002 decision led to sweeping reforms of tort laws in

all states. Under Victorian tort law reforms, people injured in Victoria cannot seek damages for pain and suffering unless they have a *significant injury* – either 5 per cent physical (non-psychiatric) impairment or 10 per cent for psychiatric injuries. There is no discretion for individual circumstances. This has left many people without a right to compensation.

County Court figures for the first 12 months since the reforms were introduced in Victoria show an 88 per cent drop in personal injury writs filed in the County Court. Injured people are missing out on compensation because they cannot satisfy the threshold test.

### More information From the LIV Bookshop

*Torts Law in Principle*, Baker, \$72.95

*Torts: Nutshell Series*, Sam Blay, \$21.95

### Useful web links

The LIV website contains information on personal injuries and compensation at

[www.liv.asn.au/public/legal/info/personalinjury](http://www.liv.asn.au/public/legal/info/personalinjury).

## The Defence of Provocation

Victorians on trial for murder will no longer be able to use provocation as a defence under law reforms to be implemented later this year.

Provocation as a defence has historically been a means for a person (predominantly men) to have a murder charge reduced to manslaughter. The defence of

provocation dates back to an era when it was acceptable, especially for men, to respond to challenges to a person's honour with violence. It was also a time when the offence of murder carried a mandatory death penalty.

In November 2004 the Supreme Court acquitted James Ramage of murder after finding he had been provoked prior to the murder by his wife's disparaging comments about him and his sexual prowess. James Ramage was instead convicted of the lesser offence of manslaughter and sentenced to 11 years jail. The resulting public outcry from this case led to the early announcement of the revocation of the defence of provocation for future murder trials.

The abolition of provocation as a defence was one of 56 recommendations from the Victorian Law Reform Commission's *Defences to Homicide Final Report*. It is anticipated that the removal of provocation as a defence will be accompanied by changes to self-defence laws and the use of hearsay evidence in trials.

### More information From the LIV Bookshop

*Criminal Law – Butterworths Tutorial Series* (2nd edn), Clough and Mulhern, \$72

*The Cambridge Handbook of Australian Criminology*, Adam Graycar & Peter Grabosky, \$89.95

### Useful websites

*Defences to Homicide Final Report* is available at [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au).

## Workplace relations – changes on the way

With the Howard government taking control of the Senate in July 2005, changes to workplace relations laws seem inevitable. The government has already signalled its intention to reintroduce the raft of workplace legislation.

### Changes to small business

- The government proposes to exempt small business (fewer than 20 employees) from the operation of the unfair dismissal laws via the *Workplace Relations Amendment (Fair Dismissal) Bill*.
- The *Workplace Relations Amendment (Protecting Small Business Employment) Bill* will exempt small business from redundancy obligations.
- The *Workplace Relations Amendment (Choice in Award Coverage) Bill* 2004 will provide small business with new avenues for resisting award roping-in applications.

### Changes to agreement making in favour of individual bargaining and independent contractor arrangements.

- Reforms include extending and streamlining the use of Australian Workplace Agreements (AWAs), and extending the operation of Enterprise Bargaining Agreements (EBAs) from three to five years via the *Workplace Relations Amendment (Simplified Agreement Making) Bill* 2002.
- Introduction of an *Independent Contractors Act*, which will protect and promote the status of independent contractors. It aims to restrain unions from seeking orders from the Australian Industrial

Relations Commission (AIRC) that limit the use of contractors.

- The *Workplace Relations Amendment (Better Bargaining) Bill* aims to enhance the AIRC's power to terminate bargaining periods and introduce "cooling-off" periods.

### Building industry reforms

The government will be looking to implement the *Building and Construction Industry Improvement Bill* 2003. This includes the establishment of the Australian Building and Construction Commission, placing limits on pattern bargaining and strike action and substantial constraints on union organising rights and activities in the industry.

### Overriding of state industrial relations systems

The government is likely to implement even more far-reaching changes such as a comprehensive national system of industrial regulation overriding the state systems. While many of the government's previously introduced Bills seek to achieve this in specific areas, the possibility now exists for a more comprehensive coverage of federal laws, using the corporations power in the Constitution as the mechanism to achieve this result.

### More information From the LIV Bookshop

*The Workplace Relations Handbook*, Colvin, Watson & Burns, \$115

### Useful web links

Department of Foreign Affairs and Trade,  
[www.dfat.gov.au/facts/workplace\\_relations.html](http://www.dfat.gov.au/facts/workplace_relations.html).

Industrial Relations Victoria,  
[www.irv.vic.gov.au](http://www.irv.vic.gov.au).

Human Resources Magazine,  
[www.humanresourcesmagazine.com.au](http://www.humanresourcesmagazine.com.au), type *workplace*

*relations reform* into the search field.

## Sexual harassment

A recent survey by Victoria's Equal Opportunity Commission (EOC) has revealed sexual harassment has become a growing problem for men in the workplace. The number of claims involving males has risen from 5 per cent in 1996 to 25 per cent in 2004. The survey also found most workers had either witnessed or experienced sexual harassment but many had not reported it.

The *Equal Opportunity Act* 1995 (Vic) prohibits sexual harassment and this applies to employers and employees. The Act defines sexual harassment as:

- an unwelcome sexual advance; or
- an unwelcome request for sexual favours; or
- any other unwelcome conduct of a sexual nature in circumstances where a reasonable person would have anticipated the other person would be offended, humiliated or intimidated.

The *Sex Discrimination Act* 1984 (Cth) also defines the nature and circumstances in which sexual harassment is unlawful. The Act complements and overlaps the provisions of the *Equal Opportunity Act* 1995.

Examples of sexually harassing behaviour include:

- unwelcome touching;
- staring or leering;
- suggestive comments or jokes;
- sexually explicit pictures or posters;
- unwanted invitations to go out on dates;
- requests for sex;
- intrusive questions about a person's private life or body;

- unnecessary familiarity, such as deliberately brushing up against a person;
- insults or taunts based on sex;
- sexually explicit physical contact; and
- sexually explicit emails or SMS text messages.

Every employer should have in place a written policy prohibiting sexual harassment and an effective complaint handling procedure.

If an employee believes an employer has sexually harassed them, they can make a complaint to the EOC. The EOC has authority to investigate complaints, negotiate with the employer and seek a resolution of the problem. It is unlawful for a person to be victimised for making, or proposing to make, a complaint of sexual harassment to the Human Rights and Equal Opportunity Commission.

If the complaint remains unresolved, it may be referred to VCAT's Anti-Discrimination List.

### **More information**

*Employment Law*, information brochure. Available from the LIV or ask your solicitor.

### **From the LIV Bookshop**

*Discrimination and Equal Opportunity Law and Practice*, C Ronalds, \$45

*Human Resources Discrimination Law and Practice*, R Pepper, \$49

### **Useful web links**

EOC, [www.eoc.vic.gov.au](http://www.eoc.vic.gov.au).

Human Rights and Equal Opportunity Commission, [www.hreoc.gov.au](http://www.hreoc.gov.au).

## **Wills – a living legal document**

Your will is a legal document that sets out how you want your assets to be distributed on your death.

If you do not leave a will your estate will be distributed according to a formula set out in legislation. In some circumstances, the result of dying without a will can be disastrous for your family or loved ones. Having a solicitor prepare your will ensures your assets will be distributed according to your wishes.

Wills, however, are not static documents. They change and evolve as your own circumstances change and evolve. Revise your will at least every five years or when a significant event such as marriage, the birth of a child, or the death of a family member takes place.

Even if you haven't changed your will, certain events such as marriage and divorce will still affect it. For example:

- a will made prior to a marriage is not valid;
- separation (but not divorce) from a spouse will not affect the will;
- any gifts to your spouse or their appointment as executor will be automatically revoked on divorce; and
- it may also be necessary to appoint a guardian for your children after their birth or to review your appointed executor.

You need to consider:

- who should be your executor and what powers they should have;

- selecting a guardian for your children and how your estate can provide for their future financial needs;
- which assets you can dispose of in your will and which assets you cannot, such as those owned by a family discretionary trust;
- minimising capital gains tax liability;
- what liabilities you need to provide for in your will and whether your life insurance is adequate in the circumstances;
- who could make a claim against the estate and how to avoid a testator's family maintenance claim?;
- options for providing for a de facto spouse, second marriages and blended families;
- the appropriate age for beneficiaries who are minors to take control of their share of the estate;
- funeral arrangements;
- where to keep your will, who should know where it is kept, and in what circumstances it should be reviewed; and
- the uses and benefits of appointing a power of attorney.

### **More information**

*Wills and Estates*, information brochure. Available from the LIV or ask your solicitor.

### **From the LIV Bookshop**

*Wills & Estate planning*, Renton, \$29.95

### **Useful websites**

LIV website, [www.liv.asn.au/public/legal/info/wills/wills-Wills](http://www.liv.asn.au/public/legal/info/wills/wills-Wills).

**Disclaimer:** The information in this newsletter is not intended to be a complete statement of the law relating to the issues raised. Accordingly, no person should rely on this information without first obtaining specific advice from our office.