

Preventing Falls At Work

Many workplace injuries and deaths occur as a result of a fall. Falls from roofs, ladders and other equipment, as well as falls into shafts and pits, have caused 20% of workplace fatalities in the last 3 years and many more work-related injuries. In an attempt to address this danger, new Occupational Health and Safety regulations together with Codes of Practice for the construction industry have been introduced. The regulations seek to make employers and employees aware of the risk factors in their job situation and, where appropriate, implement systems and safety measures to reduce the likelihood of falling accidents.

The *Occupational Health and Safety (Prevention of Falls) Regulations 2003* came into operation on 31 March 2004 and apply to all Victorian workplaces where there is a chance of someone falling more than 2 metres. The regulations apply to all employees including independent contractors engaged by an employer. Some notable exceptions from the regulations, as outlined in regulation 105, include persons involved in stunt work, acrobatics, theatre, sports and athletic

activities, bike or horse riding and rock climbing.

The regulations outline an employer's duty to identify those tasks that could involve a fall hazard and undertake a risk assessment of the likelihood of a fall. The risk assessment takes into account the surrounding circumstances of the work area, for example, noting the presence of supporting surfaces, the proximity of powerlines and trees and the prevailing weather conditions. Once identified, the employer has a duty to eliminate or reduce the risk of a fall through the use of suitable fall prevention strategies. The implementation of emergency and first aid procedures and the provision of instruction and training to employees make up the employer's obligations in relation to this specific workplace risk.

Employees have corresponding obligations under the regulations. Employees need to be aware of the safety measures taken by their employers and adopt the training and safety procedures put in place, including the correct use of safety equipment.

Two Codes of Practice have been developed by Worksafe Victoria to provide a practical guide on implementing the regulations in specific industries. Codes of Practice for the Prevention of Falls in

General Construction and in Housing Construction have been provided to address the specific dangers associated with the high levels of falls in these industries. Copies of the Codes and summaries of the regulations can be downloaded from the Victorian Workcover Authority website:

www.workcover.vic.gov.au.

The Occupational Health and Safety regulations and Codes of Practice addressing the prevention of falls will provide useful guidance in those industries where falls are an ever present danger to employees. Any measures that seek to educate employers and employees to operate in safer workplaces benefit all of us.

Crime Doesn't Pay

Legislation at both Federal and State level allows police and other authorised officers to search for and confiscate assets obtained through illegal activity. The confiscation process enables proceeds of a crime, or property that has been used to commit a crime, to be seized and forfeited to the State. Examples of property that may be the subject of confiscation would include a motor vehicle used in a robbery, proceeds from drug trafficking, or the premises where an assault or homicide

took place. Confiscation laws clearly aim to prevent offenders from profiting financially from illegal activity.

In Victoria, the *Crimes (Confiscation of Profits) Act 1986* and the *Confiscation Act 1997* outline powers and procedures for the confiscation of assets. The Asset Confiscation Office of the Department of Justice is responsible for the administration of powers under these Acts. There are various orders that can be sought in relation to property and, in some instances, orders can be made in relation to an offender's assets before he has been convicted of an offence. The *Confiscation Act* enables officers to obtain forfeiture orders in relation to property, as well as obtain freezing orders and restraining orders to prevent a person dealing with the property before it is confiscated. Breaches of restraining orders incur harsh penalties, both imprisonment (up to 10 years) and fines (up to \$12,000), under the legislation. The legislation also gives officers powers to gather information and obtain search warrants in relation to potential property to be seized.

If property cannot be recovered, an offender may be required to pay back the value of the proceeds of crime through the operation of a Pecuniary Penalty Order under the legislation.

If you have been the victim of crime and have obtained a Compensation Order, you may be eligible to receive compensation from the proceeds of forfeited assets where your Compensation

Order and the Forfeiture Order relate to the same criminal offence.

The Asset Confiscation Office is located at Level 6, 436 Lonsdale Street Melbourne (tel. (03) 9603 9101) and information can be obtained from its website:

www.justice.vic.gov.au/assets

. If you have any concerns about your rights in an area of criminal law, or your entitlements as a victim of crime, contact your solicitor.

Discriminating At Dinnertime

Anti-discrimination laws make it illegal to discriminate against women who breastfeed their children. Breastfeeding also includes the act of expressing milk. Under the *Equal Opportunity Act 1995 (Vic)*, breastfeeding has been specifically included with other attributes including gender, age, sexual orientation, and impairment, as a factor that cannot be used to treat a person differently from another. Discrimination against breastfeeding women is prohibited in areas of employment, education, the provision of goods and services, as well as in social situations such as applications for club membership. Recent attention given to breastfeeding women in restaurants highlights the unwanted attention and, arguably, discrimination, some women experience when performing this natural, motherly function.

The *Sex Discrimination Act 1984 (Cth)* also protects women from discrimination

caused through family responsibilities and potential pregnancy. "Family responsibilities" under the Act cover situations where an employee is required to care for a dependent child or an immediate family member. Immediate family member expressly includes a spouse (including a de facto spouse), parent, grandparent, grandchild, or sibling (section 4A).

Section 4B of the Act makes it unlawful to discriminate against a woman on the basis of her potential to become pregnant. Potential pregnancy is expressed to include the fact that a woman is or may be capable of bearing a child, has expressed a desire to become pregnant, or is likely to be pregnant. It is unlawful, therefore, for an employer to ask questions concerning pregnancy at a job interview or request information about such issues without a legitimate reason. A legitimate reason to request such information would include workplace issues of occupational health and safety, and, in such an instance, would require the use of such information to be confined to these issues.

It is important that both employers and employees understand their rights and obligations in relation to anti-discrimination legislation so that everyone has the opportunity to be treated fairly. If you believe you have been unlawfully discriminated against, or have any concerns regarding legislation in this area, contact your solicitor for advice.

Where There's A Will There's A Way

If you haven't made a valid Will, it may be time to consider it. If you die without making a Will, you risk failing to provide for those you care about. This is especially true for people who have divorced, entered into new partnerships or are members of blended families. The complexity and diversity of modern relationships dictate the importance of maintaining a valid and up to date Will.

When making a Will, it is important that consideration be given to various matters. The appointment of a capable, trusted person as executor is important, as he is ultimately responsible for carrying out your wishes under the Will. An executor can be a professional (for example, a solicitor or trustee), a family member or a trusted friend. A beneficiary under your Will can act as an executor. If the executor you have appointed is not a professional, then, usually, he will seek legal advice on the contents of your Will and instruct a solicitor to handle the obtaining of probate and administration of your estate.

Your Will should clearly list your assets and how you wish to distribute them. All personal property (cash, shares, jewellery, and other possessions) and real property (your home and any other land or property) should be itemised and distributed to those persons you wish to provide for. You should ensure that you clearly name all beneficiaries under your will to prevent

any dispute as to identity at a later date. In addition, when making your Will, you should ensure that your executor knows of its existence and its whereabouts (giving him your solicitor's name and address would be useful).

Remember, your will should be kept for safekeeping in a fireproof safe or deposit box - preferably with your solicitor or bank. You should retain a copy of the Will. Your executor should also be made aware of the existence and whereabouts of any property that not be easily located after your death, for example, jewellery kept in safe storage outside of the home.

While it is possible to make a valid Will without obtaining legal advice, it is strongly recommended that you consult a solicitor instead of doing it yourself. Although making a Will may appear straight forward, there are many traps for the unwary. By discussing your Will with a solicitor, you will be able to ensure that you have covered all aspects of your affairs, prepared and drawn up a valid Will, and fully understood the effects of existing relevant legislation. Issues such as the rights of dependants to challenge a Will, the need to regularly review and update your Will, and the use of powers of attorney can all be fully explained to you.

Making and maintaining a valid will is not difficult and it is something that we should all do. Don't put it off until it is too late.

The Remarriage Discount

Legislation recently passed by Parliament ends an outdated law that affects a spouse's claim for damages for wrongful death.

The *Wrongs Act* 1958 (Vic) enables the dependants of a deceased to sue the person who negligently causes the death of their loved one. The Act allows dependants (often the wife and children) to claim damages based on the financial support they would have gained from the deceased had he survived. In quantifying an amount of damages, the court is required to award an amount "proportioned to the injury resulting from such death". In attempting to arrive at a fair amount for damages, courts consider various factors in each case and allow for general contingencies in life (often referred to as the 'vicissitudes of life') that can affect the amount to be awarded. One of the contingencies considered is whether or not the spouse has remarried or there is a likelihood of remarriage. It is claimed that the remarriage factor is relevant in assessing damages because of the possibility of a wife (and her children) being financially looked after in another relationship, thereby reducing her 'injury' and, therefore, damages in the wrongful death claim. Cases where spouses have remarried provide factual evidence that may affect a claim in damages, but difficulties arise where there has been no remarriage. Should a court consider a spouse's prospects of remarrying in the future by taking into account her age,

physical appearance and demeanour and, if favourable, discount the damages payable?

In a recent High Court case, *De Sales v Ingrilli* [2002] HCA 52, the court considered whether a separate discount for the prospect of remarriage should apply. In that case, the deceased, who was 31, died as a result of the negligence of another. Liability was not in dispute in the case. The deceased's wife, aged 27 at the time of his death, claimed damages for herself and her two young children. The wife had not remarried in the nine years since her husband's death and the time of the trial. In awarding damages, the trial judge did not apply any discount for the general 'vicissitudes of life' but did apply a separate discount of five per cent to allow for the possibility of remarriage by the wife in the future. On appeal to the Full Court, the remarriage discount was increased from five per cent to twenty per cent. The wife appealed to the High Court and the case law relating to the remarriage discount was considered. The seven judges of the High Court presented differing views on the validity of a remarriage discount; some regarding it as purely speculative, misleading or inappropriate, while others found it a relevant part of the general 'vicissitudes of life' considerations but not, of itself, warranting a separate discount. In the end, the original discount of five per cent was held by the majority of the court to be a reasonable reduction in the case.

The Victorian government has now settled the issue with new legislation. The *Wrongs (Remarriage Discount) Act 2004*, which came into operation on 28 April 2004, inserts new provisions into the *Wrongs Act* providing that no reduction be made to damages awarded in claims for wrongful death on the basis of remarriage or prospects of remarriage. Remarriage is expressed to include 'de facto relationships' or "domestic partnerships" under the *Property Law Act 1958*.

Ban On Tail Docking

The practice of docking dog's tails for cosmetic purposes has been banned under government legislation preventing cruelty to animals.

The Prevention of Cruelty to Animals (Tail Docking of Dogs) Regulations 2004 No. 23 (Vic) makes it an offence to dock dog's tails except when carried out by a veterinary surgeon for therapeutic reasons. A person found guilty of committing the offence faces a fine of up to \$1000. The creation of laws prohibiting tail docking has been welcomed by animal welfare groups and veterinary associations who see the act as cruel and unnecessary for all dog breeds. Evidence suggests that dogs can feel acute and chronic pain from tail docking. Tail docking has been justified as a means of preventing tail injuries in mature dogs, but RSPCA evidence suggests that the pain of tail docking in puppies far outweighs the pain

associated with tail injuries in adult dogs. The tail docking ban brings Victoria into line with other States as we move closer to a National ban on this activity.

Responsible pet ownership is controlled in Victoria by the *Domestic (Feral and Nuisance Animals) Act 1996* and the *Animals Legislation (Responsible Ownership) Act 2001*. Legislation requires pet owners (dogs and cats) to register their animals with the local council and to look after them by ensuring that they do not become a nuisance to others. Dogs and cats will become a nuisance if they "injure or endanger the health of any person or if they create a disturbance through excessive noise that interferes with the peace, comfort or convenience of any person in any other premises". Specific offences are created under the legislation that attract fines for pet owners who do not sufficiently control their pets. In addition, owners may be liable at common law if their pet causes personal injury or property damage to a third party. The injured party may be able to seek compensation for damages suffered as a result of a dog bite.

Pet owners need to be aware of their responsibilities under Victorian law - responsibilities aimed at protecting the animals themselves, as well as the community at large. If you have a specific concern about your responsibilities as a pet owner, or have suffered injury caused by another person's dog, consult your solicitor.