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WELCOME TO THE MAY 2014 ISSUE OF THE REPORT.

A newsletter containing a selection of publications to keep you informed on legal issues affecting a broad range of businesses and industries. An electronic version of this newsletter can be found at www.mullinslaw.com.au under our *Publications* tab.

Facebook "liked" by Judge

NATASHA COLLINGS SOLICITOR

HISTORICALLY, IT HAS BEEN VERY DIFFICULT to prove a plaintiff's subjective complaints to either be overstated or untrue. However, times are changing and in a recent case we saw social media used by the defence to discredit a plaintiff.

In the case of *Reitano v Shearer & Anor (2014)* QSC 44, the plaintiff claimed damages for lower back and psychological injuries suffered as a result of a motor vehicle incident when she was 17 years old.

The plaintiff, who was 23 at the time of trial, stated that she still suffered from significant physical and psychological incapacities. The plaintiff also claimed she had become a social recluse who spent the majority of her time "watching television and playing cards with her grandmother." She told the examining doctors she "rarely went to social events and was not involved in social activities".

The plaintiff's social media footprint told a different story. During the trial, the defence led evidence from social media sites (including Facebook) which showed that the plaintiff had attended festivals, events at hotels and had even been a bridesmaid. These activities showed the plaintiff's complaints of pain and incapacity to be either inaccurate or greatly exaggerated.

The presiding Judge noted that when confronted with evidence which clearly showed her "preparedness to either misstate the facts or consciously confabulate" the plaintiff showed "an indifference to the significance of giving evidence under oath amounting to a supercilious regard for the truth".

The trial Judge considered her statements to be engineered towards recovering a higher award for damages and felt compelled to question her evidence in its totality. In particular, this related to the doctors who examined the plaintiff and largely relied on her perceived truthful account of the impact of her injuries on her social life and ability to work.

As the plaintiff was held to be an unreliable witness the Judge could only assess damages based on the objective factual and medico-legal evidence led at trial. This resulted in a lower award for future economic loss than would otherwise be expected for a plaintiff of her age.

This case is an excellent example of the effective use of social media to question a plaintiff's credibility. This is perhaps ironic considering it was the plaintiff herself who created the evidence which called into question her honesty.

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Ruling on employer's duty of care may lead to a shift in liability

JASON LEWIS PARTNER

A DECISION IS EXPECTED SHORTLY IN THE Supreme Court of Queensland matter of *Packer v Tall Ships Sailing Cruises Australia Pty Ltd & Commercial Waterproofing Services Pty Ltd*, which went to trial at the end of March 2014.

The plaintiff, Jay Packer, was assaulted during a work Christmas party organised by his employer Commercial Waterproofing, which was held on a charter boat operated by Tall Ships. Packer has sought damages against both companies.

Packer was not assaulted by a colleague, but by an intoxicated member of the public who was also on the vessel. The assault came without warning, leaving him with a fractured right jaw and cheekbone and a secondary psychological condition.

Tall Ships and Commercial Waterproofing both argued that neither of them could have foreseen the criminal act of a third party, therefore could not be liable for it. In particular, they argued: the voyage concerned was a day cruise designed for families; there was a good ratio of staff to passengers; and Tall Ships had a long history of successfully conducting these day cruises without incident.

Packer produced evidence about the security and crowd control measures he considered should have been in place on the vessel. There was a great deal of argument over just how effective such arrangements would have been, given the assault occurred completely without warning and could not have been prevented by a security guard or crowd controller. In addition, the inevitability of being apprehended clearly had no deterrent effect on the offender as the vessel was still moored at an island (ie. There was no prospect of escape, regardless of what security arrangements existed on the vessel itself).

Whether the Court finds any liability against Tall Ships will depend on what view it takes of the adequacy of its security arrangements, bearing in mind the various regulatory regimes relating to liquor service and policy.

As for Commercial Waterproofing however, Packer argued it should have made its own enquiries into the adequacy of Tall Ships' security arrangements, possibly by pre-booking or pre-boarding checks. In response, Commercial Waterproofing argued it had no expertise in security arrangements for licensed premises and therefore relied completely on Tall Ships for that. Ultimately, the question of Commercial Waterproofing's liability is just how far its duty of care to employees actually extended.

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This case has naturally generated a great deal of interest among public liability and workers' compensation insurers alike. Insurers of licensed venues have become accustomed to defending claims for assaults by offenders of no financial means, and have therefore been forced to shoulder the entire financial burden of these claims themselves. However, if Packer succeeds against Commercial Waterproofing, the venues' insurers may be able to reduce their exposure by passing a significant portion of their potential liability for future similar claims onto the victims' employers.

Employers might want to keep an eye on the Court lists before finalising arrangements for this year's Christmas party as, if Commercial Waterproofing is found liable, there are significant implications for both employers and licensees. Both parties will need to think carefully about their options because a random "coward punch" will still be a problem for employers at licensed venues next Christmas.

Court awards a record $3 million of father's estate to "disinherited" son

CHRIS HERRALD ASSOCIATE

IN MARCH 2014, JUSTICE MARTIN OF THE Supreme Court of Queensland ordered that a son, who had been "disinherited" by his father, receive the sum of $3 million from his deceased father's estate. To our knowledge, this is the largest amount awarded in Queensland to date for this type of matter.

At his time of death, the father's estate had a net worth of between $26 million and $28 million. Four of the father's seven children made an application for further provision from their father's estate (commonly referred to as "contesting the will"). Three of the four claims settled before trial, and each of those children received amounts ranging between $2.7 and $3.2 million.

The Court has the power to ensure that, upon application, "adequate" and "proper" provision is made for a deceased person's spouse, children, step-children or other dependants.

Justice Martin found that the deceased father had not made proper provision for his son because:

- The estate was very large.
- The son worked "long and hard" for his father, contributing to the growth of his father's property interests.
- At the date of death the son had substantial assets but also substantial liabilities which were subject to the unpredictability of the financial market.
- The father's Will listed reasons he did not provide for the son and the Court found that two of those reasons were misconceived or based on a misunderstanding.
- The son, who had suffered an injury that impaired him by 30% prior to the father's death, could no longer work as a pilot and could not perform labouring work on the properties he owned.
- Even though the father had provided for the son during the son's lifetime, that provision still required the son to enter into debt and as such, the provision was not a gift but rather a "discounted sale".

In deciding how much the son should receive from the estate, Justice Martin stated that "there is no formula which can be used to determine an appropriate amount".

This is a proposition that is well known to estate litigation lawyers; an amount that the Court decides is appropriate for one person to receive may be very different to an amount that the Court decides is appropriate for a person in what one would think is very similar circumstances. Justice Martin was also very conscious of the slightly different approach the Court takes in large estates because (citing other case law) competition between beneficiaries is reduced or eliminated (ie. there will be enough funds in the estate to satisfy all of the claims).

Whilst the son had assets in his own name or controlled by his trustee company of approximately $9.8 million, the combined debt of himself and his trustee company was $5.9 million, including his personal debt of $3.385 million. Justice Martin decided that an amount of $3 million was appropriate because, whilst it would not eradicate his debt, it would bring it to a manageable level.

Queensland Government's initiative to **extend the trial of the Drink Safe Precincts**

ROSE LOCKE SOLICITOR

DESPITE SEVERAL PREVIOUS INITIATIVES, STATE Governments are still concerned alcohol infused violence is not being curbed. Typically, initiatives have been attributed to the venue, however the Queensland Government is doing everything it can to put the responsibility back on individuals, including extending the trial of Drink Safe Precincts.

The trial began in 2010 as the Government's response to alcohol related violence. The program is a place-based management approach which is being piloted in three areas: Surfers Paradise, Fortitude Valley and Townsville.

Attorney-General and Minster for Justice, the Honourable Jarrod Bleijie, has received positive feedback on the high visible presence of police and collaboration of everyone involved in the precincts. He advised that the precincts will now continue until at least June 2014.

The precincts use the combined resources of State and Local Government agencies, as well as industry and community organisations, to deliver coordinated plans adapted to local contexts. The approach includes enhancing targeted and flexible police responses, improving transport information and traffic control (eg. addressing issues such a crowding and footpath queuing) and providing better on the ground coordination between community groups, security, police and licensees.

The Government has been providing evaluation updates throughout the trial. The interim evaluation covering the first 14 months made the following preliminary findings:

- The model had led to a greater coordination of local level strategies, was well regarded by stakeholders and had improved perceptions and safety.
- The place-based approach appeared to have had a positive impact on response to violence and disorder associated with dense concentration of pubs and clubs in Drink Safe Precincts especially in Fortitude Valley and Surfers Paradise.
- The trial appeared to be associated with a reduction in alcohol related violence in Fortitude Valley and Surfers Paradise, but not in Townsville.

Consistent with the 14 month findings, the evaluation update delivered late in 2013 found evidence to suggest the Drink Safe Precinct related initiatives may be having a positive impact on the violence and severity of injuries sustained by patrons across the three Drink Safe Precincts. Support services remain active and well utilised and de-escalation and diversion strategies by police in Fortitude Valley and Surfers Paradise continue to be utilised.

The trial will continue and methods will continue to be implemented to achieve a reduction in alcohol related offences, improved community safety, better patron behaviour in the precincts and improved transport.

While the current end date is June 2014, it is likely the Drink Safe Precinct approach will continue for the foreseeable future.

The technological revolution's **impact on privacy policies**

ANDREW NICHOLSON PARTNER

THE AUSTRALIAN LAW REFORM COMMISSION (**ALRC**) HAS KEPT privacy in the headlines by releasing its discussion paper on *Serious invasions of privacy in the digital era*.

The ALRC addresses what it considers to be complications and changing expectations of privacy which have arisen from the exchange of information through a digital (eg. internet and mobile technology, including social media) environment. Of course, with the increase in popularity of this technology, comes an increase in associated risks.

The paper proposes a statutory cause of action (in tort) for those who suffer "serious invasions of privacy" in which the aggrieved will be able to seek injunctions and damages including exemplary damages as a penalty for the most outrageous breaches.

The proposal is consistent with similar rights enjoyed in Canada, the United Kingdom and New Zealand.

However, the ALRC has its work cut out as Federal Attorney General, Senator George Brandis, stated in *The Australian* on 4 April 2014 that "the Government has made it clear on numerous occasions that it does not support a tort of privacy". The discussion paper follows the commencement last month of long awaited changes to the *Privacy Act 1998* (Cth) and the introduction of new Australian Privacy Principles.

The Privacy Commissioner wants businesses not to regard privacy as an add-on, but as an integral part of the collection and handling of information by businesses. The privacy policies, procedures, training and education which are adopted or implemented by businesses should be regularly reviewed to ensure that they keep pace with the business, the type of information collected and changes in technology in the industry. Any business which develops a policy and puts it in the bottom draw should be concerned about their exposure to claims in the event of a breach. Privacy will also be relevant to a number of parts of most businesses. This is best illustrated through the following (uncommon) situations which may have to be confronted by some organisations:

- Related entities, clients or organisations who are passing information between one another (as the sharing of information will come under scrutiny).
- Employees who are changing jobs and either take or bring with them customer/client lists or lists of referrers containing personal information.
- Vendors who provide personal information to a purchaser during the course of a due diligence or sale.

This topic is likely to stay on the radar for some time and there have been some recent high profile matters which have kept privacy in the headlines, including the French Data Protection Authority's investigation into Google's policy to aggregate information across its services including Gmail, Google maps and YouTube. This also applies where businesses pass information to related entities or where clubs provide information to governing bodies.

We recommend organisations review not only their privacy policies and related documents, but also their practices and procedures with a view to undertaking a wider audit to ensure compliance.

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JOHN MULLINS
EDITORIAL

THE BUDGET OF THE NEW ABBOTT government has been handed down and most business people and observers are waiting to see what effect this has on the Australian economy and the economy in South East Queensland.

It certainly has had a significant but unsurprising impact upon the government's popularity. Obviously time will tell whether the steps taken will have a positive effect on the economy and thereby win back the confidence of the electorate.

One of the accusations being made against the government is that they have broken promises. Political commentators are picking up on a sense that the electorate is looking for more honesty and integrity from its politicians. The ICAC Inquiry, which claimed and continues to claim political scalps on both sides of politics and state elections, is coming up in three Australian states. There are also royal commissions and other inquiries all over Australia, not just enquiring into government decisions but also decisions and actions of community leaders, including The Royal Commission into the Abuse of Children. We have also seen several high profile cases of child abuse from celebrities and an increase in acts of violence from parents, spouses, adolescents and even business leaders.

There is a real sense that the community is demanding better. It's demanding greater integrity. Integrity is something which is of significant importance to our firm. We speak about it constantly. We seek to define it and have people understand what it means and how it manifests itself in how we act every day. It defines how we conduct ourselves in our dealings with clients and other parties. It seems to me that honesty and integrity are very simple concepts. From an early age, people understand what these things are and when they are acting that way and when they're not.

Our society and our community relies upon people, particularly people in positions of leadership and responsibility, acting with integrity. Perhaps, and I hope I'm not being naïve, there is a sense in the community that integrity is important, that integrity is valuable and to be valued. We need to demand this of our political and community leaders. We are entitled to believe the people we elect to govern us, as well as those appointed to positions of responsibility and authority, have integrity. In fact, we must continue to demand it.