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Welcome

Wilson's Update focuses on keeping you informed and assisting you to manage professional and personal risk on a broad range of issues. That focus continues in this issue.

Your comments, feedback and questions are appreciated and will be reflected in future issues of Wilson's Update.

I am delighted to announce that Catherine Coxon, solicitor has joined our Family Law team at Wilsons Lawyers.

Our website is currently under review with a view to it being more interactive and informative. Look out for the new format in the near future.

For information about our services visit our website at www.wilsonslawyers.com.au

Geoff Wilson

New Family Law legislation focuses on greater involvement of both parents in children's lives

The *Family Law Amendment (Shared Parental Responsibility) Bill 2006* came into effect on 1 July 2006 and amends a number of important areas of the *Family Law Act 1975*, particularly with respect to children. Much media attention has been given to the new laws, but there is also great misunderstanding as to what the new laws actually mean for families dealing with separation.

The changes to the law aim to bring about a cultural shift in attitudes and the management of family separation by moving towards cooperation, and away from litigation, between parents.

The legislation aims to assist families in resolving their disputes outside of the Courts and litigation. The new laws commenced in conjunction with the opening of new Family Relationship Centres across Australia. The Centres provide expert services and support systems for parents to assist them in reaching agreement about arrangements for the care of their children, without resorting to costly and stressful legal battles. A Family Law Advice Line is also being established to help people affected by separation or relationship issues. New provisions and harsher penalties for parents who fail to comply with Court Orders about children should act as a greater incentive for all to adhere to Orders or cooperate with the other party to reach agreement about variations to plans.

The new laws confirm that parents continue to equally share responsibility for the care of children after separation, unless there is specific reason to shift [by Court Order] that responsibility to one parent alone. Parents are, post separation, required to consult with each other about major long term issues affecting their children, such as a child's education. Unilateral enrolment of a child at a new school without attempting to discuss the matter and reach agreement with the other parent may result in legal action being taken against a parent.

These concepts are not in themselves new to family law, however there is now a greater focus on adherence to the laws, coupled with an intent that parents be supported [via the new Family Relationship Centres and Advice Line] to help them to work together for the benefit of their children.

The new laws do not [contrary to popular opinion] provide for children to spend equal time living with each of their parents. Parents, counsellors, legal advisors, other professionals and the Courts must consider whether spending equal time with both parents would be in the child's best interests. Matters such as appropriate housing, a parent's ability to care for a child physically, emotionally and financially, a child's views as to his or her living arrangements [where appropriate due to the child's age and maturity], and each parent's attitude towards the child's relationship with the other parent may impact on a Court's decision as to what living arrangements will be in the child's best interests. This may be partly evident from what time [if any] one parent has facilitated the child spending with the other since separation. It should also act as a disincentive to parents who, in the past, made demands of their ex [some may say "blackmail"] that had to be met before allowing the children to see the other parent.

The new laws do not change existing court orders. Any changes to existing Orders or arrangements for children, however, will be subject to the new laws. The new laws apply to any litigation that is awaiting a Court hearing, and to any new proceedings as of 1 July 2006.

Parents should always remember that what is appropriate for children in one case may be entirely inappropriate in another. Family law is very much dependent on the individual circumstances of the case. Particular facts or issues in one case may result in a completely different outcome to another case even where, on the face of it, the two cases may have similarities. Obtaining early assistance and advice from professionals such as counsellors and family lawyers is advisable to assist parties in understanding what the appropriate legal position may be and then moving on with discussions or negotiations with the other party.

Sexual Harassment

The recent decisions of *Brown v Richmond Golf Club & anor* [2006] NSW ADT 104 (7 April 2006) ("Brown") and *K v S and N Company* [2006] QADT 11 (5 April 2006) ("K") involved complainants bringing successful sexual harassment claims against their co-workers for comments they regarded as offensive and for unwelcome conduct of a sexual nature. Although the cases originated in different States, the anti-discrimination legislation defining 'sexual harassment' is very similar. In essence it provides that a person engages in sexual harassment if they engage in unwelcome conduct of a sexual nature in relation to the other person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

In *Brown* the complainant worked at a golf club and argued that the club's General Manager engaged in sexual harassment by calling her 'babe' and 'honey' at work, terms she found to be offensive. The NSW Administrative Decisions Tribunal considered the dictionary definition of these terms to determine whether their use could be construed as 'conduct of a sexual nature' under the relevant NSW Act. The NSW Tribunal noted the imprecise nature of the terms 'babe' and 'honey', and that language can have different meanings or connotations in different contexts. The Tribunal stressed that the interpretation of the use of language is to be determined by an analysis of the circumstances of the case.

The Tribunal went on to contextualise the General Manager's comments. The Tribunal found that the conservative environment within the club and the fact that the General Manager apologised to the complainant indicated "that language of this sort was not commonplace". Factors such as the inequality of the parties' relationship, their recent acquaintance, the invitation to dinner by the General Manager to the complainant, and the inherent over-familiarity of the terms used, were all considered and found to indicate that the terms used by the General Manager amounted to conduct of a sexual nature in circumstances in which it could be anticipated that the complainant would be offended or humiliated. This therefore amounted to sexual harassment.

In *K* the respondent ran a vacuum installation company from his home and employed the complainant as an administrative assistant. The complainant argued that her employer engaged in sexual harassment by saying to her "I'm falling in love with you and would like to make you and your children move in with me". The Qld Anti-Discrimination Tribunal held that these comments were implicitly inviting or requesting the complainant to enter into a sexual relationship with the respondent, and that they implicitly requested sexual favours. The Tribunal contextualised the respondent's language within the parties confined work environment and his knowledge of the complainant's relationship with another man. The comments were found to be unwelcome conduct of a sexual nature constituting sexual harassment.

These cases are indicative of a consistent nationwide approach to analysing and contextualising language that is the subject of sexual harassment claims. In both cases, the Tribunals were satisfied that the comments were unwelcome conduct of a sexual nature and that a reasonable person, having regard to the particular circumstances of the parties, would have anticipated that the complainants would have been humiliated, intimidated or offended by the conduct, even if this was not intended.

Another Diver Back Flip

In the recent case of *Swain v Waverly Municipal Council* [2005] HCA 4, the High Court of Australia upheld a NSW Supreme Court jury decision to award a swimmer \$3.75 million damages against a municipal council. The negligence case was brought by a swimmer rendered quadriplegic when he struck a sandbar after diving into waves.

In our December 2004 Update we reported that Mr Swain had successfully sued the NSW Waverley City Council after being rendered quadriplegic by hitting a sandbar after diving into waves. Mr Swain argued that the swimming flags induced him to swim and dive as he was entitled to assume that the Council would not put the flags where it was unsafe. It was clearly unsafe because of the sandbar. Mr Swain argued that by placing the flags where the sandbar was disguised a danger to him and therefore the Council had not taken reasonable care. Mr Swain argued the council could have put the flags elsewhere or warned people of the sandbar. The jury accepted these arguments.

The Council appealed and the NSW Court of Appeal set aside the jury's verdict. The Court of Appeal held that as a matter of law, there was no evidence upon which a reasonable jury could reasonably be satisfied that the conduct of the council exhibited a failure to exercise reasonable care for the safety of the swimmer. The majority found that there was no evidence that: (1) the flags indicated it was safe to dive; (2) the council could have placed the flags elsewhere and avoided the injury; and (3) upon which the jury could have concluded the council failed to take reasonable care because the dangers of diving into the surf were so obvious.

Mr Swain further appealed. The High Court set aside the NSW Court of Appeal's decision, and the result is that the jury's original award of damages to Mr Swain stands. The High Court made it clear that the appeal was **not** about the extent of the duty of councils to swimmers who use beaches in their areas nor about the negligence liability of councils for the placement of safety flags on patrolled beaches. The Court also emphasised that the case did not involve any novel point of law. The High Court merely applied long standing principles of the role of an Appellant Court in reviewing cases on appeal. The fundamental principle in appeal cases from jury verdicts is the respect afforded by the law to juries in their role as resolving factual differences between the parties. That respect is reflected in the principle that a jury verdict should not be interfered with if there is evidence on which a jury **could** reasonably be satisfied the defendant was negligent. Whether the Appellate Court agrees with that conclusion is irrelevant. Provided that the jury's conclusion was capable of being

Another Diver Back Flip Cont...

reached on the evidence, then that is sufficient. It need not be the only conclusion.

The High Court found that it was open to the jury on the evidence in this case to find the council had not taken reasonable care for the swimmer. The High Court therefore allowed the appeal.

This case, in particular the original jury decision, was a catalyst for nationwide legislative changes to tort law which reduced the rights of injured people to claim compensation. That this decision was portrayed as a reason for change was, in the writer's view, not only misinformed and opportunistic by the insurance industry, but also a direct attack on the role of juries in resolving factual matters on a case by case basis in a manner reflecting community standards. As Kirby J said; "In some ways, the jury's verdict in this case was a surprising one. However, as the dissenting judge said in the Court below, too much should not be read into it. No jury verdict (nor appellate decision reconsidering it) enjoys the authority of precedent that belongs to a reasoned decision of a judge upheld by the judicial process. Of necessity, a jury's verdict speaks enigmatically. It gives neither reasons nor explanations. It gives nothing more than the jury's ultimate decision on the mass of evidence in the particular case."

About Wilson's Lawyers

Wilson's Lawyers is a boutique law firm providing advice across a range of areas.

*We focus on providing
excellent and individual service.*

Our services include:

- Litigation
- Business & Commercial
- Family Law
- Education & Schools
- Not for Profit Organisations
- Professional Associations
- Workplace Relations
- Health
- Aged Care

Important Notice

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. If you no longer wish to receive this newsletter, contact us on 03 9672 4000 or email us on wilsons@wilsonslawyers.com.au to be removed from the mailing list.