Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates, 1 to 4 June 2004

Question: Bud 65

Topic: **Public Liability**

Hansard Page: **Written Question on Notice**

Senator Conroy asked:

1. Is Treasury familiar with the cases of Kaouna v. Orthosports Pty Ltd and Robbs v. Pathology Services Pty Ltd trading as Mayne Health Laverty Pathology?

2. If Treasury has copies of these judgements and/or pleadings in relation to these cases could they be provided to the Committee? Can Treasury advise when these cases were decided and in what court?

3. Is the Treasury aware of any other cases where personal injuries have been claimed and/or awarded under the TPA since June 2002? Could you provide details of these cases? What provisions of the TPA were relied upon?

Answer:

1. Yes

2. Robbs v Pathology Services Pty Ltd trading as Mayne Health Laverty Pathology was set down to be heard on 15 June 2004 in the Federal Magistrates Court. Treasury does not have a copy of the pleadings or judgement in this matter.

   Kaouna v Orthosports Pty Ltd was heard on 8 April 2004 in the District Court of New South Wales. The transcript is attached.

3. Treasury is aware of Lisa Johnson v Golden Circle Limited, which was heard on 17 December 2003. Section 75AD of the TPA was relied upon. A copy of the judgement is attached.

ATTORNEY GENERAL'S DEPARTMENT
AG
NEW SOUTH WALES

REPORTING SERVICES BRANCH

FAX

Date 23/6/04

Number of pages including cover sheet 5

TO: K. McNICHOL

DEPT OF TREASURY

Phone

Fax No. (02) 6263 - 3030

FROM:

DARREN LOVES

Phone (02) 9228 7747

Fax Phone (02) 92288420

CC:

REMARKS: ☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please Comment

INVOICE TO FOLLOW

COPYRIGHT RESERVED
NOTE: Copyright in this transcript is reserved to the Crown. The reproduction, except under authority from the Crown, of the contents of this transcript for any purpose other than the conduct of these proceedings is prohibited.

DCC1183 KJT-H

THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

JUDGE ASHFORD

WEDNESDAY 7 APRIL 2004

1880/03 - STEVEN KAOUNA v ORTHOSPORTS PTY LIMITED AND RALPH STANFORD

Mr J R Young for the Plaintiff
Mr S Kalfas for the First Defendant
Mr W Reynolds for the Second Defendant

YOUNG: Your Honour before I open I understand that there is an issue in relation to the hearing allocation fee. I have instructions that that's in the process of being paid now.

HER HONOUR: Being done now, yes.

YOUNG: And I understand he's been paid in cash so there should be no problems in relation to that matter.

HER HONOUR: Is the matter ready otherwise?

YOUNG: It is your Honour yes.

HER HONOUR: It's allocated two days?

YOUNG: It was allocated two days. My friend indicated to his Honour Judge McLachlan that their estimate of the matter was that it would take four days.

HER HONOUR: Whatever.

REYNOLDS: Could I raise with your Honour from the second defendant's position that it may or may not finish in two days but if it does extend beyond two days the second defendant would have to ask your Honour for an indulgence in respect of next week. Can we deal with that--

HER HONOUR: Next week the only days available are Thursday, Friday because there is a District Court conference on Tuesday and Wednesday.

REYNOLDS: There are two problems with Thursday and Friday of next week from the second defendant's point of view. One is Dr Sandford is going to a medical conference and secondly I will not be in Sydney on Thursday and Friday of next week and I have to tell your Honour candidly in respect of that. I would ask your Honour if we get to that point we can raise it and deal with it then.

HER HONOUR: There's going to be a problem about getting

adjourned dates. It's pretty tight at the moment and the whole idea is that it starts and continues until it's finished. Why was it not flagged that it might take longer than the two days allocated?

REYNOLDS: At the time it was listed for hearing?

HER HONOUR: Well any time.

REYNOLDS: I can't answer that your Honour but your Honour will see that it's a rather interesting case in that the plaintiff has brought proceedings only in the Trade Practices count in what might otherwise be a "medical negligence" case and the reason why it might extend beyond the two day period is because of the novelty of the approach and the need to take your Honour through the Trade Practices provisions.

HER HONOUR: Sure, that might have been known prior to today though I would have thought.

REYNOLDS: I don't suggest it wasn't your Honour but I'm simply telling your Honour my own perception as to the timing of the matter rather than somebody else's perception of the timing of the case. My timing of the case, having looked at the material is that it may go beyond two days. Other people have given other estimates.

HER HONOUR: I think we will deal with it when we come to it but at this stage I'm not terribly happy about taking it other than next week.

KALFAS: Well I should indicate too that I will not be in Sydney next week your Honour and as to the position of some of the witnesses--

HER HONOUR: Again did you ever indicate that it would take longer than two days.

KALFAS: I wasn't present at the - but those who were instructed I am not able to say. I am not able to say at the moment your Honour.

HER HONOUR: Well I said we will deal with it when it happens. What about you Mr Young?

YOUNG: Your Honour there may be difficulties arising next week but I'm just going to have to deal with them. I understood that the practice was in the District Court that matters, once they started, finished.

HER HONOUR: That's what I've just said.

YOUNG: Yes and if we run into difficulties we run into difficulties.

HER HONOUR: And that's the purpose of having a direction so you have got some idea of how long something is going

to take but in any event is it ready to proceed?

YOUNG: It is ready to proceed your Honour, yes.

REYNOLDS: Ready your Honour.

HER HONOUR: There's no prospect of shortening it in any way which might solve everybody's difficulties or not.

YOUNG: Well, certainly there have been discussions this morning. I don't know whether we can advance those discussions, whether it would be worth advancing those discussions for 15 minutes or so, it might--

HER HONOUR: It's a matter for you. I'm happy to start the matter now or do you want to have a discussion for 15 minutes? I don't have a problem with that either.

REYNOLDS: I don't want to hold any hope out but 15 minutes is probably not the greatest period of time that we might spend on this case so I'm happy to take 15 minutes.

HER HONOUR: What do you want to do, I'm in your hands. I'm happy to start--

REYNOLDS: I'm happy to take 15 minutes your Honour. Can we make it 15 minutes rather than letting it just extend your Honour. I understand it rests with us in that regard but I'm just telling my friend.

HER HONOUR: Well in 15 minutes you may have some idea whether it's worthwhile or not.

REYNOLDS: Correct.

HER HONOUR: All right, 11.15.

SHORT ADJOURNMENT

HER HONOUR: Yes Mr Young.

YOUNG: Your Honour we have resolved the matter. I think Mr Reynolds has the terms there your Honour.

HER HONOUR: Good, thank you.

REYNOLDS: I have the original terms of settlement your Honour, they are signed by the parties, the plaintiff is not under a legal disability to my understanding and I have taken the liberty of handing to your Honour some copies in the expectation your Honour's associate might have a stamp.

HER HONOUR: Yes I am sure we can arrange that for you.

REYNOLDS: Thank you your Honour.

DCC1183 KJT-H

HER HONOUR: All right by consent I will enter a verdict in judgment in accordance with the terms reduced to writing signed by the parties and put those with the papers. Any other orders required?

REYNOLDS: No your Honour.

KALFAS: No thank you.

YOUNG: No your Honour.

oOo

NOTE: Copyright in this transcript is reserved to the Crown. The reproduction, except under authority from the Crown, of the contents of this transcript for any purpose other than the conduct of these proceedings is prohibited.

DCC1069 JJW-E

THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

12 FEB 2004

TRANSCRIPT CHECKED

JUDGE BLACK

WEDNESDAY 17 DECEMBER 2003

5374/02 - LISA JOHNSON v GOLDEN CIRCLE LIMITED

JUDGMENT

HIS HONOUR: On 2 May last year the plaintiff, together with her husband, visited the Woolworths store at Plumpton in New South Wales. While they were in there they were offered a sample of orange juice by a person I find to have been the servant or agent of the defendants, in fact that was never disputed. The plaintiff's husband accepted the sample and drank it without incident.

The situation was that there was orange juice in one or more large plastic bottles, as one would normally find on the shelves in a store such as Woolworths, but, for the purpose of this activity by the defendants, the orange juice was poured out of the plastic bottle into what are convenient to describe as plastic cups. They were almost a little wine cup but they were made of plastic in that they had a short stem and a circular base and then the cup part and these things are of common experience in everyday life.

So the orange juice, as I say, had been poured from large plastic bottles, either one or two litre bottles, it matters not, there is no evidence about the size of it, into the plastic cup and then provided to whoever accepted. As I have said, the plaintiff's husband drank his sample without incident.

The plaintiff accepted her sample and drank it but unfortunately in her sample there was a piece of plastic, which became exhibit A in the case, which stuck in her throat. She had no reason to suspect that was there and of course by the reason of the nature of the orange juice she would have been quite unable to see it.

I find on the balance of probabilities that that piece of plastic, exhibit A, came from another plastic cup, the defendants' servant or agent having a number of these available to set out for the purpose of offering the samples. I do not think it is particularly necessary to say where it came from but I think it was probably part of the base as indeed I think the plaintiff's husband thought. So there we have a situation where the plaintiff is offered a sample of orange juice by the defendants' servant or agent which contained this foreign body, exhibit A, which I have said, unknown to her, she then drank and, as I will come to later on in this judgment, it caused her some injury and discomfort.

In my judgment it is beyond argument that that was caused by the negligence of the defendants' servant or agent. If you are going to issue something in a container provided by you to other people, then you have a duty to see that there is nothing that will cause any problems in the container and she should have seen that piece of plastic, exhibit A, should have removed it and, as I have said, there is no contributory negligence by the plaintiff and I do not think indeed any was suggested. So as far as negligence is concerned, the defendants in my judgment are

liable.

That is by no means an end to the matter because the case is also brought pursuant to the provisions of section 75AD of the **Trade Practices Act** and that section reads as follows:

> "If a corporation in trade or commerce supplies goods manufactured by it and they have a defect and because of the defect an individual suffers injuries, then the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries and the individual may recover that amount by action against the corporation."

Now there was much argument before me about the application of that section and it particularly centred around what the meaning of "manufactured" was. Section 75AA defines manufacture as including "grown, extracted, produced, processed and assembled". It was said before me that there was not any particularly relevant authority on this issue, not one directly in point at any rate, however amongst the material that counsel kindly provided to me was reference to a case called **Glendale Chemical Products Pty Ltd v The Australian Competition and Consumer Commission and Another** 1999 ATPR 41-672. I will return to that case in a moment.

Now, as can be seen from what I have said, what happened here was that the defendants had a plastic bottle, as I have found, of orange juice which they then poured out into the smaller plastic wine cups. I accept, in so far as it is necessary to deal with this, that the plastic cups themselves were not manufactured by the

defendants and indeed it was not suggested that they were, but it is important to clear that out of the way because manufactured, as will be seen from the definition I have read out, covers a number of situations.

Now looking at what happened on a practical basis, the defendants wished to convey a quantity of orange juice to the customer, including the plaintiff. It was obviously inappropriate to hand to the customer or the plaintiff the large plastic bottle of orange juice but it was necessary to put it in some other form of container to convey it to the plaintiff. In the course of doing that the orange juice became contaminated by reason of the addition to it of the piece of plastic from another cup. Now in one way it could be said that the goods were repackaged by the defendant for supply to the plaintiff. Packaging may not be the most appropriate word but they were certainly placed by the defendant in a fresh container in order that they could be conveyed/supplied to the plaintiff.

Then returning to the case to which I referred of **Glendale Chemical Products** there was a useful discussion there under the heading "Manufacture" starting at the page reference at the top of the page 42592 and going through to 42594. That case related to some caustic soda which in fact had been repackaged by the defendants in that case and there was a complaint that the instructions on the package were not sufficiently clear and did not give a clear warning. One of the issues in the case was that the supplier **Glendale Chemical Products** were not the

manufacturer. All they had done, it was said, was repackage the original goods. The Court of Appeal of the Federal Court found that the repackaging brought the activities of Glendale within the meaning of manufacturer in section 75AD and I find that strongly persuasive in relation to the activities here.

On behalf of the defendants it was strongly urged by Mr Grant that other sections may provide a more appropriate form of remedy to the plaintiff and therefore on his argument it was not necessary to do what he maintained was stretching the meaning of the words in section 75AD. In the light of the case of Glendale, to which I have referred, I am comfortable that I am not stretching the meaning of any word and that the activities of the defendant in relation to the supply of the orange juice constitute the manufacture within the meaning of the section.

Accordingly in my judgment the defendants are therefore in breach of section 75AD of the **Trade Practices Act**. In so far as it is necessary I make it clear that I do not find the piece of plastic was in the plastic bottle from which the juice was poured, I have already stated the source from which I believe it came. In so far also as it is necessary I infer that the defendants were in fact the manufacturers of the orange juice, although that is not strictly necessary for me so to find, but even if I am wrong about that their activities in relation to it brought them within the meaning of manufacture in section 75AD.

In the light of those findings as to liability, it is then necessary for me to turn to the issue of damages. The plaintiff was born on 19 January 1964 and is accordingly about 39 years of age now. The medical reports are brief and as far as those tendered on behalf of the plaintiff are concerned an appropriate way to deal with them is I will just read them out. On 12 September 2002 Dr Elaine Hoang reported that:

> "Miss Lisa Johnson presented to our surgery on 2 May 2002 complaining of an irritation in her throat after accidentally swallowing a foreign body while trying some beverage displayed at Woolworths Plumpton Market Town shopping centre on the same day. The foreign body was shown to be a white piece of plastic measuring two centimetres with a sharp edge that was apparently (and I do not agree with this) broken from the lid by a juice bottle. While swallowing the juice, Lisa felt an immediate choking sensation. She stated that she couldn't breathe and went blue in the face. Her husband had to thump her in the back and then she successfully coughed up the piece of plastic. On examination Lisa's throat was slightly red but she was in no respiratory distress and all her vital signs were normal. A neck x-ray was ordered and the result was normal. Lisa saw Dr Hoang the next day 3 May 2002 still complaining of vague pain in her throat. She was put on Keflex an antibiotic for five days. On 31 May 2002 she still complained of a sore throat and again Keflex was prescribed. On 15 July 2002 she stated having had a persistent sore throat since the accident and an occasional irritating cough. She was referred to Dr Hunter, an ENT specialist. The diagnosis from Dr Hunter was gastro-oesophageal reflux. She was put on Losec and a special diet regime to pursue. Dr Hunter also performed an allergy test and a sinus CT which showed significant sinusitis and a high IGE level related to house dust mite and animal epithelial and grass seed mix. She was put on Rhinocort AO and also suggested to go on a waiting list for some operations. She then consulted an allergist. I last saw her on 28 August 2002 when she stated that she only has a little pain in her throat. I therefore believe that the prognosis is very good and Lisa's capacity to return to her pre-accident employment is assured."

Now the other report tendered on behalf of the plaintiff was a report of Dr Gabriel dated 16 October 2002. He is a consultant Ear, Nose and Throat Surgeon. He saw the plaintiff on the date of his report. She gave the same history that I have already referred to as being given to Dr Hoang. Then under the heading "Diagnosis" Dr Gabriel says:

> "Irritation pharyngitis, irritation nasopharyngitis, irritation laryngopharyngitis for phobia."

Then he goes on to deal with a clinical examination which shows an inflammatory congestive condition. Then he deals with phobia but under "Phobia" (b) he says:

> "Mrs Johnson is getting a pricking sensation in her throat most of the time and especially so on eating food or drinking various juices."

He then goes on to speculate what might have happened if she had not coughed up the piece of plastic which is not very helpful and that is the end of his report.

That not surprisingly was the subject of strong submissions by counsel for the defendant, Mr Grant, saying that it is not appropriate for an ENT Surgeon to present diagnoses of phobia with which I quite agree. In my judgment the report of Dr Gabriel does not add anything of significance to that of Dr Hoang.

On behalf of the defendants, the subpoenaed material from Dr Hunter, to whom it will be remembered Dr Hoang referred the plaintiff, was tendered and became exhibit 1. With that material is the referral letter of 15 July and

then a letter in reply to Dr Hoang dated 19 July.

> "Many thanks for referring Lisa Johnson seen on 19 July 2002. She swallowed a piece of plastic in May and has had an irritated throat ever since."

Then he goes on to deal with other matters such as sinusitis and that sort of thing and in the fifth paragraph of the document he says this:

> "Her larynx per se was clear but she did have significant post cricoid oedema suggesting gastro oesophageal reflux and reflux is the likely cause of her throat symptoms."

Then he goes on to suggest some further treatment. There is a further letter of 25 July after some radiology has been carried out and it is also addressed to Dr Hoang and in the second paragraph dealing with the radiology he says that illustrates significant sinusitis and after giving some medical details he said:

> "This could well be contributing to her irritated throat and post cricoid oedema."

He then goes on to recommend treatment unconnected with the matters in this accident. The rest of the material is detailed pathology tests which I do not interpret as having anything to do with the accident before me. So to summarise what Dr Hunter is saying is that there were other problems that the plaintiff had in relation to her sinuses in particular which may be contributing to her irritated throat.

It seems clear to me that there is no doubt, having seen exhibit A, that she sustained a very painful

experience on the day this happened and that thereafter for some months she had appreciable discomfort in her throat and was understandably affected by the whole experience. But beyond that, in so far as it is suggested that she has suffered any significant what might be called psychological trauma, there is no proper evidence before me to support any such finding and I just need to make that clear.

Now in her own evidence she described how she had this very alarming experience and could not breathe for a while immediately after she swallowed the piece of plastic and it was thanks to the attention of her husband that she was able to cough it up. She had two days off work and then she found that she could manage work as a sales person as long as she took strepsils and did some gargling. Then she told us about seeing Dr Hunter and acknowledged that she had been diagnosed with some other problems and agreed that she had last seen Dr Hoang on 28 August.

She said that her throat was still irritating and hurting when she saw Dr Gabriel in October and said that as far as she was concerned, although she acknowledged she was not the most independent judge, she did not feel that she was the same person. She described having nightmares about choking and waking up gasping for breath but in the last few months she has been able to drink orange juice again. She was wary of juices, quite understandably in my view, for quite some while and she says she still gets distressed about the incident. Well I can understand

that, but hopefully once this case is concluded it can all be put behind her.

Her husband also gave evidence. He is what might be described as a very protective husband, very concerned about his wife and, as I say, it was thanks to his intervention and he having had some form of training in these matters that she was able to cough up the plastic which otherwise could have made matters much worse.

He expressed his concern about his wife and described the discomfort that she had for a number of months after the accident. In so far as he seeks to say that she is a different person and, to use the expression I have already used, that there has been some psychological trauma, he of course is not qualified to say that, there is no evidence to that effect and I do not make any such finding.

In my view there has been understandable trauma for a number of months, there has been physical discomfort and understandable apprehension which does not require medical evidence to establish about consuming coloured liquids. I am glad to say that on the plaintiff's evidence she seems to have got over that, she still may have concerns but I am confident they will diminish in the future.

Well those being the findings I make about damages, we then have to look at the relevant law and the first area to deal with is common law because this matter comes within the **Civil Liability Act**, a comparatively recent Act which has imposed limits and caps on damages that can be awarded in situations such as this. Section 16 of the **Civil Liability Act** 2002 sets out a table and, as is not

unusual in these table situations, you have what is called a most extreme case and then it is for the court to find the percentage of a most extreme case. As a matter of record, if the percentage is less than 15 percent of a most extreme case, then no damages can be awarded at common law by reason of that section. With the best will in the world I am unable to get anywhere near 15 percent of a most extreme case in respect of the discomfort and injuries that I have found that the plaintiff sustained.

So as far as the common law claim of negligence is concerned, the claim does not entitle the plaintiff to any damages, however, it will now become apparent why the matter was pursued under the **Trade Practices Act** because there is no such limitation in relation to actions under that Act and accordingly damages are at large.

It is necessary to record that the economic loss of two days off work was agreed at $176. The medical expenses for which, as I understand it, the plaintiff has to reimburse the Health Insurance Commission and accordingly is entitled to recover $1,196.10. As far as general damages are concerned for the discomfort and other matters to which I have referred in my judgment, I consider an appropriate sum is $10,000.

Accordingly, there will be a verdict and judgment for the plaintiff in the sum of $11,372.10.

HIS HONOUR: Any further matters.

HEALEY: Yes, your Honour. There is an offer of compromise which the plaintiff served on the defendant which we've succeeded in beating, if that's the correct word. The amount is - I'll hand it to your Honour, it is

in fact, and I can tell your Honour, it was in fact the amount awarded by the arbitrator, but that has no relevance. It's dated 21 October.

HIS HONOUR: Hand up the document and I'll have a look at it. Alright so what is the application you are making.

HEALEY: The application in relation to costs, your Honour, is that the defendant pay the plaintiff's costs on the usual basis from the date of the statement of claim up until that date 21 October.

HIS HONOUR: So party and party up to 21 October, yes.

HEALEY: And that from 21 October solicitor and client costs or indemnity costs but your Honour I think the other day said that the correct terminology was indemnity costs. I think you went through that with--

HIS HONOUR: No I don't think I did because I've had to examine that recently and in my view it's solicitor and client.

HEALEY: Sorry, the other way round.

HIS HONOUR: You must have been here when I was giving judgment in something else.

HEALEY: I was, in the million dollar case, yes, would your Honour just pardon me I may have another application in relation to the indemnity costs in fact going back and including the arbitration. I'll just find the date of that arbitration. Your Honour, this is put on the basis of your Honour's discretion rather than a particular rule. The issue in relation to offers of compromise are of course governed by the District Court Act but my submission is that it's appropriate for your Honour to order indemnity costs from and including the date of the arbitration as the plaintiff was successful at the arbitration in that amount plus costs.

HIS HONOUR: What is the basis, did you make any offer before the arbitration.

HEALEY: Yes, the offer that was made before arbitration which was January 2003 was an offer of compromise of $15,000 plus costs which--

HIS HONOUR: Well you didn't beat that.

HEALEY: --we haven't succeeded but the plaintiff at arbitration succeeded and it was the defendant's re-hearing which brought us here.

HIS HONOUR: Yes that may be but my own view is that - thank you, I've heard what you say.

HEALEY: That's all I say, your Honour, it's a matter of

discretion but I don't take it any further.

HIS HONOUR: Mr Campbell, what do you say.

CAMPBELL: Your Honour, there's nothing I can say about my friend's first proposal, however--

HIS HONOUR: No. You don't consent to the second.

CAMPBELL: No I don't, your Honour.

HIS HONOUR: I quite understand it.

CAMPBELL: In any event I will be seeking a stay of proceedings if your Honour is minded--

HIS HONOUR: A stay.

CAMPBELL: Yes, your Honour.

HIS HONOUR: Well you won't get a stay from me I'm afraid, you'll have to go up the road for the stay.

CAMPBELL: Certainly, your Honour.

HIS HONOUR: Now there has been an application for costs as a result of this matter. Despite Miss Healey's urging, I do not regard it as appropriate to depart from an order based on the offer of compromise dated 21 October 2003 and I order that the defendants are to pay the plaintiff's party and party costs up until 21 October 2003, thereafter they are to pay the plaintiff's costs on a solicitor and client basis. I decline to grant a stay. I order the return of all the exhibits.

oOo