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## RANKIN ELLISON CASE NOTES

### NO S151Z RECOVERY FOR NEGLIGENT EMPLOYER

*South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312*

This matter arose out of a helicopter crash that resulted in the death of three people. Legal action was commenced by an array of litigants, including the dependants of two of the three deceased persons. Further, a number of additional claims and cross-claims were made by the respective Defendants to the initial proceedings.

In this matter, the Court decided three separate appeals. However, the specific focus of this case note is the Court's determination in respect of a claim for recovery of workers compensation payments under Section 151Z of the *Workers Compensation Act 1987* (NSW) (the "Act").

#### Material Facts

In February 2006, the Parkes Shire Council (the "Council") conducted an aerial survey for noxious weeds over the region south east of Parkes. The Appellant, South West Helicopters Pty Ltd ("SWH"), was engaged by the Council to provide a helicopter and a pilot to facilitate the survey. The helicopter it provided was owned by Country Connection Airlines Pty Ltd ("Country Connection") and the pilot was an employee of SWH. Two Council employees, Ian Stephenson and Malcolm Buerckner, accompanied the pilot to perform the survey. Whilst conducting the survey, the helicopter struck an Essential Energy owned powerline and crashed. The pilot and both passengers died.

Pursuant to Section 25 of the Act, the Council paid compensation to the widows of its two deceased employees, Stephenson and Buerckner. The dependants of Stephenson commenced proceedings against both SWH and the Council claiming damages for nervous shock and pursuant to the Compensation to Relatives Act 1897 (NSW). Essential Energy was later joined to these proceedings as a cross-defendant. A number of further claims and cross-claims were made by the respective Defendants and cross-defendants. At first instance, the Court apportioned liability for the death of the Council's employees between SWH (70%), the Council (20%), and Essential Energy (10%).

The Council also commenced proceedings against SWH pursuant to Section 151Z of the Act for the recovery of compensation paid to the widows of the deceased employees. At first instance, the Council's claim succeeded. SWH appealed the trial Judge's decision on the basis that Section 151Z did not confer a right of indemnity where a worker or its dependants had successfully brought proceedings for damages against the employer.

#### The Appeal

Section 151Z allows for an employer to make a recovery against a third party where that party is liable to pay damages to the worker or, as in this case, the

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worker's dependants. SWH submitted that the Council was not entitled to recoup compensation monies from it since it did not satisfy the threshold requirements established in either Section 151Z(1)(d) and/or 151Z(2)(e).

SWH contended that Section 151Z(1)(d) did not entitle the Council to recover compensation payments since it was negligent for the relevant accident. By reference to a comparable provision of the now repealed *Workers Compensation Act 1926* (NSW), Justice Basten relied on the long standing High Court interpretation that an employer is precluded from recovering compensation payments from a negligent third party in the circumstance that it too was negligent for the relevant injury. Upon determining that both SWH and the Council were negligent for the death of the Council's employees, the Court ruled that the Council was not entitled to recover compensation from SWH pursuant to Section 151Z(1)(d).

Section 151Z(2)(e) of the Act provides that if a worker is entitled to but does not initiate proceedings for damages against his/her employer, or alternatively does not accept satisfaction of the judgment against his/her employer, the employer can obtain indemnity from a negligent third party. However, indemnity is limited to the amount of compensation paid in excess of the employer's liability. In this case, Mrs Stephenson was entitled to and did commence proceedings against the Council, in which she obtained satisfaction of the judgment. Accordingly, SWH's appeal against the trial Judge's decision was upheld.

#### Practical Implications of the Decision

The Court of Appeal adopted a very literal interpretation of Section 151Z of the Act. Employers or their insurer are only entitled to recover workers

compensation payments from a negligent third party in circumstances where the worker;

- (i) Does not commence action against the employer for damages, or
- (ii) Does not accept satisfaction of a judgment for damages against the employer.

It is noted that the Court of Appeal's decision does not inhibit the operation of Section 151A of the Act, which prescribes the compensation to be deducted from an award of damages against an employer. Furthermore Section 151Z(1)(a) provides that a worker may take proceedings both against the employer and a third party, but is not entitled to retain both damages and compensation.

It is noted that the Council currently has a pending application for special leave to appeal this decision to the High Court of Australia.

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