Employment Law Bulletin

2017 . Vol 23 No 8

Information contained in this newsletter is current as at September 2017

LexisNexis® Butterworths

Robotics, artificial intelligence and work: hope for the best but prepare for the worst

James Davies *LEWIS SILKIN LLP*

Barely a week goes by without a new prediction about the impending impact of robotics and artificial intelligence (AI) on today's jobs. There is, however, a striking lack of consensus among commentators about what the future holds.[1]

These are not new phenomena. Robots[2] date back many centuries.[3] AI[4] is much newer, although is often said to have been born more than 60 years ago at the famous Dartmouth Workshop.[5]

The rapid development of technology is one of the three great drivers of workplace change in the early part of the 21st century. Crystal ball gazing is notoriously unreliable, but we can be reasonably confident that this pace of change will only increase. The other two main drivers — demographic change (particularly the rapidly ageing population) and globalisation — are also likely to continue and even accelerate. While the advent of the Trump presidency in the US and Brexit in the UK have suggested a backlash against globalisation in some quarters, these are likely to be mere hiccups in the long-term trend towards a more interconnected world.

Optimists versus pessimists

Commentators on the impact of robotics and AI on work largely break down into two schools — those who predict major disruption to jobs, and on the other hand, those who predict that the doomsayers are wrong and the impact on jobs will be positive.

Optimists' arguments

The optimists argue that the world of work is merely undergoing a further phase in a process of constant evolution. They point to doom-laden predictions in other eras which proved false. Even as long ago as ancient Greece, Aristotle was arguing that if machines could become sufficiently advanced there would be no further need for human labour.[6]

During the First Industrial Revolution,[7] agricultural jobs vanished but were replaced by manufacturing jobs. When manufacturing declined in "richer" countries in the second half of the 20th century, service industry jobs replaced them. Robotics and AI are heralded by some as being part of the Fourth Industrial Revolution,[8] although the Third[9] and Fourth Revolutions are arguably part of the same period of change in technology.

Optimists recognise that many current jobs which employ significant numbers will reduce significantly, but contend that they will be replaced by other jobs. They argue that technological advances over the centuries have always resulted in a net increase in jobs, resulting from the increased productivity that accompanies such innovations.[10] Some optimists go further and argue that, at least in the UK, the economy is in desperate need of more robots, pointing to the high levels of employment coupled with poor levels of productivity to support this.[11]

New jobs could come from increased demand for those that already exist or the creation of entirely new occupations. We can predict that new jobs will be created in areas such as virtual reality, while others are no doubt beyond our wildest dreams. During my childhood in the 1960s and 1970s, the internet would have seemed as fanciful to me as Spock being beamed up by Scotty and transported to another planet in *Star Trek*. Job titles such as social media manager, app developer or search engine optimisation consultant would have been utterly incomprehensible.

Optimists also say that improved productivity from use of technology can result in increased leisure time. Such projections go back many decades, with John Maynard Keynes having famously predicted in 1930 that we would only be working 15 hours per week by the time his grandchildren were part of the labour force.[12] I am old enough to remember predictions that the technological advances of the 1980s would lead to increased leisure time for all. In practice, for many, technology has instead resulted in being "on call" 24/7, never leaving work behind and experiencing increased stress.

Calls for reduced working hours nonetheless continue to be made. Google's co-founder Larry Page, for example, has advocated a four-day working week.[13]

Impact on jobs

Optimists and pessimists generally agree that the skills sought in the future will be different from those valued today. Jobs predicted to be most at risk are those that require routine manual effort or the analysis of data. Frey and Osborne[14] produced a report in 2013 estimating the probability of computerisation of 702 occupations. These ranged from jobs such as telemarketers and library technicians, with a 99% chance of computerisation, to dentists, social workers and primary school teachers with less than a 0.5% chance of being replaced.

Other commentators go further, such as *The Guardian* journalist Dan Tynan who recently set out how actors, teachers, lawyers and even journalists are at threat from AI.[15]

Caring jobs are among the jobs least at risk, according to Frey and Osborne. It is easy to see how the demographic changes resulting in an ageing population will lead to increased demand for nursing and other caring roles. Deloitte's 2015 report[16] found that between 1992 and 2014 there had been a profound shift towards the provision of care and education services[17] — a trend that might also be partially explained by changes in family life.[18]

There is, however, no consensus that caring roles will continue to increase. One recent prediction went so far as to suggest that robotic nurses could be the future of healthcare[19] — a development that is already happening in Japan.[20]

It has been suggested that Frey and Osborne may have overstated the impact of technology on jobs.[21] Later reports have highlighted that relatively few jobs may disappear entirely, although almost none will be wholly unaffected. The activities which go to make up a job may become replaceable, even if the entirety of the work done by the human in that job might not be susceptible to automation.[22]

Arguments of pessimists

The pessimists argue that this time things will be different. They point to the unprecedented speed of change, allowing less scope for the evolution of new jobs to replace those which are disappearing. Among those warning of the need to prepare for a world of less human work are Tesla founder Elon Musk[23] and British scientist Professor Stephen Hawking.[24]

Online shopping has hit the number of people working in stores. This has to some extent been mitigated by an increase in driving jobs as the roads become congested with delivery vans, yet businesses are already experimenting with drones and driverless vehicles. Goldman Sachs recently predicted that job losses in driving jobs across the US will amount to 300,000 per year.[25] What will replace them?

Considering how very few jobs are likely to remain unaffected by technological changes, it seems unduly complacent to dismiss concerns that mass employment is at grave risk on the basis that "it didn't happen last time". The optimists may yet be proved right, but it would appear negligent not to plan on the basis things might turn out differently this time around.

Will it be different this time?

The global economic trends accompanying today's technological advances give reason to fear that their consequences for jobs will not be positive.

A consistent feature of past "revolutions" has been increased personal wealth resulting from productivity gains, with fresh jobs developing to exploit these new-found spending powers. The study by Deloitte[26] mentioned above highlighted the growth of bartenders and hairdressers from the 1950s to exploit the disposable income created by greater efficiencies and improved productivity.

In contrast, the current changes may be arriving at a time when economic growth is not being matched by increased prosperity[27]. Thomas Piketty's seminal work[28] has warned of the dangers arising from a low-growth economy in which returns from capital outstrip those from human labour. He is one of many highlighting increased inequality in societies across the globe and the threat this poses.[29]

For the optimists, technological revolution is sorely needed to stimulate growth. For the pessimists, technological developments are not actually having that effect, and without growth, new jobs will not replace those being made redundant by machines.

What should be done?

It is impossible to predict accurately how the nature of work will change in the years ahead. But policy-makers should look at steps that might need to be taken if the less positive future vision is correct and we are required to adapt to a world with fewer "jobs". There is an urgent imperative to educate and train people to meet the challenges of the future.

Fewer human jobs will revive interest in social safety nets and job-creation programmes. Governments, politicians, lawyers, academics and businesspeople have already begun floating more radical ideas to respond to the potentially dramatic reduction in demand for human labour including, for example, a universal income[30] and even human job quotas.[31]

Taxation

These developments suggest that a root and branch reform of tax policy is needed. Taxing human jobs through employer social security contributions (13.8%

of the wage bill in the UK) is arguably becoming increasingly unsustainable. As humans compete with computers for work, our current tax system means that humans do so with one hand effectively tied behind their backs.

Employer national insurance contributions do, however, generate over £70 billion per year in the UK — around 10% of the government's entire tax receipts. The money will have to come from somewhere. There is already discussion of a wealth tax which could not only replace lost revenue from work-related taxes but also address the increasing inequalities mentioned above.[32] Others have proposed a tax on robots.[33]

A failure to prepare for these changes could result in social unrest.[34] Increased inequality and stagnating wages were arguably at the root of the Brexit vote in the UK and Donald Trump's election as US president. In both cases, globalisation was apparently rejected by a large proportion of the population. One does not need to be clairvoyant to foresee further "Luddite"[35] backlashes from those left behind by the technological progress.

Globalisation

The impact of robotics and AI is unlikely to be geographically neutral. Another predictable change is the transfer of "work" — even if undertaken by robots rather than humans — from locations with low labour costs to those with strong education systems. Clearly, the economies of cheap labour become less relevant where work is roboticised. Countries such as Singapore, South Korea, Hong Kong and Taiwan are likely beneficiaries of this shift while the losers may be nations in the developing world, resulting in increased geopolitical tensions.

Frey and Osborne have recently built upon their predictions about the effect of technology on jobs in the US by looking at the impact globally.[36] They suggest that while 47% of jobs are vulnerable in the US, the numbers rise to 69% in India and 77% in China.

The role of law

A recent contribution to the debate was a report published in April this year by the International Bar Association Global Employment Institute (IBA),[37] which sets out a thorough account of the future challenges of this Fourth Industrial Revolution. The authors, led by renowned German employment lawyer Gerlind Wisskirchen, remind us that while experts disagree about how long we will wait for these changes, they all agree on their inevitability.

The report emphasises the challenges for employers and lawmakers in adapting to the increased flexibility of working arrangements these technological developments herald, whether in relation to working hours, location of work or remuneration systems. The authors also highlight the new forms of employment that are springing up, resulting in an erosion of the dividing line between employment and self-employment[38] — a topical issue with the growth of digitally-enabled independent work, often referred to as the "gig economy".[39]

In the UK, the government commissioned Matthew Taylor to review how employment law was meeting the needs of modern working practices. His report[40] highlighted the need for the law to keep up with workplace changes and address the needs of so-called gig economy workers. Employment courts around the world have been grappling with the employment status of Deliveroo riders, Uber drivers[41] and the like, invariably applying legal rules that were designed for the workers of a bygone era. Minimum wage and working time laws established for more traditional types of work do not translate easily to individuals performing their work via online platforms, where the distinction between working and non-working time is more blurred.

A further area to which the IBA report devotes attention, which will pose increasing issues for legislators and businesses, is the growing importance of "big data" and its increased role in the workplace.

Employment law as we know it today developed in the UK in the 1960s with individual rights such as unfair dismissal protection and redundancy pay. These reforms coincided with the decline of manufacturing and a reduction in 9-to-5, full-time jobs.[42] Nowadays, these rights based on protecting job security are coming under scrutiny as they become less appropriate for more flexible and varied working relationships enabled by technology.

The future is more likely to focus more on the "human rights" of workers, such as privacy, family life and the right not to be discriminated against. As the law develops in this direction, building on more recent legislation, the distinction between employment and self-employment will become less significant and necessary.

Regardless of whether sufficient new jobs are created to replace the redundant ones, the authors of the IBA report add to the call for employers, educators, legislators and policy-makers to prepare people for significant changes ahead. They persuasively conclude as follows:

> It would be desirable for the future laws, which will hopefully be secured at the international level by uniform standards, to be geared to the technological developments and the increased need for flexibility.

Concluding comments

For employment lawyers like myself, it seems there will be work for some time. The Frey and Osborne study mentioned above,[43] predicts that there is a 3% chance of a solicitor being replaced by a robot or computer compared to a 95% chance of an accountant being replaced.

As we do not seem close to any consensus as to what the future holds, it is also safe to say there will be plenty of work for futurists and commentators on the impact of robotics and AI on work. In the words of Benjamin Disraeli in 1833, "I am prepared for the worst but hope for the best".

James Davies
Co-founder
Future of Work Hub
www.futureofworkhub.info
Divisional Managing Partner
Lewis Silkin LLP, London
james.davies@lewissilkin.com
www.lewissilkin.com

Footnotes

1. For examples of the ranges of predictions, see A Smith and J Anderson, *AI, Robotics, and the Future of Jobs*, 6 August 2014, www.pewinternet.org/2014/08/06/future-of-jobs.
2. "A machine capable of carrying out a complex series of actions automatically, especially one programmable by a computer": Oxford English Dictionary, *robot,* 21 September 2016, https://en.oxforddictionaries.com/definition/robot.
3. See F Latxague "A Brief History of Robots" *Paris Innovation Review* 18 July 2013.
4. "The theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages": Oxford English Dictionary, *artificial intelligence,* 18 September 2016, https://en.oxforddictionaries.com/definition/artificial_intelligence.
5. 1956 Dartmouth Summer Research Project on Artificial Intelligence at which many of the leading thinkers of the time participated.
6. R Campa "Technological growth and unemployment: a global scenario analysis" (2014) 24(1) *Journal of Evolution and Technology* 86.
7. 1760–1840, the development of mechanical manufacturing processes.
8. K Schwab "The Fourth Industrial Revolution" *Foreign Affairs* 12 December 2015. The Second Industrial Revolution is said to have taken place in the later 19th century and early 20th century with the advent of electricity, railways and mass production.
9. The Third Industrial Revolution is underway and takes account of the digitisation of manufacturing (see "A third industrial revolution" *The Economist,* 21 April 2012, www.economist.com/node/21552901).
10. For example, I Stewart, D De and A Cole *Technology and People: The Great Job-Creating Machine* (August 2015) www2.deloitte.com/uk/en/pages/finance/articles/technology-and-people.html.
11. B Dellot, *Too Many Robots? The UK Doesn't Have Enough*, 25 July 2017, www.thersa.org/discover/publications-and-articles/rsa-blogs/2017/07/too-many-robots-the-uk-doesnt-have-enough; A Corlett *Robot wars: automation and the labour market* Resolution Foundation briefing (July 2016) www.resolutionfoundation.org/app/uploads/2016/07/Robot-wars.pdf.
12. JM Keynes "Economic Possibilities for Our Grandchildren" in *Essays in Persuasion* Macmillan, London 1931.
13. Interview with Vinod Khosla, *Fireside chat with Google co-founders, Larry Page and Sergey Brin*, 3 July 2014, www.khoslaventures.com/fireside-chat-with-google-co-founders-larry-page-and-sergey-brin.
14. CB Frey and MA Osborne *The Future of Employment: How Susceptible Are Jobs to Computerisation* Working Paper (September 2013) www.oxfordmartin.ox.ac.uk/downloads/academic/future-of-employment.pdf.
15. D Tynan "Actors, teachers, therapists — think your job is safe from artificial intelligence? Think again" *The Guardian* 9 February 2017.
16. Above n 10.
17. For example, 909% increase in nursing auxiliaries and assistants; 580% increase in teaching and educational support assistants; 183% increase in welfare, housing, youth and community workers; 168% increase in care workers and home carers.
18. See Organisation for Economic Co-operation and Development *Doing Better for Families* (2011) www.oecd.org/els/soc/doingbetterforfamilies.htm.
19. Research of Dr De Momi: M Banks, *Robotic nurses could be the future of healthcare,* 13 February 2017.
20. "Japan's nursing facilities using humanoid robots, IT to improve lives, safety of elderly" *The Japan Times* 18 May 2017.
21. In R Berriman and J Hawksworth "Will Robots Steal Our Jobs? The Potential Impact of Automation on the UK and other major economies", UK Economic Outlook, March 2017, the predictions of Frey and Osborne are compared with those of Arntz, Gregory and Zierahn (OECD, 2016) as well as the latter predictions re-modelled by PricewaterhouseCoopers. The AGZ and PwC predictions show less disruption than Frey and Osborne.
22. J Manyika, M Chui, M Miremadi, J Bughin, K George, P Willmott and M Dewhurst *A Future that Works: Automation, Employment, and Productivity* (January 2017). See also research of Oxford Institute of Humanity: C Edmond, *This is when a robot is going to take your job, according to Oxford University,* 26 July 2017.

23. Interview with MIT students: S Gibbs "Elon Musk: artificial intelligence is our biggest existential threat" *The Guardian* 27 October 2017 www.bbc.com/news/technology-30290540.
24. "Full artificial intelligence could spell the end of the human race" — interview with the BBC: R Cellan-Jones *Stephen Hawking warns artificial intelligence could end mankind*, 2 December 2014.
25. Goldman Sachs Economics Research (as reported by CNBC: A Balakrishnan, *Self-driving cars could cost America's professional drivers up to 25,000 jobs a month, Goldman Sachs says*, 22 May 2017).
26. Above n 10.
27. See Organisation for Economic Co-operation and Development data for the UK referred to in V Romei "How wages fell in the UK while the economy grew" *The Financial Times* 2 March 2017; and for the USA, D Rotman "How Technology is Destroying Jobs" *MIT Technology Review* 12 June 2013.
28. Thomas Piketty *Capital in the Twenty-First Century* Belknap Press, Massachusetts 2013.
29. See also E Brynjolfsson and A McAfee *Race Against the Machine* Digital Frontier Press, 2011.
30. Finland is experimenting with 2000 young unemployed being given a basic income to study its effect on behaviours. Elon Musk is an advocate.
31. G Wisskirchen, BT Biacabe, U Bormann, A Muntz, G Niehaus, GJ Soler and B von Brauchitsch *Artificial Intelligence and Robotics and Their Impact on the Workplace*, (April 2017).
32. For example, the Shadow Chancellor John McDonnell before the last UK general election.
33. For example, the Socialist presidential candidate Benoît Hamon in recent French elections.
34. Above n 1, at 53.
35. The Luddites were bands of English workers in the 19th century who destroyed machinery, especially in cotton and woollen mills, which they believed was threatening their jobs.
36. CB Frey and M Osborne *Technology at Work v2.0: The Future Is Not What It Used To Be* (January 2016).
37. Above n 31.
38. In the UK, the number of self-employed increased from 3.8 million in 2008 to 4.6 million in 2015 and the number of part-time self-employed increased by 88% between 2001 and 2015, Office of National Statistics, July 2016.
39. "A way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer": Cambridge English Dictionary, *gig economy*, 25 May 2016, http://dictionary.cambridge.org/dictionary/english/gig-economy.
40. M Taylor *Good Work: the Taylor Review of Modern Working Practices*, (July 2017).
41. Cases brought in the following jurisdictions among others: UK, California, Massachusetts, New York, Alaska, Brazil, France, Canada, South Africa, and Switzerland.
42. In the UK, the proportion of the workforce employed in manufacturing declined from over 35% in 1961 to under 10% in 2011, Office for National Statistics.
43. Above n 14.

Liability as an accessory to breaches of the Fair Work Act

Ian Latham *DENMAN CHAMBERS*

Overview of accessorial liability provisions

Section 550 of the Fair Work Act 2009 (Cth) provides for liability to be fixed to accessories to a contravention of a civil penalty provision. It states that:

> (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
> (2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:
> (a) has aided, abetted, counselled or procured the contravention; or
> (b) has induced the contravention, whether by threats or promises or otherwise; or
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
> (d) has conspired with others to effect the contravention.

Provisions in relation to accessorial liability are designed to ensure that persons involved in contravening conduct, often directors or very senior employees of corporations, are held liable for their conduct insofar as it resulted in a contravention of the relevant legislation. Further, they also ensure that liability is able to be imposed on persons involved in the contravening conduct in circumstances where a company has, for example, become insolvent or been deregistered, and no penalty would otherwise be recoverable.[1]

Fair Work Ombudsman: statement about accessorial liability

The Fair Work Ombudsman has stated that:

> We have been adventurously testing the limits of accessorial liability provisions to ensure someone is held responsible for breaches of the Fair Work Act.[2]

In the same address, the Ombudsman stated that:

> And just like employers, we expect advisers to take their responsibilities seriously.
> If you know that your employer or client is running two sets of books or keeping false records or not paying the employees their full entitlements, know that the new higher penalties may soon extend to them … and to you.[3]

Elements to be proved for accessorial liability

Accessorial liability requires a pleading of actual knowledge on the part of each and every element of the offence or contravening conduct … and an election to engage in the relevant conduct.[4] As Flick J held in the recent Federal Court case of *Australian Building and Construction Commissioner v Parker*:

> It is also to be accepted that a pleading that alleges that a person is an accessory to the contravention of a "*civil penalty*" provision by another person should separately allege:
> - knowledge on the part of the accessory of each and every element of the contravention; and
> - the identity of the other person who engaged in the contravening conduct.
>
> Where the contravention is one involving an "*intent*" or "*purpose*", it is also necessary to separately allege that the accessory:
> - had knowledge of that "*intent*" or "*purpose*".[5]

How involved in a contravention of a civil remedy provision must the person be to be liable as accessory?

In order that a person may be "involved in" a contravention of a civil remedy provision, it is necessary to demonstrate that the person in question was a knowing participant in the contravention.[6] Mere involvement is not sufficient.

Regardless of the precise words of the accessorial provision, such liability depends upon the accessory associating himself or herself with the contravening conduct — the accessory should be linked in purpose with the perpetrators.[7]

Knowledge

The proper construction of para (c) of s 550 requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention.[8] Declarations made against the primary contravener do not prove a contravention against the accessory.[9] That may be very important if the accessory is an individual and has exercised a privilege against penalty.

Knowledge is required to be actual. Constructive knowledge will not suffice.[10] Unless a person is wilfully

blind, they cannot be found to be an accessory. As White J held in the Federal Court decision in *Fair Work Ombudsman v South Jin Pty Ltd*:

> In several cases … this Court has referred with approval to a passage from the advice of Lord Sumner in *Zamora (No 2)* [1921] 1 AC 891 at 812–3 in which his Lordship noted two senses in which a person may be said not to know something because they do not wish to know it:
>
> > A thing may be troublesome to learn, and knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a person is said not to know because he does not want to know, where the substance of a thing is borne in upon his mind with a conviction the full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests …
>
> In the former circumstance described by Lord Sumner, the person will not have actual knowledge of the matter. In the latter circumstance, the person does have that knowledge but deliberately refrains from asking questions or seeking further information in order to maintain a state of apparent ignorance. That is not a circumstance of constructive or imputed knowledge, but of actual knowledge reduced to minimum by the person's wilful conduct … [11]

Proving knowledge of underpayment

The vast majority of accessory cases are brought in relation to underpayments of an industrial instrument. Proving knowledge of underpayment in such circumstances is not without its difficulties. As White J held in *Fair Work Ombudsman v Devine Marine Group Pty Ltd*:[12] "Without knowledge that an Award is applicable, it is difficult to see how a finding could be made that the accessory had intentionally participated in the contravention".

As his Honour went on to hold,[13] the applicant is required to establish actual knowledge by the accessory that:

- the person performed work for the employer;
- they did so as employees;
- their work was governed by an industrial award (whether or not that person knew of the name of the award);
- the award stipulated minimum rates of pay; and
- the amounts that the employer paid to the person were less than those minimum rates.

In *Fair Work Ombudsman v Grouped Property Services Pty Ltd,* Katzmann J doubted that proposition when expressing an obiter view that where:

> … the contravention is a failure to pay award rates, an accessory must know what rates are being paid but need not know that the rates which were paid were below the rates prescribed by the applicable award.[14]

Flick J referred to both views in *Australian Building and Construction Commissioner v Parker* before holding that:

> Either approach, with respect, exposes a difficulty. Where the contravention in question is a contravention of s 50 [of the Fair Work Act], that section does not require the person contravening a term of an enterprise agreement to have any knowledge of the existence of an enterprise agreement and does not require knowledge of the term being contravened or the fact that the act of contravention is in fact contravening conduct. If the "*elements*" of s 50 do not encompass those matters, it is — with respect — difficult to see why an accessory need have any greater knowledge.[15]

Knowledge of a system or specific facts

The need to prove knowledge of specific facts in circumstances where there was knowledge of a system of underpayments was dealt with by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd*. In that case her Honour held that:

> … where an alleged accessory is aware of a system producing certain outcomes, and those outcomes constitute contraventions of the Act, it is unnecessary to show that the alleged accessory knew the details of each particular instance of those outcomes in order to show the requisite knowledge. … But much of the Ombudsman's submissions in this respect rose no higher than evidence that [the accessory] was told that [the employer] had failed to pay certain entitlements to certain employees on certain occasions, and thereafter failed to ensure that [the employer] paid the same entitlements to different employees on different occasions. Evidence of this nature is inadequate: the mere fact that [the accessory] was put on notice that a particular kind of contravention had occurred did not make him strictly liable for all similar contraventions occurring in the future. Nor does it give rise to an inference that he had actual knowledge of those later contraventions or of a "system of non-compliance".[16]

Knowledge of a corporation

Difficult questions also arise when determining the knowledge of a corporation. No one individual may have knowledge of all of the elements of the contravention. Can the court then aggregate the knowledge of more than one individual to prove that the corporation as a whole had that knowledge? In *Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)*, Manousaridis FCJ explained that:

> There are cases that have considered whether the knowledge of different agents of a body corporate of different facts may be attributed to the corporation so that the company may be taken to have the combined knowledge of the agents. The cases are discussed in *Ford, Austin & Ramsay's Principles of Corporations Law*. The authors there consider the circumstances in which the knowledge of different agents may be combined and attributed to the body corporate of which they are agents.[17]

In an unpublished paper, Ingmar Taylor and Larissa Andelman concluded that: "The issue of whether

and in what circumstances knowledge of individual employees can be aggregated to demonstrate knowledge of a corporation is an unsettled area of law."[18]

Accessory to one's own action

There is also some doubt about the ultimate reach of accessorial liability. One contextual limitation may be found in the intersection between accessorial liability and primary liability for a contravention. It is theoretically possible for a body corporate to be deemed to have contravened the Fair Work Act through the actions of its officers and employers by virtue of s 793. Could the officer then be found to be an accessory to the deemed contravention of the company, in effect becoming an accessory to his or her own contravention?

At least in a criminal context, the courts have consistently made clear the need to fix either direct or indirect liability for offences.[19] As Dixon J held in *Mallan v Lee*:

> It would be an inversion of the conceptions on which the degrees of offending are founded to make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts.[20]

Federal Circuit Court Judge Vasta dealt with the point in *Australian Building and Construction Commissioner v Hanna (No 2)*.[21] In that case, his Honour held that:

> There is no doubt that it is unusual to consider that a person is an accessory to their own actions. But that is because there is usually no need to consider such a state of affairs because, in such a situation, the person is liable as a principal offender and that is sufficient.
> There is nothing in the wording of s.550 that would preclude a principal contravener also being involved in a contravention. That much was made clear in *Hamilton* (supra). In fact, it is on this basis that many "prosecutions" launched by the Fair Work Ombudsman ("FWO") come before the Courts.[22]

His Honour went on to reach a conclusion that:

> I cannot find any authority where the reasoning of the FWO has been challenged. It may be that this point has never been argued and has just been accepted by Respondents to actions taken by the FWO. But it seems to me, that the acceptance of such a conclusion by parties in such proceedings is because the conclusion is both logical and correct.[23]

It is an unconventional approach to statutory construction to use the behaviour of parties in other cases to determine the meaning of a statutory provision. His Honour's decision is unlikely to be the final word on the matter.

Conclusion

The accessory provisions provide a very powerful forensic tool for the Fair Work Ombudsman. Nevertheless, that power is not without limit, even though its precise limitations still await authoritative determination.

Ian Latham
Barrister
Denman Chambers
ianlatham@denmanchambers.com.au
www.denmanchambers.com.au

Footnotes

1. *Devonshire v Magellan Powertronics Pty Ltd* (2013) 275 FLR 273; (2013) 231 IR 198; [2013] FMCA 207; BC201309377 at [84].
2. Natalie James "An adviser's responsibility: the Fair Work Ombudsman's approach to accessorial liability" (Speech delivered at the Australian Human Resources Institute (AHRI) Employee Relations/Industrial Relations Network NSW forum, 27 July 2016) at 4, www.fairwork.gov.au/about-us/news-and-media-releases/speeches.
3. Above, at 12.
4. *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) v John Holland Pty Ltd* (2008) 180 IR 350; [2009] FCA 274; BC200901915 at [44]; see also *Fair Work Ombudsman v Centennial Financial Services Pty Ltd* (2010) 245 FLR 242; [2010] FMCA 863; BC201008512 at [151].
5. *Australian Building and Construction Commissioner v Parker* [2017] FCA 564; BC201703869 at [36].
6. *Dowling v Kirk* [2007] FMCA 2106; BC200711640 at [24].
7. *Construction, Forestry, Mining and Energy Union (CFMEU) v Clarke* (2007) 164 IR 299; [2007] FCAFC 87; BC200704421 at [26].
8. Above n 6, at [28].
9. *Fair Work Ombudsman v Safecorp Security Group Pty Ltd* [2017] FCCA 348; BC201701131 at [7].
10. *Potter v Fair Work Ombudsman* [2014] FCA 187; BC201401233 at [82].
11. *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456; BC201512721 at [232]–[233].
12. *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [176], [178], [179] and [187].
13. Above, at [191] although note contrary obiter comments of Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd* (2016) 152 ALD 209; [2016] FCA 1034; BC201607267 at [1019].
14. Above n 13, at [1019].
15. Above n 5, at [128].

16. Above n 13, at [957]–[958].
17. *Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCCA 3322; BC201611124 at [176].
18. I Taylor and L Andelman "Accessorial Liability under the Fair Work Act" (paper presented at 2014 Australian Labour Law Association Conference, Sydney, 14 November 2014) at para 113.
19. *Hamilton v Whitehead* (1988) 166 CLR 121 at 126–27.
20. *Mallan v Lee* (1949) 80 CLR 198 at 216.
21. *Australian Building and Construction Commissioner v Hanna (No 2)* [2017] FCCA 1904.
22. Above, at [19]–[20].
23. Above n 21, at [28].

Make sure your "expert" witness is an expert

Chris Molnar *TRESSCOX LAWYERS*

Parties to litigious employment matters may require an expert witness for a variety of evidential reasons — a financial expert to establish pecuniary loss, a medical expert to establish incapacity and the extent of pain and suffering, or an engineer to identify reasonable measures to eliminate safety hazards. However, expert evidence, or more formally, opinion evidence, must qualify and be accepted by the court as admissible evidence.

This article examines a recent ruling of the Magistrates Court of Tasmania on 24 August 2017 in the matter of *Sears v Copper Mines of Tasmania Pty Ltd*[1] (*Sears*), which determined that the expert evidence presented by the Tasmanian Director of Public Prosecutions (DPP) by one witness, a critical witness, was inadmissible (Ruling). The article also comments on implications for litigators.

Background to Sears

Frederick Sears was the Tasmanian Chief Inspector of Mines. Mr Sears brought a prosecution against Copper Mines of Tasmania Pty Ltd (CMT), the operator of the Mount Lyell Mine in Queenstown, under the Work Health and Safety Act 2012 (Tas) (WHS Act) in relation to a fatality, arising from a mud rush event, which took place at the mine on 17 January 2014. It was alleged that CMT had failed in its health and safety duties under the WHS Act in respect of the incident. The DPP assumed the conduct of the prosecution.

The hearing commenced on Monday, 14 August 2017. On the seventh day of the hearing, on 22 August 2017, the DPP presented John Webber, a mining engineer, as one of its witnesses and sought to qualify him as an expert witness under s 79(1) of the Evidence Act 2001 (Tas).[2] Section 79(1) provides an exception to the rule that opinion evidence is not admissible:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

CMT argued that the exception under s 79(1) should not apply to Mr Webber's evidence, thus making inadmissible at least a large part of Mr Webber's evidence. If the exception did apply, CMT argued that the court should in any event exercise its discretion to exclude Mr Webber's evidence under s 137 of the Evidence Act as it was unfairly prejudicial: "In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

Debate over whether Mr Webber would qualify as an expert witness continued on the eighth day, 23 August, and on the ninth day, 24 August, the court made the Ruling against the DPP. On the 10th day of trial, 28 August, the DPP applied to have the complaint dismissed, effectively withdrawing the charges against CMT in relation to the fatality.

Arguments of CMT

CMT's key arguments to disqualify Mr Webber as an expert witness were:

- some of the areas on which he expressed an opinion were outside his expertise.[3] Mr Webber was a general mining engineer but he also expressed an opinion about correlation between rainfall and mud rush events, meteorology, hydrology and sublevel caving, all of which arguably fell outside his expertise as a general mining engineer. The report by Mr Webber, which the DPP sought to rely on, was not in the form of a proof of evidence and did not set out the assumptions on which the opinion evidence was based;
- lack of independence as an expert witness.[4] Mr Webber had been involved at an early stage in Mr Sear's investigation — he had allegedly made presentations to the DPP, authored parts of the prosecution's recommendation and held the view that it was appropriate for CMT to be prosecuted;[5] and
- he had acted as a consultant and given recommendations in relation to an earlier mud rush incident at the Mount Lyell mine in 2009. As such, he was a witness on factual issues as well as a purported expert witness.[6]

Arguments of the DPP

In response, the DPP argued:

- Mr Webber had extensive experience in mining and was entitled to refer to and rely on information from other sources;[7]
- he had experience in dealing with data from hydrologists and meteorologists;[8]
- it is the evidence, not the form of the proof that is important;[9]

- as a consultant Mr Webber was independent, with no interest in a prosecution, and had not reached any particular conclusion about prosecution;[10] and
- it was possible to "determine whose opinion and on what basis the conclusions were drawn".[11]

Legal background

CMT referred to a number of cases in support of its arguments.

On the requirement that the opinion evidence clearly set out its reasoning and its assumptions, some of the key decisions CMT relied on were *Makita (Australia) Pty Ltd v Sprowles, HG v R, Jackson v Lithgow City Council, R v Tang, Dasreef Pty Ltd v Hawchar*, and *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* where the Full Court of the Federal Court stated:[12]

> The further requirement that an opinion be based on specialised knowledge would normally be satisfied by the person who expresses the opinion demonstrating the reasoning process by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialised knowledge.[13]

On the issue of partiality some of the key decisions referred to by CMT were *McMartin v Newcastle Wallsend Coal Co Pty Ltd, Australian Securities and Investments Commission (ASIC) v Rich* and *Phosphate Co-operative Co of Australia Pty Ltd v Shears (No 3)* where Brooking J stated on the issue of independence:[14]

> There will often be a danger that the client, who may well, in addition, be engaging experts who are to act in a partisan capacity, will come to regard the independent expert as another member of a team which is being paid very large sums of money to achieve a certain result. The client will often, as here, have at its disposal other advisers who are in a position, by reason of qualifications and experience, to influence, either directly, or indirectly through representations made by the client, the judgment or actions of the independent expert. The greatest circumspection is required in relation to this matter of making representations to an independent expert, not by way of correcting some error of fact, but by way of influencing his judgment on the established facts.[15]

The ruling

In accepting CMT's arguments, and excluding Mr Webber's evidence under ss 79(1) and 137 of the Evidence Act, the court ruled, as a summary:[16]

- the proof was in the form of investigator's notes, not a proof of evidence;
- the witness was not aware of his duties as an independent witness;
- the witness failed to (i) identify facts upon which his opinion was based, (ii) to clearly differentiate between facts and expert opinion, or (iii) explain the process of thinking that led to the conclusion;
- the witness relied on facts sourced from his own prior dealings with CMT and other sources — it was not possible to identify the basis on which he has expressed his ultimate opinion, nor were some of the assumed facts disclosed until cross-examination;
- the witness was not independent: (i) he was part of the prosecutor's team; and (ii) he advised CMT following the 2009 mud rush event;
- some parts of the witness' evidence was outside his expertise.

Implications

Whether acting for a plaintiff or defendant, lawyers need to carefully assess the requirement for an expert well before hearing and then, if needed, follow some key guidelines:

1) identify very clearly the particular issue for which expert evidence is required;
2) choose an expert who has the specialised knowledge or experience to address that issue, and this may involve a lawyer making extensive enquiries;
3) on engagement, the expert should be provided with the Expert Witness Code of Conduct applicable to the relevant jurisdiction. This Code, the receipt of which should be acknowledged in the expert's report, usefully sets out the expert's duty to the court and the form of the report;
4) the letter instructing the expert should clearly set out each of the issues which the expert should address, together with relevant documentation. That letter and other written communications with the expert is likely to be discoverable;
5) the lawyer should review whether the report complies with the Code; and
6) the lawyer should understand that the expert is independent and their duty is to impartially assist the Court above any duty to a party. This does not stop a party from engaging an expert to provide advice on litigation strategy but that expert should not be used to give expert evidence.

Concluding remarks

Much litigation in the employment field will typically need at some point to rely on expert evidence. Most litigation on safety issues, such as in the *Sears* case, will require expert evidence because risk management of hazards requires specialised knowledge or experience.

While the substantive law will usually be front and centre in successful litigation outcomes, procedural law,

including the admissibility of expert evidence, may also be an important factor in a successful outcome, and the *Sears* case is a reminder to litigators of the significant challenges in this area.

Chris Molnar
Partner
TressCox Lawyers
Chris_Molnar@tresscox.com.au
www.tresscox.com.au

Footnotes

1. Transcript of Proceedings *Sears v Copper Mines of Tasmania Pty Ltd* (Magistrates Court of Tasmania, Magistrate Webster, 24 August 2017) at 720–21.
2. The Evidence Act 2001 (Tas) is based on the Model Uniform Evidence legislation adopted by the Commonwealth, New South Wales, Victoria, Tasmania, Australian Capital Territory and the Northern Territory.
3. Above n 1, at 686.
4. Above n 1, at 704.
5. Above.
6. Above n 1, at 559.
7. Above n 1, at 710–11.
8. Above n 1, at 713.
9. Above n 1, at 714.
10. Above n 1, at 714–15.
11. Above n 1, at 718.
12. *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; (2001) 25 NSWCCR 218; [2001] NSWCA 305; BC200105538; *HG v R* (1999) 197 CLR 414; (1999) 160 ALR 554; [1999] HCA 2; BC9900188; *Jackson v Lithgow City Council* [2010] NSWCA 136; BC201003932; *R v Tang* (2006) 65 NSWLR 681; (2006) 161 A Crim R 377; [2006] NSWCCA 167; BC200603593; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; (2011) 277 ALR 611; [2011] HCA 21; BC201104304; *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* (2000) 120 FCR 146; [2000] FCA 1463; BC200007242.
13. *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd*, above, at [23].
14. *McMartin v Newcastle Wallsend Coal Co Pty Ltd* [2003] NSWIRComm 292; (2005) 190 FLR 242; (2005) 53 ACSR 110; [2005] NSWSC 149; BC200501057; *Phosphate Co-operative Co of Australia Pty Ltd v Shears (No 3)* [1989] VR 665; (1988) 14 ACLR 323; BC8800613.
15. *Phosphate Co-operative Co of Australia Pty Ltd v Shears (No 3)* [1989] VR 665 at 681; (1988) 14 ACLR 323 at 337; BC8800613 at 33.
16. Above n 1, at 721.

For editorial enquiries and unsolicited article proposals please contact David Pearce at david.pearce@lexisnexis.com.au
Cite this issue as (2017) 23(8) *ELB*
SUBSCRIPTION INCLUDES: 10 issues per volume plus binder www.lexisnexis.com.au
SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067
CUSTOMER RELATIONS: 1800 772 772
GENERAL ENQUIRIES: (02) 9422 2222
ISSN 1440-4532 Print Post Approved PP 243459/00130