

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

## Responsibility For Criminal Conduct In Licenced Premises

In our last edition of GDNews we discussed two NSW Court of Appeal judgements that dealt with the liability of licensees and providers of security services for the conduct of patrons. This month the topic has raised its head once more with another Court of Appeal judgement.

The duty of care owed by proprietors of licensed premises is a significant one. The Liquor Act in New South Wales provides that a licensee shall not permit intoxication or any indecent, violent or quarrelsome conduct on his or her licensed premises.

A licensee's duty of care owed to patrons in relation to the risk of violent behaviour of patrons is well recognised and it is firmly tied to the control of the premises that a licensee exercises.

In *Spedding - v - Nobles* the New South Wales Court of Appeal noted that -

*"First, it is clear from the authorities which have upheld the existence of a duty of care owed by a licensee to patrons that that conclusion depends not on the existence of a "special relationship" recognised by law, but on the element of control. Although the Liquor Act 1982 does not impose a statutory duty of care on licensees, enforceable by patrons, by conferring a power of control and an obligation to exercise that power, the statute provides the basis for a finding with respect to control, which in turn attracts the common law duty of care and informs its content. The relevant statutory provisions may be found in s 2A of the Liquor Act which identifies as a primary object of the statute "the minimisation of harm associated with the misuse and abuse of alcohol (such as harm arising from violence and other anti-social behaviour)", in combination with s 103(1) which empowers a licensee or an employee of a licensee to "turn out, or cause to be turned out of the licensed premises", any person who is intoxicated. The section authorises the use of "such reasonable degree of force as may be necessary" to turn a person out: s 103(3A). In addition, s 125 of the Liquor Act provides that a licensee shall not permit intoxication, or any indecent, violent or quarrelsome conduct on his or her licensed premises"*

The Courts have held that a hotel manager or licensee may be liable for injury to a patron caused by the deliberate and unlawful act of another patron. The duty to exercise reasonable care for the safety of patrons has been seen to depend upon proof that the hotel manager licensee knew or ought to have known facts requiring intervention to protect patrons and in those circumstances they have failed to take reasonable steps to safeguard their patrons.

The recent decision of the Court of Appeal in *Adeels Palace Pty Limited - v - Moubarak* and *Adeels Palace Pty Limited - v - Bou Nhaem* is sure to raise more concerns for licensees.

Adeels Palace is located at Punchbowl and its entrance to the premises describes it as a "Reception Restaurant". It held a New Year's Eve function at the premises attended by members of the public on payment of an admission price. In the early hours of New Years Day a dispute on the dance floor escalated and fighting between a Mr Moubarak and Mr Abas took place. Mr Abas left the premises and returned with a gun. Mr Moubarak and Mr Nhaem were shot. Nhaem and

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Moubarak claimed damages and sued the owners and licensees of Adeels Palace. Nhaem succeeded in a claim in the District Court and received compensation of \$170,000.00 and Moubarak succeeded in his claim and his damages were assessed at \$1,026,682.98.

The licensees of Adeels Palace appealed.

Justice Giles noted that the duty of care in hotel and club cases can be owed in relation to violent behaviour, whether from intoxication of a patron or from other causes. Intoxication may be a common cause, and may be what brings occasion for intervention to protect other patrons, but it is not essential. The Liquor Act strictures have extended and extend to indecent, violent and quarrelsome conduct.

It is important to note that the licensee's duty arises not only out of intoxication but a dangerous condition of its patrons. In those circumstances the duty of care owed by Adeels Palace extended to a duty to take reasonable care to guard against injury from intoxicated unruly or violent (including criminal) behaviour of other patrons.

The Court of Appeal noted that Adele's Palace was not a small licensed café and for what it's worth, the New Year's Eve function was attended by family groups and persons of a broad range of ages. It was noted the function was attended by many who readily joined in the dispute on the dance floor who were aggressive.

The premises were filled to capacity and very likely beyond capacity. Alcoholic liquor was readily available over the long period of the function and there was evidence some patrons were drunk. The function should have been seen beforehand as having a potential for drunken and violent behaviour. There had been previous incidents at the establishment, including violence in the streets outside the premises. There had also been incidents involving gun use on previous occasions, although no person had been shot. However, a car had been shot up outside Adeels Palace on a previous occasion.

There were no security guards in the stairway which was the only entrance to the premises to prevent the assailant returning to the premises after he had left. Effectively there was no access control at the point of entry from ground level and this was seen as the failing which resulted in the breach of duty of care.

Justice Campbell also provided further insight into the significant duties for hotel proprietors. Justice Campbell, in his judgement, concluded:-

*"In a hotel the proprietor can influence the way patrons conduct themselves by measures like aiming to attract a particular market segment (through matters such as décor, facilities, entertainment offered and pricing policy), having security staff identifiable as such, whose presence in itself can have a deterrent effect, having visible security cameras that act as a reminder that the acts of patrons will not go unobserved and unrecorded, having trained and competent bar staff and security personnel instructed to act in a way calculated to prevent trouble arising or diffuse trouble if it seems to be brewing, and having procedures and security staff that result in troublemakers being removed. However, hotels are usually the sort of premises that an adult can enter if minded to do so, and multiple entrances to the premises are quite common. Adeels Palace had even greater capacity for control than most hotel proprietors have because at the premises, public entry was permitted only through one set of doors at street level which led up a set of stairs and only on payment of admission."*

The history of the establishment and the inherent probabilities of the type of activity being carried on at Adeels Palace made it reasonably foreseeable that patrons would include the potentially troublesome and violent patrons which were at Adeels Palace on the night.

It is not only intoxication that a hotelier needs to worry about. A duty of care is owed to patrons to protect patrons from indecent, violent or quarrelsome conduct of patrons as the Liquor Act provides a licensee shall not permit intoxication, or any indecent, violent or quarrelsome conduct on his or her licensed premises. The question will always be "What was foreseeable?".

A patron causing problems at licenced premises when allowed to remain on the premises will present a risk for a licensee as repeated similar behaviour that causes damage is likely to result in a claim against the licensee and remember the licensee's duty extends to violent behaviour, whether from intoxication of a patron or from other causes such as indecent, violent and quarrelsome conduct. Those who provide security services to licenced premises will also need to tread warily as no doubt licensees will seek to pass its responsibilities on to the security provider and impose contractual liability on the security provider to indemnify the licensee from claims arising out of a failure to act where a patron is intoxicated, or indecent, or

violent or quarrelsome whilst in or about the licensed premises.

The duty owed owners and operators of licenced premises is a high one indeed and owners and operators can be held liable for damages caused by the criminal conduct of patrons.

## **Date Of Accident Does Not Trigger the Start of the Limitation Period**

In our last edition of GD New we discussed a claim that was statute barred as it was commenced more than three years after the date of the accident and the defendant was able to demonstrate actual prejudice. As that accident occurred before 2002 prejudice was the primary issue that the Court had to consider. On 6 December 2002, however, the *Civil Liability Amendment (Personal Responsibility) Act 2002* commenced which amended the provisions of the *Limitation Act 1969*. Now, if proceedings are commenced more than three years after the date of the accident, the question is whether the cause of action was "discoverable" on the day that it happened - it is this date of discoverability that is the critical date in determining whether or not a claim is statute barred.

The New South Wales Court of Appeal has recently had the opportunity to consider the amendments to the *Limitation Act 1969* for the first time in the decision of *Shakrya Baker-Morrison by her tutor Alicia Baker v State of New South Wales*.

On 26 May 2004 Shakra Baker-Morrison, then two years old, sustained injury at the Gosford Police Station when the fingers of her right hand got caught in the automatic sliding doors. The Statement of Claim was filed on 21 June 2007, three years and 26 days after the date on which she was injured. The defendant filed an application in the District Court seeking an order that the Statement of Claim be struck out on the basis that it was statute barred. The trial judge found that the claim was statute barred and, as in his opinion he did not have power to extend the time for filing the Statement of Claim, the Statement of Claim was struck out.

Baker-Morrison appealed. The question that the Court of Appeal had to consider was whether or not the cause of action was "discoverable" by Mrs Baker, the claimant's mother and tutor, in the 26 days period following the accident; that is, was Mrs Baker aware in the 26 days following the accident that the injury to her daughter was "caused by the fault of the defendant" and that the injury was "sufficiently serious to justify the bringing of an action on the cause of action."

The Court of Appeal found that it was not and allowed the appeal.

Justice Basten who delivered the leading judgment stated:

*"The exercise undertaken by the State in the present case fell far short of demonstrating that the plaintiff's mother knew, at the relevant time, of any steps which could and should reasonably have been taken by the occupier of the premises to render the sliding door safe. The primary particular of negligence on the statement of claim was a failure to provide "a protective guard or covering along the area of operation of the ... sliding glass doors". Until the plaintiff's mother was aware (or ought to have been aware) of the availability and reasonable practicability of installation of such a device, she could not be said to be aware that her daughter's injury was caused by a failure on the part of the State to take reasonable care for her safety. These are the terms in which the relevant test under s 50D(1)(b) should be formulated."*

Further, in Justice Basten's opinion, it may be necessary to seek medical and legal advice before an action is discoverable.

Baker-Morrison is therefore entitled to pursue her claim.

As a consequence of this decision, the reality is that a cause of action may not be discoverable until well after the accident date and after a potential claimant has had the opportunity to seek legal and medical advice. If there is difficulty identifying the proposed defendant, for example where there is a complex company structure, then this will also be a relevant issue. It is no longer as simple for a prospective defendant as waiting three years and then breathing a sigh of relief that a claim has not been filed.

Insurers need to be well aware that long tail claims such as personal injury claims in NSW have an even longer tail than they thought. The date of accident is not the trigger for the limitation period it is the date of discoverability.

## Can Those Who Are Involved In Supplying Recreational Activities Escape Liability For Negligence?

In New South Wales the Civil Liability Act provides that a person (the defendant) does not owe a duty of care to another (the plaintiff) who engages in a recreational activity to take care in respect to a risk of the activity if the risk was the subject of a risk warning. For the purposes of the Act a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. However, a defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.

Further a term of a contract for the supply of recreation services may exclude, restrict or modify liability that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill. Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any Court to refuse to enforce the term, to declare the term void or to vary the term. A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

In addition a person (the defendant) is not liable in negligence for harm suffered by another person (the plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff. This applies whether or not the plaintiff was aware of the risk. A dangerous recreational activity is a recreational activity that involves a significant risk of physical harm.

There is much debate on what amounts to a recreational activity and what amounts to a dangerous recreational activity. If the recreational activity is not a dangerous recreational activity a defendant will only escape liability for negligence where it can demonstrate there was an adequate risk warning and/ or a contractual waiver term in the contract which governed the supply of the recreational activity.

So what is a recreational activity?

The New South Wales Court of Appeal in *Belna Pty Limited t/as Fernwood Fitness Centre, Parramatta - v - Kylie Irwin* recently considered a claim by Ms Irwin who alleged that she was injured when the fitness centre failed to exercise reasonable skill and care while she was exercising at the gym. She was injured whilst lunging and one of her legs gave way and she fell to the floor.

The claim originally proceeded to hearing and Ms Irwin succeeded in the claim. The trial judge determined that the exercise she was undertaking was not a recreational activity principally as she undertook the activity to lose weight and get fit.

Fernwood appealed. On appeal there was some good news for Fernwood as the Court of Appeal held that working out at a gym was a recreational activity, however the Court of Appeal also held that the purported risk warning of Fernwood did not amount to a risk warning and Fernwood were still liable in damages.

The definition in the Civil Liability Act of a recreational activity includes:

- any sport (whether or not the sport is an organised activity); and
- any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- any pursuit or activity engaged in, at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or activity for enjoyment, relaxation or leisure.

The Court of Appeal noted that Ms Irwin was engaged in her exercises in a place where people ordinarily engage in sport or in a pursuit or activity for enjoyment, relaxation or leisure. The activity was a recreational activity.

It was noted that Fernwood provided Irwin with a questionnaire which she had signed which contained a statement -  
*"I understand that Fernwood Fitness Centre is not able to provide me with advice in regards to my medical fitness and that this information is used as a guideline to the limitations of my inability to exercise. I will not hold this club liable in any way for the injuries that may occur while I am on the premises."*

The Court of Appeal noted that this was not an adequate risk warning in terms of the Civil Liability Act and therefore the defence of the claim on that basis failed.

Fernwood also relied on a clause in its agreement with Ms Irwin which noted -

*"It is my express interest in signing this agreement to release Fernwood Fitness Centre, its directors, franchises, officers, owners, heirs and assigns from any and all claims for professional or general liability which may arise as a result of my participation, whether fault may be attributed to myself or its employees. I understand that I am totally responsible for my own personal belongings whilst at the Centre. I also understand that each member or guest shall be liable for any property damage and/or personal injury while at the Centre."*

Justice Ipp of the Court of Appeal noted that a release ordinarily is not an exclusion of liability for breaches of duty that may occur in the future. It was also noted the phrase "*professional and general liability*" may or may not encompass negligence or breach of contract. The Court noted the purpose and meaning of the clause was rather obscure. In fact the Court of Appeal, as did the original trial judge, determined that the clause was so vague as to be meaningless and could not reasonably be construed as exempting Fernwood from liability as Fernwood argued.

So it's back to the drawing board for Fernwood to draft a risk warning and release clause. There is no doubt that exercising in a gym amounts to a recreational activity and had Fernwood provided an adequate risk warning the defence under the Civil Liability Act would have been available. Care needs to be taken when drafting risk warnings and persons involved in the supply of recreational activities need to ensure that a risk warning is in plain language and warns a participant about the risk of the activity. If that puts someone off the activity so be it however once warned the supplier does not owe a duty of care to the participant.

The *Civil Liability Act* is designed to limit the duty of care owed in recreational activities and there is no duty owed in a dangerous recreational activity where a risk warning is provided. Persons involved in recreational activities should take advantage of the protection available and limit claims that can be brought against them and ultimately reduce their insurance costs by providing adequate risk warnings and considering contractual limitations of their liability. But be warned the Courts will look very closely at risk warnings and waiver clauses. Ambiguities will be fatal to a risk warning and it will be essential that the actual risk of harm has been the subject of the warning otherwise the Courts may find that no risk warning was provided.

## **High Court Judgement Will Impact on Recovery Rights Of Worker's Compensation Insurers**

Workers compensation insurers in NSW need to ready themselves for an increase in litigation following the recent High Court Judgement in *Goodman Fielder Limited - v - Hickson*.

In NSW when an injured worker receives worker's compensation payments from the employer and then sues a person other than the employer for damages for injuries sustained in an accident, the worker's compensation insurer is entitled to recover the compensation payments made. However, the Law Reform (Miscellaneous Provisions) Act 1965 provides that the sum that may be recovered is to be reduced to the same extent that the damages recoverable by the claimant against the other party were reduced for contributory negligence.

So what happens where there is a settlement of a claim against a third party and no finding by the Court on the extent of contributory negligence? Does the employer recover the totality of compensation payments made or will there be an adjustment for contributory negligence notwithstanding that a Court has not determined the extent of contributory negligence or can there be another trial this time between the worker and the employer to determine the contributory negligence.

Until the High Court's decision in *Goodman Fielder Limited - v - Hickson* the workers compensation insurer was entitled to recover the totality of compensation payments made where there was a settlement of a damages claim against another party but where there was a judgement the amount recovered was reduced proportionately for the finding of contributory negligence.

The Court of Appeal of NSW had concluded in its majority decision in *Goodman Fielder Limited - v - Hickson* in May 2008 that the totality of payments must be refunded where there is a settlement of the claim against the third party.

The majority of the Court of Appeal noted:

*"A settlement is ordinarily a compromise between the parties according to their assessments of the likely outcome of the worker's claim. In these assessments, perceived factual and legal difficulties for one or the other of the parties, or for both, play a part although with different perceptions. The perceived difficulties will commonly go beyond any question of contributory negligence, to core questions of liability and the extent of damages recoverable; a compromise will not often*

*turn on contributory negligence, but will involve other considerations also, and there will be a compromise because the parties come to divergent global assessments of all considerations."*

The Court of Appeal noted, a purported agreement between an injured person and a third party on the extent of contributory negligence would be viewed with some suspicion as it would be in the interests of the claimant to have that contributory negligence as high as possible and the findings of contributory negligence would not affect the third party. Consequently an agreement between a claimant and a third party should not be binding on an employer.

The Court of Appeal determined that the Law Reform (Miscellaneous Provisions) Act has the effect that the totality of payments must be refunded where there is a settlement of the claim against the third party. Justice Hislop in his judgment noted :

*"An obligation to repay the entire amount would not prevent settlement of a claim against a third party with agreement from the employer as to the deduction for contributory negligence from the payback figure. In fact tri-partite agreements between the injured worker, the third party and the employer are common place and appropriate. If the employer was not a party to a settlement between the worker and the third party the worker would need to take into account in settling the claim the position in relation to the repayment, namely that the full amount was repayable." and*

*"Leads to certainty and the elimination of further proceedings in that the apportionment for contributory negligence is either determined by the Court in the damages proceedings or settled by tri-partite agreement."*

The High Court however has determined that this is the wrong approach and the recovery must be reduced for contributory negligence even where there is a settlement of a third party claim.

Justice Bell in the High Court noted:

*"The majority (of the Court of Appeal) considered that the Law Reform Act as originally enacted was against reduction of the liability to repay compensation in cases in which the tortfeasor action was settled. ....Giles JA considered that a "trial within a trial", in the repayment action, as to the damages recoverable by the worker and the extent of the reduction produced an unsatisfactory situation. He pointed out that the worker's concern in the repayment action will have changed, in the tortfeasor action it would have been to deny or minimise contributory negligence, in the repayment action it will be to admit and maximise it. The language of the provision, in his Honour's view, was against permitting the question to be litigated in the repayment action since the court would be determining what the court hearing the tortfeasor action would have considered just and equitable by way of reduction. This would not allow of a reduction to the same extent as "the damages recoverable by the claimant are reduced.*

*Hodgson JA, in dissent, considered the question to be not to what extent the damages "recovered" by the claimant are reduced but to what extent are the damages "recoverable by the claimant reduced". His Honour considered that the court hearing the repayment action may come to its own view as to what a court hearing the case between the claimant and the tortfeasor would reasonably have thought to be a just and equitable reduction "*

The High Court agreed with Hodgson JA of the NSW Court of Appeal. Justice Bell of the High Court in its unanimous judgement concluded that the recovery must be reduced for contributory negligence where there is a settlement of the third party claim and concluded that:

*"The circumstance that in the repayment action the court may be required to determine the damages recoverable by Mr Hickson and the extent of reduction .. is a reflection of the fact that the parties in the repayment action are not the same as in the tortfeasor action. The fact that this may involve a "trial within a trial" is an incident of the working out of the respective liabilities under the statutory scheme and the common law. As Giles JA noted, under s 151Z(2) the court is called upon to determine the damages which the worker could have recovered from the employer in order to arrive at a reduction in the worker's damages. The desirability of finality does not justify reading s 10(2) ( of the Law Reform (Miscellaneous Provisions) Act 1965 ) as confined to those cases in which the tortfeasor action proceeds to judgment with a curial determination of the extent of the worker's contributory negligence ..."*

The High Court also determined it was necessary to comment on the method by which the recovery is to be reduced for contributory negligence. The reduction in liability to repay compensation is a proportionate reduction in the damages recoverable on account of the worker's contributory negligence rather than a reduction based on the actual amount by which the damages were reduced. That is if there is 25% contributory negligence the compensation refundable is reduced by 25%.

So at the end of the day a plaintiff may bring a claim against a tortfeasor, settle the claim and then dispute the amount payable to the workers compensation insurer raising contributory negligence as a defence and no doubt call evidence to maximise the finding of contributory negligence to reduce the recovery for the workers compensation insurer.

So what can a workers compensation insurer do to avoid a dispute down the track and litigation against a worker seeking to reduce the amount they must payback? The answer is simple - the workers compensation insurer must commence recovery proceedings against the negligent party and ensure the recovery proceedings are heard at the same time as the workers claim against the negligent party. The negligent party will not settle one claim without settling the other. If workers compensation insurers do not commence recovery proceedings they will be exposed to a possible abuse by the worker who settles a case against a negligent party without compromise and then disputes a recovery claim on the basis there was contributory negligence.

So it is likely workers compensation insurers will now issue recovery proceedings rather than sit back and collect the recovery when a worker sues a negligent party as workers can and will settle their claims against third parties and challenge the workers compensation insurer's recovery rights arguing for a reduction for contributory negligence.

## **No Right To Medical Examinations In 151Z Proceedings**

In NSW if a person is injured on their way to, from, or at work a person is prima facie entitled to payments of compensation pursuant to the *Workers Compensation Act 1987*. Sometimes, however, the accident will have occurred because of the fault of someone other than the employer. A person may be injured in a car accident, or on a building site due to the negligence of the head contractor, or they might slip and fall - these are only some of the examples. So what happens if payments have been made by a workers compensation insurer to, for or on behalf of an injured person?

Section 151Z of the *Worker's Compensation Act 1987* gives the workers compensation insurer the right to recover the payments made from the negligent third party. Sometimes this is straightforward - the injured person will sue the negligent third party themselves and the workers compensation insurer will simply be paid back out of the injured person's damages. Sometimes, though, for one reason or another, an injured person will decide not to sue the negligent third party (for example they decide their worker's compensation rights are more valuable) and it will be up to the workers compensation insurer to try and recover the payments themselves.

So how is this done? The workers compensation insurer is entitled to be indemnified by the negligent third party for payments made to, for, or on behalf of the worker up to a notional assessment of damages under either the *Civil Liability Act 2002* or the *Motor Accidents Compensation Act 1999* (if the accident is a motor accident). If the matter cannot resolve out of Court then the workers compensation insurer has six years from the date of each payment in which to commence Court proceedings.

So how will the parties or the Court notionally assess damages? The same way as if a claimant commences Court proceedings - medical reports and other documents are examined and witnesses including the injured worker will give evidence if the matter proceeds to a hearing. There is however one significant difference - if a claimant commences Court proceedings themselves then under the Court Rules there are provisions whereby the defendant has the right to have a claimant medically examined. The Court of Appeal has recently decided however that in proceedings brought pursuant to section 151Z of the *Worker's Compensation Act 1987* the parties have no rights to have the injured worker medically examined (*Kurnell Passenger & Transport Service Pty Ltd v Randwick City Council*).

In this case, Paul Castillo was struck by a bus on 7 July 1994 on his way to work. Castillo was employed by Randwick City Council who made payments to, for or on behalf of Castillo pursuant to the Act. Randwick City Council subsequently brought proceedings against Kurnell Transport seeking to be indemnified in respect of payments made pursuant to section 151Z of the Act. Kurnell Transport wished to undertake a medical assessment of Castillo's injuries however Castillo would not consent to such an examination. Kurnell Transport had no right to such an examination but argued that Randwick City Council did under section 119 of the *Workplace Injury Management and Worker's Compensation Act 1987*. Kurnell Transport sought a stay of the proceedings until the Council exercised this statutory power. Justice Simpson in the Supreme Court dismissed the application and Kurnell Transport appealed.

So what was the end result? The majority of the Court of Appeal (with Justice McColl dissenting) found that the provisions in section 119 related to claims for compensation and not claims for indemnity under section 151Z. Justice Basten in the majority judgment stated:

*"Section 119 comes within Ch 4 of the 1998 Act, under the heading "Workers compensation". That Chapter deals generally with claims and proceedings for compensation; it does not deal with what are now described as "work injury damages": cf Ch 7, Pt 6. Read in context, and in their own terms, the various provisions within s 119 expressly relate to claims for compensation.*

*" The difficulty for Kurnell Transport is to explain how such procedures are engaged in the present matter. As noted above, questions of entitlement to compensation are not raised in these proceedings. Rather, the reason why Kurnell Transport wishes to have the worker medically examined is for the purposes of establishing the limit of its indemnity, namely the damages which would have been payable by it in the event of proceedings brought by the worker against it. The attempt by Kurnell Transport to call in aid a provision designed for an entirely different purpose is the misconception underlying the application. The proposed purpose was, as the primary judge correctly identified, "extraneous" to the statutory purpose of s 119."*

Perhaps not a surprising result but one which may cause defendant's some difficulty in cases where in their opinion medical reports obtained on behalf of the injured worker or the workers compensation insurer do not allow them to properly assess or defend the case.

One of the Judges of the Court of Appeal did suggest that the Government amend the workers compensation legislation to provide for medical examinations in section 151Z claims so perhaps this is not the end of the matter. For now, until there is legislative change, the Court will simply assess the damages based on the evidence available and the negligent party cannot arrange a medico-legal examination of a worker to obtain medical evidence to rebut the medical evidence that a workers compensation insurer has gathered, even if that evidence is incomplete.

## **Costs In Work Injury Damages Claims**

In NSW the legal costs which must be paid to a worker for a work injury damages claim are regulated by the Workers Compensation Regulations, 2003. The maximum payable is specified by Schedule 7 of the Regulations.

In a work injury damages claim the parties must attend a mediation to attempt to resolve the claim unless, the claim is exempted from mediation by the Commission and an exemption can only be granted where there is a denial of liability or the case involves multiple parties in addition to the employer.

At the mediation parties are required to make final offers of settlement and the mediator must provide a certificate which records the final offers of settlement. If the claim does not resolve at mediation it then proceeds to the District Court.

The Regulations have a further limitation on costs where a matter does not resolve at mediation. The Regulations provide that if the judgment or settlement obtained by the worker is equal to or greater than the worker's last offer at mediation then the Court must order the employer to pay the worker's costs. If the settlement or judgment is less than the insurer's last offer the worker must pay the insurer's costs. If the settlement or judgment falls between the two offers each party must pay their own costs. The cost consequences are designed to ensure that parties make reasonable offers at settlement at mediation at the risk of adverse costs consequences if reasonable offers are not made.

When proceedings are commenced in the District Court, the District Court refers to the *Civil Procedure Act* in relation to costs and in particular to rules which permit parties to make offers known as offers of compromise during the course of the proceedings. Offers of compromise are intended to reward a party who makes a reasonable offer by providing the Court with the power to order one party to pay the other party's costs on an indemnity basis where a judgment is more beneficial to the party than their offer of compromise. Parties in work injury damages claims therefore saw offers of compromise as a way to overcome the adverse consequences in the *Workers Compensation Regulations*.

However, in a recent decision of the Court of Appeal in *Smith v Sydney West Area Health Service* the Court of Appeal has determined that the *Civil Procedure Act* has no application to work injury damages claims and the costs which must be awarded by the Court are those as regulated by the *Workers Compensation Regulations, 2003*. In addition if a claim proceeds to hearing in the Court of Appeal on appeal from a District Court judgment no additional costs are payable as once again costs in the Court of Appeal proceedings are subject to the *Workers Compensation Regulations, 2003*.

The Court of Appeal noted:

*"In the usual course, costs are in the discretion of the Court: see the Civil Procedure Act, s 98. However, s 98 is*

*expressly subject to, relevantly, "any other Act": s 98(1). The WIM Act, s 346 makes specific provision for the award of costs in claims for work injury damages including costs in court proceedings for such claims."*

In Smith's case following the mediation, the employer made a further offer to settle (the Calderbank offer). The trial judge, in the purported exercise of his discretion, ordered costs, including indemnity costs, in the employer's favour. The employer contended, however, that by operation of the Workplace Injury Management Act and the Regulations the worker appellant was not entitled to an order for costs in this case and that the appropriate order was that each pay their own costs, in accordance with the provisions of the Regulations.

The Court of Appeal determined:

*"The Uniform Civil Procedure Rules, Pt 42 relating to offers of compromise, also do not operate once a Certificate of Mediation has issued. In short, so far as costs are concerned (but subject to agreement between the parties), parties to court proceedings in a claim for work injury damages are fossilised in their respective positions at the conclusion of the mediation."*

In the opinion of the Court of Appeal, on the construction of the section in accordance with its ordinary meaning, costs "in relation to ... court proceedings" extends to proceedings in the Court of Appeal.

Accordingly, the maximum legal costs for a claim that proceeds past mediation to the District Court and on to the Court of Appeal are capped at the maximum costs stipulated by the Regulations for a matter that proceeds past mediation.

In *Smith's* case, the ultimate outcome achieved by the worker fell between the final offers of the employer and the worker and in those circumstances the Court of Appeal ordered that there be no order for costs with the intent that each party shall bear their own costs.

The appeal to the Court of Appeal was no doubt an expensive exercise for Smith. Smith is obliged to bear his own costs of the hearing in the District Court and the Court of Appeal.

The decision will bring the question of costs sharply into focus at a mediation as a high offer by a worker will expose the worker to adverse costs consequences if they fail to beat their last offer at mediation. Further workers cannot use offers of compromise or Calderbank offers to avoid these consequences as the Workers Compensation Regulations will govern the awarding of costs in work injury damages claims and the usual discretion as to costs vested in a Court and the rules concerning offers of compromise in the Civil Procedure Regulations have no application in work injury damages claims.

## **Workers Compensation and Social Security Benefits Interaction**

The wider implications of settlement of a workers compensation claim can sometimes be overlooked. The interaction of compensation and social security benefit rules can have some interesting consequences.

Broadly, where a person receives compensation, which includes a component referable to lost earnings or lost capacity to earn, the Commonwealth Social Security Act 1991 makes provision for the imposition of a period during which the age pension and other allowances and benefits are precluded - that is, the claimant is unable to receive them.

Generally, fifty percent of any compensation settlement amount is taken as the relevant amount, regardless of the extent to which the compensation settlement is said to be for lost earnings or lost capacity to earn. A formula is then applied by Centrelink to that relevant amount to produce a preclusion period expressed in a number of weeks.

Section 1184K(1) of the Act makes provision for disregarding part or all of a compensation payment, which results in a shortening of the applicable preclusion period, where "special circumstances" exist. Just what might be special circumstances?

In *Lahoud and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] AATA 30, the Administrative Appeals Tribunal determined that in the special circumstances of that case, the preclusion period should be shortened by 50%.

Mr Lahoud had settled a compensation claim in 2001. The settlement provided for payment of weekly compensation amounts.

On turning 66 in January 2008 this entitlement to weekly compensation ceased. Mr Lahoud then sought the age pension.

Centrelink sought to impose a 36 week preclusion period.

The evidence before the Tribunal showed that Mr Lahoud " has run out of money, is addicted to gambling, is in poor physical and mental health and has separated from his wife, although still living under the same roof and accepting some financial responsibility for her. As well, Mr Lahoud is distressed about a serious illness affecting his adult daughter. "

Whilst noting that financial hardship will not generally constitute a special circumstance unless the financial hardship goes beyond strained circumstances and is truly exceptional, the Tribunal was prepared to find "special circumstances" warranting the variation of the preclusion period.

The decision is a useful reminder that a settlement of workers compensation rights can have financial implications which may only arise long afterwards. Paying attention to these at the time of settlement can remove the element of 'gamble' from the process.

### **How Far Can You Open A Car Door Before It Becomes Negligent?**

The New South Wales Court of Appeal in *Hamshere v Favelle* recently examined whether a driver would be negligent in partially opening a door which subsequently resulted in a collision with a motor cycle. A motor cyclist had been travelling at 80 to 90 kilometres per hour and was a relatively inexperienced rider. He lost control as he tried to correct after an overtaking manoeuvre. This caused him to veer to the left and ride much closer to a parked car than any reasonable rider taking care for his own safety would have done. At the same time the driver of the car opened his door by 20 centimetres to activate the interior light. The motor bike struck the vehicle and the motor cyclist suffered significant injuries.

The Court of Appeal determined that the driver of the motor vehicle acted reasonably. A reasonably prudent person in the driver's position would not have expected a vehicle, either a car or motor bike, to pass so close to a parked car so as to be endangered by a door opening only 20 centimetres. There was simply no foreseeable risk to cause a reasonable person to refrain from acting as the driver did. Justice McFarlane focused on the motor cyclist's loss of control and the fact that he was so close to the vehicle that he was in danger of colliding with it even if the door had not been ajar. The motorist was not negligent in failing to guard against the possibility of that occurring. This was despite the presence of oncoming traffic. The driver had looked immediately prior to opening the door and was satisfied there was no impending collision.

Whilst the decision is unfortunate for the badly injured motorcyclist, it reinforces the view that negligence will not be imputed on a driver simply because the positive act of opening a door caused the accident. Nevertheless we would expect the decision would have been different had it been a cyclist who was riding at a more subdued speed rather than a motor cyclist who was speeding. The Court would also take into account whether it would be reasonably foreseeable for a cyclist to be travelling relatively close to a parked car. It is clear that personal responsibility continues to be a live issue in the assessment of liability.

### **Builders With Insurance Claims - Can You Make Progress Claims Pursuant To The Security Of Payment Legislation?**

A building collapses and a builder has construction risk insurance which covers claims arising out of the design and construction of the works. A claim is made on the insurer and there are lengthy negotiations with the insurer concerning payment of the claim. The builder carries out works to minimise the damage to the works. What is the position concerning these works in relation to the insurance claim, can the builder make a claim upon the insurer for progress payments pursuant to the Security of Payments regime in NSW?

The NSW Court of Appeal in *Zurich Specialist London Limited - v - Theiss Pty Limited and John Holland* has been called on to determine this precise issue. Zurich Specialist London Limited and SR International SE were the insurers of the Theiss/John Holland Joint Venture under a Construction Risks Insurance Policy pursuant to which cover was provided in respect of the investigation, planning, development, design, construction and commissioning of the Lane Cove Tunnel Project and associated activities. A dispute arose between the insurers and the Joint Venturers by reason of the collapse of a portion of the Lane Cove Tunnel on 2 November 2005. In February 2007 the Joint Venture made a claim upon the insurance policy and negotiations in respect of the claim continued until the Joint Venture purported to serve a Payment Claim under the Building and Construction Industry Security of Payments Act, 1999 seeking payment for works carried out.

The insurers applied to the Supreme Court to prevent the Joint Venturers proceeding with the claim under the Security of Payments legislation. The insurers succeeded in their application, however the Joint Venturers appealed.

It was necessary for the Court of Appeal to determine whether there was a construction contract that formed part of the insurance.

In the Court of Appeal the Joint Venturers argued that the insurance policy contained a separate construction contract between them and the insurers to carry out construction work. It was argued that an obligation to take all reasonable precautions to safeguard the subject matter insured and to prevent loss or damage would in certain circumstances obviously include the need to carry out construction work. This argument found no favour with the Court of Appeal.

The Court of Appeal determined that the commercial purpose of the policy was to provide indemnity for the insured on the terms and conditions included in the policy and the imposition on the condition of the insured, which had to be satisfied prior to indemnity being available, namely the obligation to take precautions, was not an agreement by the insured to carry out construction work for the insurer, but an agreement by the insured that in carrying out the construction work for the principals/owners they had to do so in a particular manner, that is by taking reasonable precaution in order to qualify for indemnity under the policy.

The commercial purpose of the insurance policy was to provide indemnity against certain loss and damage. The commercial purpose was not to enable the insurers to procure the performance of construction work. The Court determined that the insurance policy was not a construction contract and therefore the Security of Payments legislation did not apply.

At the end of the day the Joint Venturers were not entitled to proceed with a Progress Claim pursuant to the Security of Payments legislation. Builders are not entitled to make claims under the Security of Payments legislation on construction risk insurers for the work undertaken to safeguard the works and the terms of the policy will determine what payments, if any, must be made when the claim is ultimately paid.

## OH&S Roundup

### It's a High Standard

The Industrial Relations Commission has recently determined an appeal from a conviction of GRD Minproc Pty Ltd for a breach of the OH&S Act where GRD Minproc argued that the system used by it to secure a penetration, was a safe system, consistently checked and one which did not require it to warn workers of the risk of falling through the penetration. It argued that a correct conclusion of the fact should be that a third party disrupted the system and rendered it unsafe. This intervention was disassociated from GRD Minproc and the intervening third party in cutting of the ties caused an unforeseen failure of a system that was safe and inspection that were adequate and such a system, without that intervening act, operated without risk and did not require warnings that were inadequately guarded or secured penetration.

GRD Minproc was originally convicted for a breach of Section 8(2) of the Occupational Health & Safety Act and fined \$90,000 arising out of an incident on 12 July 2004 when a worker fell through coverings on penetrations in a fan room.

The NSW Industrial Relations Commission had previously fined Process Engineering Group Pty Limited \$50,000 and the sole director and employee of that company the sum of \$20,000 following the incident where persons were placed at risk when a penetration on a construction site was inadequately secured and guarded. Mark Griffith was a sole director and employee of a company, Process Engineering Group Pty Limited. Mr Griffith was engaged as a construction manager on a construction site through his service company Process Engineering Group Pty Limited which was retained by GD Minproc.

Access Roofing the employer of the apprentice was also convicted of an offence under the OH&S Act arising from the same incident and was fined \$60,000 in relation to the offence, effectively for failing to warn its employees and secure the penetration.

GD Minproc entered into a contract with a roofing contractor as a sub-contractor to install and erect wall and roof cladding at the site. Griffith, being the construction manager, had overall responsibility to implement the health, safety and environment plan of the main contractor. A first-year roof apprentice plumber was on site. The apprentice was working on the ground floor area which had an underground room below it and there were a number of penetrations in the floor. The apprentice fell through a penetration which had been covered by reinforcing bars tied at right-angles into a mesh configuration. The mesh cover had been moved. The Court ultimately concluded it was reasonable to weld the mesh bars as covers even though the covers had to be open for safety purposes. The Court held that the system of covering the penetrations was not safe and led

to the known risk namely of a fall through penetrations and it was the responsibility of Griffith as the construction manager on site to ensure safety by properly securing the penetrations, and to properly inspect the covers to identify the ongoing risk and he was liable to warn of the ongoing risk posed by the penetrations.

The penetration covers had apparently been tied by wires, or loosely tied. It was argued that the wires had been cut. That did not trouble the Court, as the Court concluded that on the day of the incident the penetration was not properly guarded.

GD Minproc had appointed a construction manager; it had a systematic and comprehensive site safety system in place prior to the incident; it had a particular site safety plan; it required its contractors to comply with its safety plan; it required daily inspections of the contractors work areas; such inspections were in fact conducted; it had identified the hazard posed by the penetrations in the fan room; its site safety committee met regularly; the safety committee designed safety measures and ensured they were followed up; its employees and the site safety committee were satisfied the penetration cover secured the penetrations in the fan room; and inspections by its officers and its sub-contractors were satisfied the work area was safe; and its officers on site, namely its safety officer, its mechanical supervisor and its civil engineer supervisor were active on site.

At the original trial the Court noted that in this case the system for inspecting the penetration covers was not sufficiently rigorous to discover the ongoing risk to safety and there was also no warning issued to the employees of sub-contractors regarding the ongoing risk. Whilst the Court noted that the contribution by third parties to the identified risk to safety was a relevant consideration, most importantly, the Court noted that the culpability of the principal contractor was greater than that of the other offenders prosecuted for breaches under the Act.

The head contractor was responsible for the overall design, operation and implementation of all occupational health and safety systems at its place of work and it was noted the mesh coverings chosen under the defendant's plan failed to remove the risk to safety and inspections by its officers, who, while concerned with safety, failed to ensure an employee of a sub-contractor could work with safety at its work site.

So what happened on appeal? GRD Minproc argued that there was no evidence that it had cut the ties, nor that had it arranged for the cutting of the ties, nor had it authorised any person to cut the ties or permitted interference with the ties. It was argued that there were no acts which it did which caused or contributed substantially or significantly to the existence of the risk of falling through the penetration.

The Court of Appeal noted:

*"An act by a third party such as cutting of wire, securing a penetration cover on a busy worksite is hardly of the type of unique unforeseen scenario which could result in a defence".*

The Court of Appeal held that the GRD Minproc's system did not adequately deal with the possibility that a third party would cut the ties. It was also noted that a fail safe system could have been implemented with minimal cost and time and resources and that system would be welding the mesh to the penetrations. At the end of the day the Appeal was dismissed.

So how many penetrations are properly secured? Penetration covers are removed regularly during construction on a construction site. Should they be bolted and padlocked rather than nailed or screwed? The risk to life is significant so perhaps more expensive systems should be considered. If the model National OH&S laws come into effect with maximum penalties of \$3 million perhaps locking of penetration covers will become the norm and the piece of loose ply covering a penetration secured by a nail or two will become known the urban myth of what used to be done in the old days. Time will tell.

## Employment Roundup

### Mistreatment because of pregnancy

A Queensland employer has been ordered to pay compensation and costs to a former apprentice hairdresser who claimed she was discriminated against because she was pregnant.

The worker had been employed for about 2 years. On many occasions she had heard her employer say that he would sack anyone who became pregnant. When she herself became pregnant she was scared to tell her boss.

Eventually she did tell him. She was not dismissed, but the employer began to treat her harshly. Even though she was a good worker, her employer began to criticise her for insignificant errors, and to abuse her verbally. He would not let her change her

shift to attend an important antenatal medical appointment.

The worker resigned and brought a claim alleging discrimination in the Queensland Anti-Discrimination Tribunal.

The Tribunal had little difficulty in finding against the employer.

The evidence showed that the employer's conduct produced a situation where the worker could either keep her job (and the mistreatment) and miss her antenatal class, or leave her job and keep her medical appointment.

Surprisingly, the Tribunal did not find that this amounted to a constructive dismissal.

Because it was satisfied that she would have been dismissed had she not resigned, however, the Tribunal concluded that the worker had been discriminated against. She was awarded over \$10,000 plus costs - *Roberts v King* [2009] QADT 3

Similar legislative environments exist throughout Australia. Employers must remember their obligations towards workers who become pregnant.

### **Fixed Term Contracts - The Pitfalls**

The current vogue of having employees on fixed term contracts can have its pitfalls.

A corporate services manager was employed for a three month fixed term contract. She was given verbal assurances by the human resources department that she would become a permanent member of staff. None of these assurances were reduced to writing.

The worker then entered another three month fixed term contract. Shortly before this was to expire she was informed that her contract would not be renewed and that there was no permanent position for her.

The worker brought proceedings under section 643(1) of the Workplace Relations Act 1996 (Cth) claiming that she had been dismissed in a way that was harsh, unjust or unreasonable or unlawful.

The Australian Industrial Relations Commission agreed that her dismissal had been harsh.

Although the employer was not bound by the verbal assurances of a permanent role, the AIRC held that the termination was at the employer's initiative. This was because the worker was given a letter on the last day of her second contract telling her that would be her last day. She had also been paid a termination amount as required by the fixed term contract.

In these circumstances, the dismissal fell foul of the section. The parties will now 'conciliate' (with an inevitable outcome for the employer!).

The case - *McDermid v Samsung Electronics Australia Ltd* [2009] AIRC 171 - demonstrates the care that needs to be exercised when making representations to workers in relation to possible future status. The benefits of fixed term contract can easily be undone by careless words.

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*Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.*

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