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Interim Payment Applications- A New Frontier in Personal Injury Claims

In New South Wales the *Civil Procedure Act* was introduced in 2005. One of the provisions in the *Civil Procedure Act* which has received little attention until recent times is a provision which permits an injured person to make an application to the Court to seek interim payments against their damages entitlement. The interim payment application can be made at any time during the course of proceedings and can be made more than once.

The NSW Courts have not seen a large volume of interim payment applications to date, however this may change as a consequence of a recent decision of the NSW Supreme Court.

The *Civil Procedure Act* permits a plaintiff to make an application for an interim payment of damages where liability has been admitted. An application will involve a hearing before the Court which will need to determine that the plaintiff has an entitlement to substantial damages. The *Civil Procedure Act* also permits the Court to make an Order for an interim payment of damages where it is satisfied that if the matter went to trial the claimant would obtain judgment for substantial damages against the defendant. Effectively this requires the Court to be satisfied that the plaintiff would succeed in the claim.

The approach of the Court to an application where liability had not been admitted had not been the subject of judicial interpretation until the Supreme Court of NSW delivered a judgment in *Pierre Matouk - v - Hungry Jacks Pty Limited and Anor*. The Court made orders that the defendant pay interim damages despite the fact that the defendants disputed liability.

Effectively the application for interim damages involved a preliminary hearing on the question of liability and it was necessary for evidence to be led on the issue of liability and the potential damages. Whilst the Court needed to determine that the plaintiff would succeed in the claim, it did not as part of the application determine the issue of liability and noted this was ultimately a matter for the trial judge.

So, what was Matouk's case about?

Pierre Matouk, sustained an injury as a consequence of an incident on 10 August 2008 when he sat on a stool that was allegedly unsecured and fell from the stool suffering injuries. A defence was filed denying liability. Matouk made an application to the Supreme Court seeking an order that the defendants' make an interim payment to him pursuant to Section 82 of the *Civil Procedure Act, 2005*.

Section 82 of the *Civil Procedure Act, 2005* provides that a Court can order a defendant to make one or more payments to a plaintiff on the application of a claimant at any stage of the proceedings. However, an order cannot be made unless:

- the defendant has admitted liability; or
- the claimant has obtained judgment against the defendant for damages to be assessed; or
- the Court is satisfied that, if the proceedings went to trial, the claimant would obtain judgment for substantial damages against the defendant.

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If a person is injured during the course of their employment they have access to worker's compensation payments and if they are injured in a motor vehicle accident they have access to interim payments made pursuant to the Motor Accidents Compensation Act, 1999. However, neither scenario applied here and Matouk made the application as a consequence of his financial circumstances.

Matouk's application was successful despite the fact that liability had neither been admitted by the defendants' nor determined by the Court. Acting Justice Matthews of the Supreme Court ordered an interim payment of \$35,000.00 be made to Matouk commenting that she was "comfortably satisfied" that liability would be established, however liability ultimately remained an issue for the trial judge.

Her Honour took an interesting approach to the interpretation of the section examining the facts on a subjective rather than an objective basis. Her Honour noted that in this particular case a number of complications are likely to arise in the assessment of the claim including exaggeration of the claimant's injuries and pre-existing conditions. Her Honour, however, noted that Matouk's pre-injury earnings were in the order of \$50,000.00 a year and so Her Honour was satisfied that Matouk would recover damages in an amount of at least \$100,000.00. In Her Honour's opinion in this particular case given Matouk's difficult financial circumstances \$100,000.00 would be subjectively considered substantial damages.

Her Honour considered the fact that if the claim is ultimately unsuccessful the defendant would have difficult recouping the money however this was not enough to deter Her Honour from ordering an interim payment.

No doubt the judgment will raise concerns amongst insurers who will now need to develop strategies to deal with interim payment applications when liability has not been admitted.

The judgment may well open the floodgates and give hope to plaintiffs that they can make an application for an interim payment of damages even where liability has not been admitted. Perhaps plaintiff lawyers will look to interim payments as a way to secure a fighting fund to cover investigation costs. No doubt interim payment applications will increase the legal costs of a claim for all parties in a claim.

The Matouk judgment will have significant ramifications for the insurance industry and no doubt there will be an increase in the level of interim payment applications and increased legal costs will be a knock on effect. With the concern of running a Trial within a Trial and the fact that a defendant may be put to proof on its defence to a claim to resist an application for interim payments legal costs will increase and there will be a need to prepare liability for the preliminary hearing as well as the final hearing.

On a more positive side the application for interim payments may well provide an opportunity for insurers to resolve matters when the matter is brought before the Court as no doubt the plaintiff at that time will have the benefit of Counsel appearing on their behalf and Counsel no doubt will have considered the liability issues and the quantum of the claim and should be in a position to negotiate an overall settlement.

An option for insurers who receive applications for interim payments of damages where liability is not admitted may be to seek a separate hearing on the liability issue to be heard at the same time as the interim payment application and then the costs of preparing for an interim payment application will not be wasted as liability will be determined at the same time. Obviously this may not suit every case.

The question remains. Will the floodgates open and will we see a significant increase in applications for interim payments of damages, particularly where liability has not been admitted.

Proprietors & Licensees Of Licensed Premises - The High Court's Judgments On Liability For Criminal Behaviour Of Patrons And Responsibility For An Intoxicated Patron's Behaviour After They Leave The Premises

In 2009 the NSW Court of Appeal and the Tasmanian Full Court delivered judgments which sounded warning bells for proprietors and licensees of licensed premises. The NSW Court of Appeal found that the proprietors of licensed premises were liable for the actions of a patron who left the premises after an altercation and returned to the premises and shot a number of persons. The Tasmanian Court of Appeal concluded that a hotel licensee had breached its duty of care that it owed to a patron who was fatally injured in a motor vehicle accident on his way home where the motor vehicle accident was caused by his intoxication.

The cases are known as *Adeels Palace Pty Limited - v - Moubarak & Najem* and *CAL No. 14 Pty Limited - v - Scott*.

The Court of Appeal's decision in *Adeels Palace Pty Limited - v - Moubarak* and *Adeels Palace Pty Limited - v - Najem* also raised concerns for insurers as it seemed that the Courts were moving closer to a regime where an entity could be liable for the criminal conduct of third parties who commit violent crimes.

In both cases there was an appeal to the High Court and in November the High Court delivered their judgments which overturned the initial findings of the Court of Appeal and Full Court and clarified the way in which a Court must approach claims where there is a contention that a proprietor and licensee of licensed premises is liable for the criminal conduct of a patron. The judgments also clarify the responsibility of a proprietor or licensee of licensed premises to take steps to prevent a patron from harming themselves as a consequence of intoxication.

So, what did the High Court conclude?

Adeels Palace

Adeels Palace was a reception/restaurant in Punchbowl. The premises were licensed under the *Liquor Act NSW*. There was a seating capacity of 295 persons. On New Years Eve 2002 the restaurant was full. Admission to the premises was collected at the door and cost \$60.00 but did not include alcoholic drinks. There was a band, singers and entertainers and patrons could dance. A dispute erupted between women on the dance floor. Words were exchanged. Relatives and friends intervened. Fighting erupted. Punches were thrown. Chairs, plates and bottle were thrown. One man involved in the fight was hit in the face, drawing blood. The man left the premises, returned with a gun and shot two patrons.

Adeels Palace argued in the High Court that it owed no duty of care to prevent criminal conduct by third parties and it if did, it was not shown that the reasonable response to the risk of violent behaviour at the function would have been to employ licensed security personnel. It was also argued that the plaintiff had not shown that the want of licensed security personnel was a cause of the shooting.

The *Civil Liability Act* in NSW applied to the claims. The High Court noted the provisions of the *Civil Liability Act* were central to the questions of breach of duty and causation. The High Court also noted that consideration of the provisions of the *Liquor Act* was also central to the question of duty of care.

The High Court noted the central complaint that each plaintiff made was that Adeels Palace had not regulated who came onto its premises, who stayed on those premises and how those who were on the premises conducted themselves towards other patrons. Section 125 of the *Liquor Act* obliged the licensee not to permit on his or her licensed premises any indecent, violent or quarrelsome conduct. Contravention of this provision permitted a licensee or his or her employee to refuse to admit to the licensed premises or to turn out of or cause to be turned out of the licensed premises, any person who is then violent, quarrelsome or disorderly. The *Liquor Act* also obliged members of the Police to assist the licensee who is entitled to turn out a patron.

The High Court noted that these provisions in the *Liquor Act* are set in a context of two considerations. Firstly, the sale of liquor is controlled because it is well recognised that misuse and abuse of liquor causes harm including violent, quarrelsome or disorderly conduct and secondly, that the duties cast upon those responsible for the service of liquor on licensed premises can be understood as part of the price that is exacted for the statutory permission granted under the *Liquor Act*.

The High Court noted that in its decision in *Modbury Triangle* it concluded that a shopping centre did not owe a plaintiff a duty to take reasonable care to prevent injury to the plaintiff resulting from the criminal behaviour of third persons on the shopping centre's land but it was important to recognise that in Modbury's case the duty was only said to arise as a consequence of the occupier of the land controlling the physical state of the land.

The High Court noted that the criminal conduct in question is of great importance in deciding not only what, if any, duty is owed to prevent its commission and the criminal conduct goes to both questions of breach of duty and causation of injury. The High Court ultimately accepted that Adeels Palace did owe a duty of care. The judgment of the High Court noted:

"First, the complaint that was made in these cases was that the occupier of premises failed to control access to, or continued presence on, its premises. Secondly, the premises concerned were licensed premises where liquor was sold. They were, therefore, premises where it is and was well recognised that care must be taken lest, through misuse

and abuse of liquor, "harm [arise] from violence and other anti-social behaviour". And thirdly, the particular duty said to have rested on the occupier of the premises (who was the operator of the business that was conducted on the premises) is a duty to take reasonable care to prevent or hinder the occurrence of events which, under the Liquor Act, the licensee was bound to prevent occurring – violent, quarrelsome or disorderly conduct. (And although variously expressed in the legislation of other Australian jurisdictions, the evident scheme of all liquor licensing laws in Australia is to minimise anti-social conduct both on and off licensed premises associated with consumption of alcohol.)"

The High Court confirmed that Adeels Palace owed a duty of care to the two persons who were shot and the duty was consistent with the duty imposed by statute upon the licensee and which was a duty enforceable by criminal process. The Court noted the duty is not absolute and it is a duty to take reasonable care. The High Court noted:

"Although it is a duty directed to controlling the conduct of others (for the avoidance of injury to other patrons) it is a duty to take reasonable care in the conduct of activities on licensed premises, particularly with regard to allowing persons to enter and remain on those premises."

However, the question of breach of duty was another issue. The High Court noted that it could be accepted for the purpose of argument that there was a risk that Adeels Palace knew or ought to have known that there would be violent, quarrelsome or disorderly conduct in the restaurant and the risk was not insignificant. The question then turned to what a reasonable person in Adeels position would do and whether that meant that there should be the provision of licensed security personnel who would act as crowd controllers or bouncers. Interestingly, the High Court noted that it was necessary to consider the issues identified in Section 5B(2) of the *Civil Liability Act*, namely:

- the probability that the harm would occur;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk; and
- the social utility of the activity that created the risk.

The High Court noted that when considering those factors:

"Of course there is always a risk that there will be some altercation between patrons at almost any kind of event. And the risk of that happening is higher if the patrons are consuming alcohol. But unless the risk to be foreseen was a risk of a kind that called for, as a matter of reasonable precaution, the presence or physical authority of bouncers or crowd controllers to deal with it safely, failure to provide security of that kind would not be a breach of the relevant duty of care. As noted earlier, there was no finding at trial or in the Court of Appeal that a risk of that kind should have been foreseen."

The High Court noted that there was no finding at the original trial or in the Court of Appeal that a risk of that kind should have been foreseen. The High Court then went on to provide guidance on points of general application noting that:

"first, that whether a reasonable person would have taken precautions against a risk is to be determined prospectively, and second, that the answer given in any particular case turns on the facts of that case as they are proved in evidence. It follows from the second of these considerations that deciding the question of breach in these cases would not establish any rule about when or whether security personnel should be engaged by the operators of licensed premises. It is not useful in these circumstances for this Court to form a conclusion about whether breach was proved in these cases. In particular, it is not necessary to examine the evidence that was led at trial to determine whether the finding of breach could be supported. Instead, it is desirable to consider the question of causation. Examination of that issue reveals that the negligence found against Adeels Palace was not shown to have been a cause of the injuries suffered by the plaintiffs."

When the High Court considered causation once again it referred to the *Civil Liability Act*. The High Court emphasised that where the *Civil Liability Act* or equivalent statutes are engaged it is the applicable statutory provision that must be applied when considering causation. Importantly the High Court noted the *Civil Liability Act* introduced a "but for" test when considering the question of causation.

The High Court found:

"it is necessary to observe that the first of the two elements identified in Section 5D(i) of factual causation is determined by the "but for" test: but for the negligent act or omission, would the harm have occurred?"

The High Court noted that the evidence at Trial did not show that the presence of security personnel would have deterred the re-entry of the gunman. That conclusion could have been reached only if it was assumed that the gunman would have acted

rationality. The High Court noted that the evidence did not show that security personnel could or would have prevented the re-entry by the gunman, a determined person armed with a gun and irrationally bent on revenge. Providing security at the entrance of the restaurant might have delayed the gunman's entry and might have resulted in someone else being shot rather than one of the patrons that were shot but the plaintiffs did not prove factual causation. The High Court noted that:

"Nor was "but for" causation established in the cases by observing that the relevant duty was to take reasonable care to prevent injury to patrons from violent, quarrelsome or disorderly conduct of persons."

Section 5D(2) of the *Civil Liability Act* makes provision for exceptional cases where liability can be imposed but does not define what is an exceptional case. Section 5D(2) is engaged when the "but for" test of causation is not met. In such a case the Court is then obliged to consider whether or not and why responsibility for the harm should be imposed on the negligent party. The High Court noted that prior to the introduction of the *Civil Liability Act*, the "but for" test of causation was not always a sufficient test of causation. But as Section 5D shows, the "but for" test is now to be (and has hereto been seen to be) a necessary test of causation in all but the unidentified group of exceptional cases contemplated by Section 5D(2). The High Court noted that:

"Even if the presence of security personnel at the door at the restaurant might have deterred or prevented the person who shot the plaintiffs from returning to the restaurant, and even if security personnel on the floor of the restaurant might have been able to intervene in the incident that broke into fighting, in time to prevent injury to anyone, neither is reason enough to conclude that this is an "exceptional case" where responsibility for the harm suffered by the plaintiff should be imposed on Adeels Palace. To impose that responsibility would not accord with established principles."

The High Court declined to decide how and when Section 5D(2) would be engaged, preferring not to come to any definitive view on what are exceptional circumstances.

Finally the Court noted that the event which caused the plaintiff's injuries was the deliberate criminal wrongdoing and the wrongdoing occurred despite society devoting its resources to deterring and preventing it through the work of Police forces and the punishment of those offenders who are caught. That being so it should not be accepted that negligence was not a necessary condition of the injury that resulted from a third person's criminal wrongdoing.

So, at the end of the day *Adeels'* case will have a significant impact on tort law in New South Wales and potentially in all other Australian jurisdictions.

Firstly, the High Court has made it clear that rather than simply make reference to the common law principles of negligence when considering claims, a Court must specifically pay attention to the provisions in the *Civil Liability Act* including the provisions which specify factors to be considered when dealing with questions of negligence, factual causation and breach of duty.

Secondly, the High Court has confirmed that proprietors and licensees of licensed premises owe a duty of care to patrons to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons. That duty is consistent with the duty imposed by statute upon licensees of premises and is enforceable by criminal process.

Finally the question of whether or not there has been a breach of duty will not arise where the alleged negligence has not caused the injury and in New South Wales, when considering causation it is necessary to apply the "but for" test of causation, namely the inquiry is whether "but for" the negligent act or omission, would the harm have occurred?

As can be seen, there will now be a substantial shift in the approach of the Courts to the examination of liability for criminal conduct and the liability of proprietors and licensees of a licensed premises.

CAL No. 14 Pty Limited v Scott

In *CAL No. 14 Pty Limited - v - Scott*, the High Court considered claims which arose as a consequence of a fatal motor vehicle collision when Shane Scott, was killed in a motor vehicle collision on the way home from a hotel. He had been drinking at the hotel and the accident resulted from his ingestion of alcohol. His alcohol reading was .253. The claims were brought by Scott's wife against the proprietor and licensee of the hotel. There were also claims by the Motor Accidents Insurance Board of Tasmania to recover sums it paid to or on behalf of Mrs Scott from the proprietor and licensee.

Scott had been drinking at the hotel from early in the afternoon. A rumour circulated in the hotel that a Police breathalyser or

speed camera was in the vicinity of the hotel, near where Mr Scott lived. A friend of Scott suggested that he place his wife's motorcycle in a lockable room, known as the store room or plant room and the friend asked the licensee to store the motorcycle. The licensee placed the keys to the motorcycle in the petty cash tin which was the normal receptacle for keys handed over by customers. Scott's friend's wife arrived and offered Scott a lift home on two or three occasions but he refused. She did not detect signs of intoxication in Scott as he seemed OK and was talking OK. Scott did not appear to be uncoordinated. After his friend left some time later the licensee came into the bar and told Scott that he had had enough and it was time for him to go home and asked for Mrs Scott's telephone number so that she could be contacted to come and get him. Scott reacted angrily and became somewhat aggressive. Scott went outside for a couple of minutes and then returned asking for his motorcycle and keys. The licensee asked three times whether or not Scott was OK to ride and he said he was fine. The licensee returned the keys, Scott drove off and was fatally injured on his way home.

The Tasmanian Full Court found that the proprietor and licensee had been negligent, however the High Court rejected that conclusion, finding that:

- Even if there was a duty of care and even if it was breached, it had not been shown that the breach caused the death.
- Even if there was a duty of care it was not breached.
- There was no duty of care.

The breaches of duty of care were alleged to be:

- Failing to ring Mrs Scott.
- Failing to deflect, delay, stall or manifest some resistance to Mr Scott driving.
- Refusing to hand over the motorcycle.
- The licensee failing to drive Scott home.

It was alleged that the duty owed to the licensee was one to call Mrs Scott. The licensee accepted in his evidence that he often rang the wife of a customer who had become abusive or a handful and asked her to collect him. Mrs Scott in the case gave evidence that she would have collected her husband if she had been rung. The High Court noted there was no evidence that the licensee knew either Mrs Scott's home or mobile number or that the numbers were available in the local telephone directory. It was also noted that when Scott was asked for the telephone number he reacted aggressively. The High Court noted it was also not possible to conclude that even if Mrs Scott was rung she could have come to the hotel in time to prevent Scott from driving the motorcycle. Therefore the High Court noted that it had not been shown that telephoning Mrs Scott would have prevented the accident.

The High Court noted that if the licensee had refused to hand over the keys, he would have been committing an illegal act. The licensee could not lawfully detain Mr Scott or his wife's motorcycle or the keys to it. Deflecting, delaying or stalling the departure was likely to be ineffective in light of the aggressive response received when the request for Mrs Scott's telephone number was made. Further, it would not have been reasonable for a sole person in charge of a hotel and its various areas to leave it for a period of time to drive someone home.

However, the Tasmanian Full Court had determined that the proprietor and licensee owed a duty to take reasonable care to prevent Mr Scott from riding the motorcycle whilst so affected by alcohol as to have a reduced capacity to ride it safely. There was not a duty to restrict service of alcohol to Mr Scott.

However, the High Court concluded that *"there was no duty of care owed to Scott."*

The High Court scoped the duty of care for publicans in the following terms:

"Save in exceptional circumstances, publicans owe no duty of care to their customers in relation to how much alcohol is served and the consequence of serving it. It says nothing about whether publicans owe a duty to third parties who may be damaged by reason of the intoxication of those customers. Defendants owe duties of care not to the world but to particular plaintiffs. Some of the arguments against imposing a duty of care on publicans to their customers may have less application where the plaintiff is a third party injured by the customer."

The High Court noted that Canadian cases have recognised a duty of care to a third party in similar circumstances to Scott's case but the High Court concluded that generally there is no duty to a customer in these circumstances and the Canadian approach should not be followed.

In an effort to clarify the law concerning a publican's duty to its customers, the High Court concluded that a proprietor or licensee of licensed premises does not owe its customers a duty of care to protect customers from the consequence of the

alcohol they choose to consume. The High Court stated that:

"The reason is that outside exceptional cases, persons in the position of the proprietor and the licensee, while bound by important statutory duties in relation to the service of alcohol and the conduct of the premises in which it is served, owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume. That conclusion is correct because the opposite view would create enormous difficulties ... relating to customer autonomy and coherent legal norms."

The High Court also noted that if a customer wants to leave a publican is caught between the dilemma of committing the torts of false imprisonment or battery and committing the tort of negligence.

So at the end of the day the High Court has put an end to claims by customers who allege that incidents resulting from their own intoxication can be sheeted home to the proprietor or licensee of licensed premises.

Conclusion

These two most significant cases will have an impact on tort law throughout Australia. The duties owed by proprietors and licensees of licensed premises have been clarified as has the way in which Courts must deal with questions of negligence where civil liability legislation stipulate the tests for determining duties of care, breaches of duty and causation in negligence claims. In addition, Courts are more likely to be uninclined to impose liability on persons for criminal conduct of third parties.

Contractual Liability Results In Recoverable Loss

In last month's issue of GD News we examined the Victorian Court of Appeal's decision in *Metrolink Victoria Pty Limited - v - English* which determined that a contractual penalty was a recoverable loss in a claim where that penalty arose as a consequence of damage to property.

The NSW Court of Appeal in *Rail Corporation NSW - v - Fluor Australia Pty Limited* examined yet another claim where damages paid pursuant to a contract resulted in a recoverable loss.

Rail Corporation was the owner of rail tracks in New South Wales. Pursuant to an access agreement, SRA were entitled to operate its trains on the rail tracks including the East Hills Line. Rail Corporation had engaged Fluor Australia to carry out work on the tracks. Fluor Australia sub-contracted those works to Alpcross. On 6 October 2000 a passenger train owned by SRA left the rails on a section of the East Hills Line in Sydney. As a result of the derailment track and overhead lines owned by Railcorp were damaged and three carriages of the train owned by SRA were seriously damaged. On the two evenings preceding the derailment Alpcross had undertaken maintenance works on the relevant part of the tracks. The works had been carried out negligently.

Pursuant to the access agreement Railcorp paid to SRA more than \$5 million in for the damage caused to SRA's trains and injuries to its passengers. Railcorp sought to recover from Alpcross damages equivalent to the payments made by Railcorp to SRA. The payment to SRA had been assessed by a loss adjuster and the payment did not include any component for interest.

The original Trial Judge rejected Railcorp's claim to recover the monies paid to SRA on the basis that Railcorp had not discharged its onus of showing that the amount of the settlement negotiated with SRA was regarded as objectively reasonable. Railcorp appealed.

The Court of Appeal noted that the access agreement between Railcorp and SRA gave rise to a contractual obligation to maintain the tracks. The Court of Appeal noted that the Trial Judge had found that the duty to maintain the tracks was not a non delegable duty but was one that could be satisfied by engagement of appropriately qualified and competent sub-contractors. However, the Court of Appeal did not agree with this conclusion in light of the contractual obligations in the access agreement.

The Court of Appeal noted :

"The position in contract, as reflected in the standard contract texts, is that a contractual promisor may or may not be

entitled to discharge its obligations by having a subcontractor perform the relevant work or services. Whether it may do this will depend upon the nature and terms of the contract. For example, subcontracting will not be permitted where it is apparent that the contractor's personal skill or expertise was likely to have been of significance to the other party. However, "as a general rule, where the promisor performs the contract through a third party subcontractor the promisor remains liable on the contract and may therefore be sued in contract if the vicarious performance is not in accordance with the contract"The position will be otherwise if the contract makes it clear that if the promisor has a subcontractor perform its obligations the promisor is not to be liable for any deficiency in the work of the subcontractor. However, no provision to his effect is contained in the Access Agreement. Although it may be accepted, and has implicitly been accepted by the parties to these proceedings, that RailCorp was entitled to engage subcontractors, its obligation to safely maintain the infrastructure was not in my view qualified by the existence of what was only an implied ability to subcontract performance of its obligations. "

The Court of Appeal therefore held that Railcorp was liable in contract to SRA in respect to the loss and damage suffered by SRA as a result of the derailment and was entitled to approach a claim made by SRA for reimbursement in respect of that loss and damage upon the basis that SRA would have been highly likely to succeed in a damages claim against Railcorp. The Court of Appeal also accepted that the settlement was a reasonable one, particularly where there had been no allowance for interest which effectively demonstrated a compromise of the claim. The Court of Appeal then concluded that that liability to pay damages for the contractual breach was a recoverable loss for which Alpcross was liable.

An issue arose as to whether or not the claim was a claim for pure economic loss and not consequent to damage to property and therefore could not be compensated. This argument was also rejected. It was accepted that the payment to SRA was consequent upon damage to Railcorp property, however pure economic loss can be recovered in some situations and one of the important factors in considering whether pure economic loss can be awarded is the vulnerability of a plaintiff. The Court of Appeal noted:

"Vulnerability is to be understood as a reference to the plaintiff's inability to protect itself from the consequence of a defendant's want of reasonable care, either entirely, or at least in a way which would cast consequences of loss on the defendant."

McFarlane J held that if there had been no property damage, Railcorp had not satisfied the vulnerability criteria to be entitled to recover pure economic loss. Railcorp could have obtained an indemnity from Fluor or required Fluor to cause any sub-contractor to give a contractual indemnity to Railcorp and therefore Railcorp did not have the necessary vulnerability to be entitled to recovery for pure economic loss. The two other Judges did not provide a concluded view on these issues, simply noting the monies were recoverable as they were consequent upon damage to Railcorp's property.

So, the case demonstrates that contractual arrangements with third parties which result in loss are recoverable when the contractual liability arises consequent upon property damage and may be recoverable even where there is no property damage subject to the problem that the claim might be one for pure economic loss and vulnerability will need to be demonstrated.

Professional Indemnity Insurers Beware!

The recent decision of the NSW Court of Appeal in *Rail Corporation v Fluor Australia* provides a timely reminder for Professional Indemnity insurers that incorporating a comprehensive description of professions in the schedule to the policy can lead to a liability for non professional services. In addition a Professional Indemnity insurer may be liable for non professional services provided by a subcontractor where the insured has a contractual liability to perform the professional services.

We have detailed the primary issues in that case in the preceding article. A side issue in the case arose which called for the Court of Appeal to consider whether or not the professional indemnity insurance policy of Fluor Australia would respond to a claim against Fluor.

Fluor effected a professional indemnity policy with Zurich. The insuring clause of the Zurich policy provided the cover for the insured in respect of any civil liability incurred by the insured "in the conduct of the profession". Profession was defined to mean "the profession, business or occupation specified in the schedule". The schedule referred to some nine callings of a diverse character, including Personal Consultants, Civil Engineering, Construction Management And Project Management.

Fluor was engaged by Rail Corporation to carry out works on rail tracks owned by Rail Corp. Fluor engaged Alpcross to carry out works and those works were negligently performed.

Lengths of rail had been inserted into the tracks and the trial judge had held that the work that Alpcross had undertaken was the replacement of glued insulated joints with continuously welded rail. This process required the replacement of some lengths of rail. Care needed to be taken in determining the length of rail to be inserted because temperature changes caused railway lines to expand and contract. The appropriate method to be used was the rail in/rail out method which was described as requiring that the length of rail to be inserted into the gap, making due allowance for the weld at each end, be the same as the length of the material removed. Alpcross did not follow that method but instead placed excessive steel into the closure and that caused the track when it heated up to buckle and become mis-aligned. This resulted in a rail derailment.

The Court of Appeal noted that the policy did not adopt a narrow or traditional meaning of profession. Further, the Court of Appeal found that: *"words (in the conduct of the profession) required a characterisation of the overall activity in the context of which the act occurs. It was therefore a necessary but particular act of a professional character."*

It was therefore a necessary but particular act of a professional character. The Court of Appeal noted that the original trial judge had found that Alpcross' defective work was done in the course of one or more of the professions of civil engineering, construction management and project management listed in the Zurich policy and as there was an express provision in the contract between Fluor and Alpcross which provided that Fluor was liable for the negligent work of its sub-contractors, Alpcross' acts were for relevant purposes the acts of Fluor.

The Court of Appeal ultimately determined that the civil engineering works carried out arose in the conduct of the profession, business or occupation of civil engineering. Accordingly the Zurich policy responded to the claim against Fluor made by Rail Corporation.

The Zurich policy also contained an exclusion clause which excluded liability arising from or attributable to:

- the replacement of or lack of efficacy of any goods manufactured, sold, designed, specified, formulated, constructed, installed, distributed, treated, serviced, altered, repaired or supplied by the insured; or
 - any defect in any goods manufactured, sold, designed, specified, formulated, constructed, installed, distributed, treated, altered, repaired, supplied or serviced by the insured;
- except where such a claim arises from or is attributable to any advice, design or specification prepared by the insured in the conduct of the profession or otherwise in the course.

The Court of Appeal held that the particular lengths of rail that were inserted were not themselves defective or inefficacious. It was argued that the overall section of the track into which the lengths were inserted became inefficacious or defective by reason of rails of the wrong length being inserted. It was argued that the policy intended to exclude liability for faulty workmanship (not the result of professional character) which did not give rise to a deficiency in goods. The policy contained a title faulty workmanship under which the relevant exclusion concerning defect and efficacy was inserted. However, the policy also contained a provision noting that titles in the policy were for descriptive purposes only and did not form part of the policy. The Court of Appeal held that the exclusions were limited to exclusions for goods that were inefficacious or defective prior to their use and it was clear that new railway lines were installed and were not in that category. Accordingly the exclusions were inapplicable. Further the overall section of the track did not constitute goods for the purposes of the exclusion in the Court of Appeal's view.

So at the end of the day a professional indemnity policy was found to be liable to respond to a claim for work which an insurer would ordinarily have thought was not of a professional character. Of more significance, the person that carried out that work was not the insured as the work was undertaken by a sub-contractor of the insured but because the insured's contract with its client imposed a liability on it for its sub-contractors the policy was liable to respond.

An exclusion clause in the policy which excluded liability for losses arising as a consequence of or in connection with services provided by sub-contractors of the insured would be one way to deal with the conundrum.

This case did not involve the insurer who may have raised other arguments in relation to the claim for indemnity however the case is instructive of the approach the Courts will take in claims under similar policy wordings.

Trip & Fall On Stairs - Some Interesting Issues

The NSW Court of Appeal has recently delivered a judgment which raises interesting issues for Councils and owners shopping centres when it comes to claims arising out of accidents on stairs leading to car parks.

In *Stojan (No.9) Pty Limited - v - Carolyn Adel Kenway*, the NSW Court of Appeal considered a claim for damages for injuries sustained by Mrs Formosa who was injured when she tripped and fell heavily when ascending steps from a shopping centre

which led to a car park. At the time of the accident it was dark but the car park, including the corner from which the stairs ascended was adequately lit. Stojan had control of the car park which it managed in conjunction with the shopping centre. It provided lighting in the car park which extended to the area from which the stairs ascended. It had allowed two large charity bins to be placed against one side of the staircase with the effect of blocking the lighting at the point where the first flight of seven steps reached a landing and made a right angle turn. Kenway was approaching the landing when she entered the darkened area, let go of the handrail in order to cross the landing diagonally and tripped on a step when she thought she had reached the landing but in fact had not. The Local Council owned the land on which the stairs were constructed.

Kenway claimed damages from Stojan and the Council. She succeeded in the claim and was awarded damages of \$336,271.70 with liability being apportioned 80% to Stojan and 20% to the Council. The Trial Judge found that there was no contributory negligence on the part of Kenway. An appeal followed.

Stojan was the registered owner of the plaza and occupied the car park from which the stairs ran. The Council had the care, control and management of a park at the top of the stairs. The Council admitted that it was a Local Government Authority with powers in relation to the unformed road reserve adjacent to the western end of the plaza and pleaded that it was a road authority pursuant to the Roads Act, 1993 but did not admit it was the occupier of the stairs. The Council asserted that it had not constructed the stairs and Stojan undertook the day to day repair and maintenance of the stairs. The Council also argued that the risk was an obvious risk within the meaning of the *Civil Liability Act, 2002* and also that its limited financial and other resources exempted it from liability pursuant to Section 42 of the *Civil Liability Act, 2002*.

Stojan denied it was owner or occupier of the stairs.

The Court of Appeal noted that an occupier need not have exclusive possession of property and may have shared occupation. What matters is that persons have the immediate supervision and control and the power of permitting or prohibiting the entry of other persons and the control need not be total. The Court of Appeal noted that the evidence at Trial demonstrated that Stojan had constructed the stairs and the stairs were constructed on land which the Council permitted Stojan to use as part of the plaza. Stojan had at least a licence to use the car park and they took advantage of that licence to use the air space above the unconstructed road or reserve to construct the stairs leading to the park.

Effectively the Council had given Stojan the legal right to invite both users of the plaza as well as members of the public generally to enter the car park whether by car or foot. That degree of possession was sufficient to classify Stojan as an occupier of the stairs.

The Court of Appeal noted:

"The duty to take reasonable care requires an owner or occupier to protect entrants from risks of injury which can be foreseen and avoided. The measure of the discharge of the duty is what a reasonable person would in circumstances do by way of response to the foreseeable risk."

The Court of Appeal noted that in relation to the Council whilst the accident occurred on a stairway, it was still a road authority for the purposes of accidents on the stairway and as such it was obliged, if the state of the stairs, whether from design, construction, works and on repair, posed a risk to road users, to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. It was obliged to exercise such reasonable care to make the road (stairs) safe "for users exercising reasonable care for their own safety". The Council's liability therefore arose in its capacity as a road authority rather than an occupier of the stairs.

The Council was held to be a road authority as the park was open to the public as too was the car park. In this case a survey plan depicted a lane running from the park to the shopping plaza and the same lane was shown in the plans to run along one boundary of the car park. Effectively the lane was a road reserve and separated the park from the plaza and provided vehicular access to a dentist whose premises appeared to be located to the north of the car park. The definition of road in the Roads Act included the air space above the surface of the road and the soil beneath the road and any bridge, tunnel, causeway, road, ferry or other work or structure forming part of the road. The Court of Appeal accepted that the unformed road reserve formed part of a public road and the stairway was a footway as defined by the Roads Act that was part of a road set aside for a path or way for pedestrian traffic. In those circumstances the Council was a road authority in accordance with the Road Act. Interestingly, the Court of Appeal picked up the High Court's reasoning in *Adeels Palace Pty Limited - v - Moubarak*, noting that it needed to consider the provisions in Section 5B of the *Civil Liability Act* when determining whether there was a breach of duty of care.

Ultimately the Court accepted that both the Council and the owner of the shopping centre had been negligent in failing to remove the bins from their position. However, the Court of Appeal also determined that Kenway had contributed to her own demise.

The Court of Appeal noted that when determining issues of contributory negligence it was necessary to consider the provisions in Section 50 of the *Civil Liability Act* which reflected the fundamental idea that people should take responsibility for their own lives and safety. The Court noted that the question of whether a person has been guilty of contributory negligence is determined objectively and the onus is on the defendant to prove that the plaintiff has been guilty of contributory negligence. In this case the Court of Appeal determined that an appropriate apportionment of liability for the claim was 50% to the plaintiff for her own negligence for failing to hold on to the handrail as she was approaching and crossing the landing when she realised it was dark and could not see where she was going.

In relation to the liability of the Council and the shopping centre manager, liability was apportioned two thirds to the shopping centre owner and one third to the Council. That liability arose from the fact that a safety audit had been conducted by the Council previously which identified the potential risks on the stairs and that safety audit had been supplied to Stojan as well as some correspondence the Council had received from members of the public complaining about the stairs. Stojan took no action after the receipt of that correspondence and was seen to have the lion's share of responsibility.

The case serves to demonstrate the substantial impact that the High Court's recent decision in *Adeels Palace* will have on the examination of negligence claims in New South Wales. It also confirmed an interesting concept that a Council can be a road authority for a stairway leading from a road and therefore have a responsibility in relation to the stairway.

Finally, the Court of Appeal confirmed that concepts of personal responsibility remain alive and well when it comes to consideration of blame for accidents

Litigation Funding And Class Actions - Federal Government Steps In

In our last newsletter we considered the Full Federal Court's decision in *Brookfield Multiplex Limited v International Litigation Funding Partners Pty Limited* which held that a funded class action currently being maintained against Brookfield Multiplex was a managed investment scheme within the meaning of Section 9 of the Corporations Act. The managed investment scheme must be registered with ASIC and must be operated by a public company that holds an Australian financial services licence and must have a compliance plan that meets the requirements of the Corporations Act.

In a move to overcome the problems created by that decision for litigation funders and lawyers involved in class actions the Federal Government has stepped in to grant transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions. In a media release ASIC announced:

"ASIC will grant transitional relief to avoid any disruption that could adversely impact plaintiffs and those actions, or interfere with the timely inefficient conduct of the subject of litigation. The relief will allow time for government and ASIC to consider and consult on how funded class actions should be regulated under the (Corporations) Act in future. Depending on the outcome of that process, existing class actions may need to be restructured to meet the requirements of the Act by the end of the relief period."

To obtain relief it is necessary to make an individual application to ASIC for class actions commenced before 4 November 2009, the date of ASIC's announcement. Applications in respect to class actions commenced after that date will be considered separately and ASIC will assess whether or not and on what terms they will grant transitional relief.

The move by ASIC has been welcomed by litigation funders and lawyers involved in class actions. However, there will still be uncertainty for future class actions.

No doubt ASIC's considerations of class actions commenced after 4 November 2009 will involve a consideration of whether or not any relief will be granted to lawyers and litigation funders involved in that action and whether or not there will need to be:

- an Australian financial services licensed public company as a responsible entity to operate the scheme;
- a compliant constitution and compliance plan for the scheme;
- a product disclosure statement for the scheme;
- ongoing disclosures to members of the scheme.

The lie of the land will not be certain until 30 June 2010 and until that time litigation funders involved in class actions will need to apply for relief to ASIC and will need to comply with any conditions which ASIC imposed.

Commercial Domestic Assistance Claims - At Last A Hurdle

In New South Wales when the *Civil Liability Act* and the *Motor Accidents Compensation Act* were introduced a regime was imposed to regulate the award of damages for gratuitous care in personal injury claims. At common law where needs are created by the plaintiff's injuries and those needs were satisfied gratuitously, an injured person was entitled to recover damages in respect to the gratuitous services provided. The *Civil Liability Act* and the *Motor Accidents Compensation Act* imposed a threshold such that unless the care was provided for six hours a week and for six months, damages could not be awarded for gratuitous care. This inevitably led to injured persons claiming at the time of Trial that they required commercial domestic assistance, an argument that was readily accepted by the Courts. However, the decision of the NSW Court of Appeal in *Miller - v - Galderisi* will throw a spanner in the works for claimants.

Galderisi was injured in a motor vehicle accident. He brought a claim for damages against the driver in respect to his injuries. Part of his claim included a claim for commercial domestic assistance. His pre-accident medical condition was such that he had a need for domestic assistance which had been increased by the accident but that increase did not reach the threshold of six hours and six months for the award of damages for the provision of gratuitous domestic assistance. The original Trial Judge awarded domestic assistance based on commercial rates, allowing four hours per week permanently to deal with the initial needs created for the balance of Galderisi's life.

An appeal to the Court of Appeal followed. The Court of Appeal noted that there is no reason in principle why, if the evidence justifies it, damages may not be awarded in respect of a need for commercial domestic assistance likely to arise in the future after the availability of gratuitous assistance ceases. The Court confirmed that whether gratuitous assistance will continue after the Trial is a factor which the Trial Judge is entitled to take into account. If that circumstance were to change in the future domestic assistance would foreseeably be required from a commercial provider. In this case the Court of Appeal noted that that expense was neither immediate nor inevitable and no doubt there was a likelihood of the contingency that the need for care would increase by factors other than the accident.

The Court of Appeal noted that the ability and willingness of family members to provide assistance is a factor to take into account. There was no evidence in this case that the health of the wife or a son who was providing the gratuitous assistance would result in them being unable to provide the assistance at some time in the future. The Court of Appeal noted there was no reason why the wife would not be able and willing to assist.

The Court noted that:

"There is no conventional allowance for the provision of domestic assistance on a commercial basis at some future point in time, against the possibility that the gratuitous carer may no longer be able or willing to provide such care."

Importantly, Galderisi never utilised Commercial domestic assistance. All his needs were catered for by his wife and to a lesser extent by his son. At the time of the accident, Galderisi's wife was only fifty one.

The allowance in the damages award for commercial domestic assistance was reduced as was the economic loss component which was awarded. Galderisi's damages were reduced from \$152,403.11 to \$9,111.11.

It is sure to be of great comfort to insurers that the Court of Appeal saw through to the reality of the situation. Galderisi never utilised commercial domestic services in the past and would be unlikely to do so in the foreseeable future.

This case sounds a warning to injured persons that it will be more difficult to argue that there should be an award of damages for commercial domestic care when they are receiving gratuitous care up until the date of the Trial unless compelling evidence is available that the gratuitous care will not continue. However, clear evidence from a gratuitous care provider that they will not provide that assistance in the future may well overcome the difficulties that will confront injured persons as a consequence of this decision.

No Extension Of Limitation Period In Personal Injury Claim Where Loss Of Contractual Rights Causes Prejudice

The NSW Court of Appeal in a decision in *GIO General Limited - v - James Love* has confirmed that the loss of contractual rights will have an impact on an application to extend the limitation period in an action in negligence.

On 23 January 2001 Love suffered an injury in the course of his employment whilst undergoing a training course conducted by

Firefox Training Corporation Pty Limited ("Firefox"). He received workers compensation payments from his employer and made no damages claim against his employer. In 2008, more than four years after the three year limitation period expired he sought an extension of the limitation period within which to commence proceedings in negligence against Firefox. Because Firefox no longer existed due to deregistration, the claim was brought against Firefox' insurer.

The Court has power under the *Limitation Act*, 1969 to extend the limitation period where it is just and reasonable to do so where the extension sought does not exceed five years. The Court of Appeal noted that the effect of the *Limitation Act* if leave was granted, would be to extend the time for a claim for contribution from the employer but would not extend the time for an action for breach by the employer of any contract between Firefox and the employer. The limitation period applicable to such an action in contract had expired.

The loss of Firefox' cause of action in contract against the employer was relied on as a source of material prejudice which went against the grant of the application to extend the limitation period. GIO also argued that the lapse of time had caused it evidentiary prejudice and that it had lost contact with a potential witness due to the delay in bringing the claim and also one witness had become uncooperative.

The Court of Appeal confirmed that GIO had suffered material prejudice through the loss of a possible claim by Firefox against the employer for breach of contract and the claim should not be dismissed as merely fanciful or theoretical.

The Court also noted there had been a loss of a diary during the period in which the plaintiff would be entitled to bring a claim without seeking an extension of the limitation period and this was a factor that could still be taken into account in deciding that there was actual prejudice. The Court effectively held that "*if prejudice occurs to a defendant within the limitation period and the plaintiff sues, that is the defendant's problem but if the plaintiff needs an extension of the limitation period, it is the plaintiff's problem*".

The Court of Appeal therefore, after considering all of the factors which went to prejudice, determined that it would not be just and equitable to extend the limitation period.

The *Limitation Act* provides that a claim for breach of contract must be brought within six years of that breach. Where a plaintiff's injury is caused by two parties and there are contractual arrangements between those parties, the loss of a damages claim founded on those contractual rights by virtue of the expiration of the limitation period (6 years) will result in material prejudice and is likely to substantially influence the Courts in any application for leave to extend the limitation period.

Motor Vehicle Accidents And Safe Systems Of Work

The recent decision of the NSW Court of Appeal in *Doumit v Jabbs Excavations* considers the issue of whether or not a bulldozer is a motor vehicle for the purposes of the Motor Accidents Compensation Act 1999 and the Road Transport (General) Act 2005. It is also instructive for employers because it confirms previously accepted principles about an employer's duties in respect of workplace safety. Safe systems of work are both enforceable and required by law, even when some aspects of the work which is being performed is inherently dangerous.

Mr Doumit was employed by Jabbs Excavations on a construction site in January 2004. Jabbs Excavations was contracted to perform earthmoving work on that construction site. Whilst on site, Mr Doumit was struck by a reversing bulldozer. Mr Doumit suffered serious injuries and commenced proceedings claiming Work Injury Damages.

The two central issues considered by the Court of Appeal were as follows

- Was the bulldozer that struck Mr Doumit a motor vehicle which would result in the claim being governed by the damages regime in the Motor Accidents Compensation Act?
- Did Jabbs Excavations have a safe system of work?

In a 2:1 majority judgment the Court of Appeal concluded that bulldozers are no longer a motor vehicle for the purposes of a CTP claim. Handley and Ipp JJA concluded that the bulldozer was not a motor vehicle for the purposes of a CTP claim whereas Young JA concluded that it was.

Prior to 1997 the definition of "motor vehicle" for the purposes of CTP claims in NSW was:

"any motor car, motor carriage, motor cycle or other vehicle propelled wholly or partly by any volatile spirit, steam gas, water or electricity, or by any means other than human or animal power."

Applying the old definition, courts had no difficulty in concluding that mechanical loaders which had tracks that made contact with the ground were motor vehicles in the decisions of *Fawcett v BHP By-Products Pty Ltd (1960) 104 CLR 80* and *Grygorcewicz v Broken Hill Proprietary Company [1963] NSW 1205*.

An amended definition was introduced in 1997 significantly narrowing the meaning of the term "motor vehicle" for the purposes of CTP claims with the introduction of the concept that a motor vehicle was "any description of vehicle on wheels (including a light rail vehicle) but not including any other vehicle used on a railway or tramway".

Handley AJA noted the 1997 changes were significant and concluded:

"The 1997 amendment narrowed the definition and, given the decisions that tracked vehicles were within the earlier definition of motor vehicle, the presumptive intention of Parliament was to exclude such vehicles from the new definition because they are not "on wheels." The only category of motor vehicle not covered was a bulldozer or a mechanical loader."

Only the tracks of the bulldozer made contact with the road. Adopting a literal interpretation, Ipp JA and Handley AJA found that a bulldozer was not a motor vehicle.

Young JA disagreed concluding that the requirement that a vehicle be on wheels really meant either on wheels or their equivalent or a circumstance where wheels contributed to vehicular locomotion.

The majority finding that the bulldozer was not a motor vehicle meant that any damages would be assessed under the work injury damages regime in the workers compensation legislation rather than the CTP damages regime which would have resulted in a substantially greater amount of compensation if the claim succeeded.

The Court of Appeal then turned to consider the allegations of negligence.

The Court was unanimous in finding that notwithstanding the injuries suffered by Mr Doumit, the employer did not breach its duty to provide a safe system of work.

Employers have a duty to devise and provide a safe system of work. Further an employer is bound to take reasonable care to avoid injury to employees that may occur even through inattention or mismanagement on the part of the employee. An employer must not only have a safe system it must also ensure that the system is implemented.

The fact that dangerous work is carried out on a construction site does not diminish the employer's duty indeed that those who engage in dangerous operations, must take precautions not generally required of persons who engage in routine activities.

Essentially, whether or not a safe system of work is in place and enforced will be a question of fact to be determined on a case by case basis. The factors in this case which swayed the Court of Appeal to find the employer was not negligent were that:

- the bulldozer emitted a beeping noise whilst it was being operated;
- Mr Doumit was required to keep a specified distance from the bulldozer whilst it was being operated;
- clearance from the bulldozer operator was required before Mr Doumit was permitted to approach the bulldozer whilst it was in operation;
- Mr Doumit received on the job occupational health and safety training at toolbox meetings;
- Mr Doumit was working in close proximity to the excavator together with a colleague shortly before he was struck. He walked away from his colleague and towards the moving bulldozer without looking at it. It was at that time that he was struck by the bulldozer.

The impression created was that Mr Doumit was acting outside the safe system of work imposed by his employer at the time of his injury. The concept of personal responsibility once again raised its head with the Court of Appeal rejecting Doumit's claim that someone other than Doumit was to blame for the accident.

So in this case the facts demonstrated that there was a safe system of work and even though the employer owed a duty of care and had an obligation to implement a safe system it did not breach that duty. The worker's departure from the system was the cause of the incident.

Each case will turn on its own facts. However, when an accident occurs a worker will not succeed in a claim by simply asserting there was a failure to implement a safe system of work. The extent of proper supervision will be relevant as will any departure from a safe system that was caused by the workers own actions or inattention. If there is a safe system of work the worker's departure from that system which causes their injury will not necessarily result in a successful damages claim. Sometimes the reasonable response of an employer will not be able to prevent an accident and in those situations a worker cannot look to blame the employer for their injury.

Domestic Assistance - Workers Compensation Claims in NSW

Section 60AA of the Workers Compensation Act, 1987 (the "Act") governs the payment of gratuitous domestic assistance in workers compensation claims. The section must be read in conjunction with the WorkCover Guidelines for the Provision of Domestic Assistance (the "Guidelines") which were released on 15 October 2004.

The recent decision of the President in the Workers Compensation Commission of *Kajic - v - Hawker De Havilland Aerospace Pty Limited* provides guidance on the proper interpretation of Section 60AA when considering payment of any lost income or the value of any foregone employment sustained by the care provider.

As a result of a workplace accident *Kajic* became a quadriplegic. His wife cared for him after the accident. She made a claim for the amount of her loss of wages and foregone employment she had suffered as a result of the care she provided.

The President considered whether there was a maximum amount of compensation payable for any loss of wages or if the compensation payable was referable to the actual loss of wages.

Section 60AA(3) provides:

"Compensation is not payable under this section for gratuitous domestic assistance unless the person who provides the assistance has lost income or foregone employment as a result of providing the assistance."

The Guidelines provide that the person claiming compensation for providing gratuitous domestic assistance must provide evidence to the workers compensation claims manager they have lost income or foregone employment as a result of providing this assistance. This evidence can include:

- pay slips demonstrating less overtime worked for that period, with a supporting letter from the employer;
- pay slips demonstrating fewer hours of work if casually employed, with a supporting letter from the employer;
- evidence of reduced hours of work such as from full time to part time;
- letter of resignation giving reasons;
- letter of termination by employer outlining the reasons for the loss of job.

The Guidelines state the maximum hourly fee amount for which an employer is liable under the Act for gratuitous domestic assistance services is the hourly rate calculated by dividing by 35 the amount estimated by the Australian Bureau of Statistics (ABS) as the average weekly total earnings of all employees in New South Wales from time to time. Compensation is not payable for more than 35 hours per week.

Kajic's employer argued that any compensation payable for the cost of the relevant domestic assistance should be limited to the amount of lost income of the care provider.

Section 60AA(3) provides the carer must have either lost income or foregone employment as a result of providing the assistance. There is no mention of any amount value or limitation.

In essence, the care provider must only prove they have lost income rather than establishing an amount of lost income.

The President found the introduction of Section 60AA in the Act was intended as a remedial provision to ensure the long term care needs of the most seriously injured workers are met by the statutory scheme. There was no legal obligation on family

members to provide domestic assistance and personal care although it is often the case these family members willingly provide such care. If they do not, then professional carers would need to be engaged.

The President concluded *Section 60AA(3)* can only be read as a qualifying provision or evidentiary threshold. The section merely provides the carer must have either lost income or foregone employment as a result of providing the assistance. Once the carer has passed through this evidentiary gate, the compensation should not be limited to or measured by, the extent of the lost income or foregone employment.

The President specifically discounted WorkCover's assertion that *Section 60AA(3)* should be read together with clause 7 of the Guidelines to limit compensation for gratuitous domestic assistance services to the actual amount of the carers lost income or the value of income from forgone employment. He commented this assertion was unsupported by any reasoned argument or authority, and was inconsistent with the proper construction of the Act and Guidelines. The President focused on the Parliamentary intention of the legislation which was to beneficially provide for the long term care of the most seriously injured workers.

In essence, a workers' carer will simply need to demonstrate they have either forgone or lost income whilst providing domestic assistance to an injured worker. Once this evidentiary threshold is met, the amount to be awarded is in reference to the number of hours given to the injured worker not the forgone income. Any care provided by someone who has not lost or forgone income will not be entitled to compensation. The limitations on paid care is the "capping" of total paid care hours at 35 per week. Any care in excess of 35 hours per week will not attract compensation for domestic assistance. The total amount paid per week will remain average weekly earnings of a NSW employee as determined by the Australian Bureau of Statistics.

OH&S Roundup

Substantial Penalty For Leasing Contractor

Metropolitan Demolitions Pty Limited and a director of the company recently received fines of \$110,000.00 and \$10,000.00 respectively in connection with prosecutions under the Occupational Health and Safety Act following an incident when the demolisher's employees entered an exclusion/drop zone whilst an excavator was operating on a level above them and the excavator knocked some bricks into the exclusion zone.

The employees had entered the exclusion zone for the purposes of refuelling the excavator. The refueling of the excavator required the use of an electrically powered pump to pump the diesel from the tank on the ground level via a hose up to the excavator on level 5. The fuel tank and the pump were required to be moved into the exclusion or drop zone during the refueling process.

There was no documented risk assessment or safe work procedure for refueling machines on the upper levels of the building being demolished. Not all employees of the demolisher had been at a lunch time meeting when refueling of the machines had been discussed. It would have been reasonably practical to eliminate the hazard by relocating the plug in point of the electrical lead to the fuel pump to refuel the machines to another area of the demolition site. Whilst there were comprehensive safe work method statements they were deficient in that they failed to accommodate the specific circumstances of the accident.

An inadequate risk assessment in this case with the significant potential of harm resulted in a fine of \$110,000.00 and \$10,000.00 against maximum potential penalties of \$550,000.00 and \$55,000.00 respectively.

Manslaughter Conviction For Workplace Fatality

The NSW Industrial Relations Commission was recently called on to assess a penalty for a breach of the *Occupational Health & Safety Act* arising out of a fatality when a worker fell from a roof. The penalty imposed was \$5,000.00 however more surprising was the fact that the employer had previously been convicted for manslaughter arising as a consequence of the incident.

David Smith was a sole trader and had quoted to remove and replace roofing on a warehouse site. His crew consisted of a roof plumber and leading hand, a metal roofer, a roof labourer, a subcontractor and his partner (Davis) who provided administration services. Davis walked across the roof stepped onto a sheet of poly-carbonate near the ridge of the roofline and the sheet gave way as well as the safety mesh under it and she fell 9.6 metres to the ground suffering fatal head injuries.

The safety mesh had been fitted the day before the incident. Davis was Smith's life partner as well as being his business partner. As a consequence of the accident Smith lost his life partner, his business partner, his business, his house and his relationship with his step children.

Effectively there was no supervision of the person who performed the tying off of the safety mesh. Smith conceded that if he had checked the safety mesh he would have detected the defect and fixed it.

The Industrial Relations Commission heard that Smith had been charged with manslaughter which is an offence which carried a maximum penalty of 25 years imprisonment. The actual charge advanced against Smith was under Section 18 of the *Crimes Act* for the felonious slaying of Judith Davis. A plea of guilty was entered and he was sentenced to a term of imprisonment of 2 years. The sentence was suspended on the basis that Smith entered into a good behaviour bond for the same period.

Notwithstanding the criminal conviction the Industrial Relations Commission proceeded to impose a fine upon Smith for a breach of the *Occupational Health & Safety Act*. As Smith had lost his life partner, his business, had been bankrupted and was now forced to live in a granny flat and was only working casually and no longer conducted his own business, a fine of \$5,000.00 was determined as the appropriate penalty.

The case serves to highlight that breaches of the *Occupational Health & Safety Act* which result in fatalities can lead to criminal prosecutions and a conviction for manslaughter in NSW as well as a fine for a breach of OH&S legislation.

\$250,000 Fine For Electrocution

Blue Circle Southern Cement were recently fined \$250,000 for a breach of the Occupational Health & Safety Act arising out of circumstances where an employee was electrocuted whilst performing electrical work on a switch board when his head came into contact with a row of exposed live terminals. The employee that was fatally injured was employed by a contractor who had been engaged by Blue Circle Southern Cement.

Employees had opened a fuse switch located on the low voltage switch board and there was no labeling in the vicinity of the fuse switch which advised that the isolator did not isolate all of the electrical installations. There were electrical diagrams which were located in the switch board however the Court noted the risk in the circumstances of the offence arose from multiple power sources to the switch board and required to work near live terminals. The Court noted it was not simply a failure to instruct the worker that electrical drawings were located in the switch room but Blue Circle Southern Cement employees were mistakenly of the view that the isolation switch isolated the whole board.

After the incident the front door of the control room was labelled to clearly identify the external supply, a label was placed on the fuse to advise that it did not isolate the control supply, and the exposed terminals were replaced and located behind locked covers. Blue Circle Southern Cement ensured that all labelling reflected the electrical drawings and an isolation procedure was developed

In the circumstances a fine of \$250,000, a significant fine was imposed noting that the maximum penalty was \$825,000 rather than \$550,000 as Blue Circle Southern Cement had previous convictions even though they attracted relatively minor penalties and had occurred along time. Previous OH&S convictions had resulted in penalties ranging from \$1,000 to \$7,500 and the offences dated back to April 1978, December 1991, August 1999 and March 2000.

Employment Roundup

Big Changes To Industrial Relations In NSW

The NSW Government has decided that all NSW employees in the private sector currently covered by the NSW Industrial system (mainly sole traders and partnerships) will move into the National Scheme from 1 January 2010.

From 1 January 2010 the Commonwealth Government's *Fair Work* legislation will apply to all NSW private sector employers and the NSW Industrial Relations Act, 1996 will no longer apply.

Estimates are that more than 200,000 small businesses and charities in NSW will be affected by this change.

NSW was the second last jurisdiction to join the National Scheme and only Western Australia is yet to commit their industrial relation powers to the Commonwealth Government.

The change will sound an end to State Awards in NSW in the private sector and Modern Awards, the National Employment Standards, and obligations in relation to Enterprise Agreements which are the cornerstones for the *Fair Work* legislation will apply to all NSW Private sector employers and employees.

Employees and employers in the NSW public sector and the local government sector will not be subject to the change.

NSW will also retain its laws which apply to workplace health and safety, workplace surveillance and anti-discrimination as well as public holiday, shop trading and long service leave.

NSW private sector employers and employees will now have one industrial relations platform to regulate industrial relations: Fair Work Australia and the *Fair Work* legislation.

Small Business Fair Dismissal Code Fails To Protect Employer

Commissioner Deegan of Fair Work Australia handed down a decision on 26 October 2009 in the matter of *French - v - Lufra Investments Pty Limited t/as Best Western Lufra Hotels*. The employer argued it had complied with the Small Business Dismissal Code (the "Code"). However, the Commissioner determined that the dismissal for alleged serious and willful misconduct was not made out and as such the Code did not protect the employer from French's unfair dismissal claim.

French had been employed as a maintenance man with the employer since May 2004. He was directed on 7 July by one director to clear out a shed at the hotel to enable goods arriving from China to be stored. It became apparent the other director's son had stored his own items in the shed.

The director who gave the instructions to clear out the shed allegedly became upset and told Mr French to leave and never come back. The employer argued Mr French had been summarily dismissed for serious misconduct which was constituted by his refusal to carry out a lawful and reasonable instruction that was consistent with his contract of employment.

Section 385 of the *Fair Work Act, 2009* (the "Act") provides:

"A person has been unfairly dismissed if the FWA is satisfied that:

- (a) the person has been dismissed; and*
- (b) the dismissal was harsh, unjust or unreasonable;*
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
- (d) the dismissal was not a case of genuine redundancy."*

The Code provides that it is fair for an employer to dismiss an employee without notice or warning where the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal.

Serious misconduct is defined in Regulation 1.07 of the Fair Work Regulations, 2009 as:

"Serious misconduct having its ordinary meaning;

- *Willful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;*
- *Conduct that causes serious and imminent risk to the health and safety of a person or the reputation, viability or profitability of the employer's business;*
- *Theft, fraud or assault;*
- *Being intoxicated at work where the employee is so impaired that the employee is unfit to be entrusted with his or her duties;*
- *Refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment."*

The Commissioner was not satisfied that French's conduct in initially refusing to restore the shed to its former state or refusing to discuss the matter with one of the directors some short time later was, *"in all the circumstances willful or deliberate*

behaviour or in fact conduct so serious as to justify summary dismissal."

The Commissioner then considered whether the dismissal was harsh, unjust or unreasonable. Section 387 of the FWA provides the FWA must take into account in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable:

- Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- Whether the person was notified of that reason; and
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- If the dismissal related to unsatisfactory performance by the person - whether the person had been warned about that unsatisfactory performance before the dismissal; and
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- Any other matters that FWA considers relevant.

The Commissioner noted the letter of termination to French set out two reasons for his dismissal:

- Firstly, he continued to discuss the employer's business and take direction for his work program from one director despite having been instructed not to do so by the other director.
- Secondly, he failed to perform lawful tasks within his skills as directed by one of the directors.

The Commissioner was not satisfied either of these reasons was a valid reason justifying French's dismissal. It was noted that whilst Mr French was both notified of the reasons for his dismissal and afforded an opportunity to dispute the reasons, he was not given the opportunity to put his version of events prior to the termination taking effect.

Whilst the employer was a small business and did not have a dedicated human resources management specialist, it did not justify the "*deplorable*" way French had been terminated.

The Commissioner found that had French not been unfairly dismissed he would have continued to be employed by the employer indefinitely. The Commission intended to make an order compensating the applicant for any reduction in remuneration he suffered since his dismissal.

Unfair dismissal legislation has changed for dismissals after 1 July 2009. The Code provides a framework for small employers to follow in avoiding unfair dismissal claims when it terminates employees. However, employers should be aware that following the Code does not provide any ultimate protection from an unfair dismissal claim as was the case in *French - v - Lufra Investments Pty Limited*.

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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