

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on the employment and insurance market in Australia. In this month our feature article deals with the High Court's recent decision concerning the liability of a principal for the actions of its contractors. We can be contacted at any time for more information on any of our articles.

Are You Liable for Your Contractor's Actions?

When will a principal be liable for the actions of its contractor? The law of vicarious liability traces its origins to the master servant relationship and agency principles.

The law recognises that employers are liable for the actions of their employees whilst those employees are acting in the course of their employment. In addition persons who engage agents that act within their authority are responsible for the actions of those agents.

An issue of responsibility can also arise where contractors are engaged and are required to hold themselves out as representatives of the principal and the contractor may not act in a truly independent manner.

Generally when considering such issues the courts turn to a consideration of the nature of the relationship and whether or not the relationship is one of employer/employee or independent contractor.

The determination of this at issue has not always been enough. Some businesses engage independent contractors and kit them out in uniforms which give the impression that the independent contractor is part of that business. Some businesses use independent contractors to deal with sudden increases in demand for services and whilst that demand remains the contractors find they are working almost exclusively for the business.

Businesses need to be wary when independent contractors are engaged as they may be responsible for the actions of their independent contractors.

The High Court has recently clarified the circumstances where a principal will be vicariously liable for the actions of its contractor. Fortunately those situations will be very limited.

In *Sweeney v Boylan Nominees* and others the High Court considered a personal injury claim which resulted in an award for damages of some \$43,000.00. Liability had been imposed by a trial judge on a principal who had engaged Mr Comminos to carry out work on its behalf.

Mrs Maria Sweeney was injured when a refrigerator door in the shop of a service station in Pymble, a Sydney suburb, fell off its hinge and hit her on the head. The incident was recorded by a video camera.

Earlier in the day, a defect or hazard of the door had been reported by the proprietors of the service station ("the Patels") to Boylan Nominees Pty Limited trading as Quirks Refrigeration. Boylan owned the refrigerator. It leased it to Australian Co-operative Foods Limited who placed it in the service station shop pursuant to a further lease. Under the "Master Operating Lease Agreement", Boylan agreed to service and maintain the refrigerator "in a proper and workmanlike manner".

Pursuant to the Patels' notification, Mr Nick Comminos arrived at the service station and partly dismantled the door of the refrigerator. He purported to affect a repair and to test the door, demonstrating the apparent absence of defect to the Patels' attendant. The defect that had

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originally occasioned the Patels' report to Boylan was not in fact repaired. Mr Comninos had failed to fix it and this constituted negligence on Mr Comninos' part and that such negligence was the cause of Mrs Sweeney's injuries.

Mrs Sweeney did not sue Mr Comninos. Her action was brought in the District Court of New South Wales against the Patels (as occupier of the premises in which the hazardous refrigerator door existed) and Boylan (allegedly responsible for the maintenance and upkeep of the refrigerator and for the negligent repair of the defective door by Mr Comninos).

The primary judge found that the relevant negligence was that of Mr Comninos and that Mrs Sweeney's damages amounted to \$43,932. These findings were not challenged in the High Court.

The real issue was the relationship between Boylan and Comninos. The trial judge found the relationship had the following features:

- Comninos had no formal or written contract with Boylan.
- Comninos was supplied with no uniform, whereas Boylan's employees wore a shirt with its insignia. This differentiation was unlikely to have been known by Mrs Sweeney. It may not have been noticed by the Patels.
- Comninos used his own van.
- Comninos was not paid wages by Boylan nor were superannuation payments made for him.
- Whereas Boylan's employees filled in daily service reports, contractors like Mr Comninos, who were used as work pressure required in place of employees, rendered weekly invoices.
- Boylan regarded Mr Comninos as a qualified tradesperson.
- Boylan required contractors to provide their current liability and also their worker's compensation [details].
- Comninos performed work for Boylan on a daily basis;
- Comninos performed the same work as Boylan's employees, doing the same activities on its behalf as Boylan's work requirements necessitated.
- Comninos proceeded to Boylan's jobs at the direction of Boylan's employees.
- Comninos regularly attended at Boylan's premises to obtain from Boylan parts necessary to effect repairs, doing so in the same manner as employees.
- Boylan was fully aware of the regular course of work undertaken in this way by Mr Comninos on its behalf.
- Boylan provided Mr Comninos with a book of service reports bearing the title "Quirks Refrigeration" which reports Mr Comninos provided to Boylan's customers on behalf of Boylan.
- provision of service reports, for execution by the customer, was part of Boylan's intended relationship with its customers.
- the form authorised Mr Comninos to collect the "amount due" to Boylan from its client and described him as "our mechanic".
- when Boylan reported Mrs Sweeney's injury to its public liability insurer, it represented Mr Comninos as being "our mechanic" and described his activities as part of Boylan's own acts in tightening the door screws of the defective refrigerator.

In the original trial the primary judge concluded that Boylan was vicariously responsible for the consequences of Mr Comninos' negligent repair of the refrigerator door. The trial judge concluded Mr Comninos was acting as a servant or agent of [Boylan] with the authority and the approval of [Boylan] to undertake the work that he did. Effectively Comninos was found to be an employee.

An appeal to the Court of Appeal followed with that Court concluding that Mr Comninos was not an employee of Boylan. It decided that Mr Comninos was in essence carrying on a trade or business of his own. In particular, the Court of Appeal held that the mutuality of obligations, normal to an employer/employee relationship, was missing from this case because "Mr Comninos was free to accept or decline work" from Boylan. This conclusion led the Court of Appeal to consider whether Boylan was nonetheless liable for the acts of Mr Comninos as an agent or representative but the conclusion was that it was not liable.

The appeal to the High Court followed. A majority of 5 judges of the court in a joint judgement concluded that:

"the mechanic was not an employee of Boylan. He conducted his own business. It may be that it could be inferred that he did that through, and as an employee of, the company whose name provided the name advertised on his vehicle. But this was not a matter to which close attention was given in evidence at trial and it is not necessary to pursue it to its conclusion. That the mechanic was engaged in a business other than that of Boylan was demonstrated by a number of circumstances but chief among them were his invoicing Boylan for each job he did and Boylan's concern to verify that the

mechanic had proper workers' compensation and public liability insurance. The interposition of the mechanic's company would, of course, give further support to the conclusion that he was engaged in a business other than that of Boylan. The mechanic or, if it were the case, his company, was engaged from time to time as a contractor to perform maintenance work for the respondent. Boylan did not control the way in which the mechanic worked. The mechanic supplied his own tools and equipment, as well as bringing his skills to bear upon the work that was to be done. And... the mechanic was not presented to the public as an emanation of Boylan."

The Majority of the High Court found that Comninos did what he did for the benefit of Boylan in attempted discharge of its contractual obligations. But he did what he did not as an employee but as a principal pursuing his own business or as an employee of his own company pursuing its business. The conclusion that the mechanic was an independent contractor was held to be determinative of the issue and Boylan were not vicariously liable for Comninos' actions.

But one of the High Court judges disagreed.

Kirby J concluded that Comninos was not an employee but that was not the end of the issue. Kirby J queried whether the primary judge correctly concluded that Mr Comninos was an agent of Boylan, acting not in a wholly independent capacity, but as a representative of Boylan, thereby giving rise to vicarious liability on Boylan's part for his negligence? If the judge was correct in that respect his orders would be upheld on that footing notwithstanding the erroneous finding of employment.

Kirby J referred to a principle that had stood in Australian law for more than 75 years as a result of a decision in *CML v Producers and Citizens Co-operative Assurance Co of Australia Ltd* where CML were held liable for defamatory comments of Mr Ridley who was a canvasser for the sale of CML policies. The High Court in that case concluded:

"In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal. But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity."

Did Comninos fall within this representative capacity? Kirby J concluded he did. Kirby J concluded the result was that a person such as Mrs Sweeney was entitled to treat Mr Comninos as the representative of Boylan's "refrigeration company", just as the Patels, by inference, believed he was.

Kirby J stated

"If Boylan complains about having to assume vicarious liability for the wrongs done by Mr Comninos, they may be answered in the way contemplated by the CML principle. They should not have put Mr Comninos into the position that he could represent himself as Boylan's agent. They should have taken steps to make it plain to third parties that people, such as Mr Comninos, were not their "representatives" but represented their own business alone, being a separate, independent enterprise. At trial Boylan should have joined Mr Comninos as a third party liable to indemnify it or to contribute to any judgment. Because, to the contrary, Boylan armed Mr Comninos with the means to make the representations that he did (and took no steps to correct such representations or claim indemnity or contribution) Boylan must accept the legal consequences. "

Kirby J concluded that it followed that it was open to the primary judge to hold that Boylan was vicariously liable for the wrong committed by Mr Comninos, its representative, and that this was the cause of Mrs Sweeney's injury and that the Court of Appeal erred in disturbing that conclusion and the judgment at trial.

Nevertheless Kirby J did not favour the adoption of a rule which exposes a principal to vicarious liability in respect of torts committed by an independent contractor in circumstances where the contractor "represents" the principal simpliciter.

The majority judgement of the High Court determines the issue but what were the views of the majority in relation to the CML principle. The majority stated

"The conclusion reached in Colonial Mutual Life, that the party engaging an agent (albeit as an independent contractor) to solicit for the creation of legal relationships between that party and others is liable for the slanders uttered in the course of soliciting proposals, .. stands within those bounds because of the closeness of the connection between the principal's business and the conduct of the independent contractor for which it is sought to make the principal liable. The relevant connection is established by the combination of the engagement of the contractor as the agent of the principal to bring about legal relations between the principal and third parties, and the slander being uttered in the course of attempting to induce a third party to enter legal relations with the principal."

The majority also concluded:

"But the wider proposition that underpinned the argument of the appellant in this case, that if A "represents" B, B is vicariously liable for the conduct of A, is a proposition of such generality that it goes well beyond the bounds set by notions of control (with old, and now imperfect analogies of servitude) or set by notions of course of employment. These bounds should not now be redrawn in the manner asserted by Comminos. Hitherto the distinction between independent contractors and employees has been critical to the definition of the ambit of vicarious liability. The view, sometimes expressed, that the distinction should be abandoned in favour of a wider principle, has not commanded the assent of a majority of this Court."

The High Court's ruling which is found in the majority judgment will give businesses and their insurers some comfort that a principal is not vicariously liable for the actions of their subcontractors except in limited circumstances. It will always be necessary to carefully examine the relationship to determine whether or not the person engaged is truly an independent contractor. If they are a truly independent contractor then there is a good chance that the principal will not be vicariously liable for the contractor's actions.

Proposed Amendments to Occupational Health & Safety in New South Wales

The New South Wales Government has recently telegraphed proposed changes to occupational health and safety legislation in NSW. A draft bill has been published and public comment has been invited. The closing date for public comment was 18 May 2006.

The NSW OH&S Act 2000 has been reviewed and the proposed bill seeks to amend the 2000 Act and provide further clarification of the duties imposed by that Act. A number of new concepts will also be introduced.

One of the objects of the new legislation will be to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or, if that is not reasonably practicable, reduced to the lowest level that is reasonably practicable.

The following important features can be extracted from the proposed legislation:

The New Duty-the Concept of Ensuring Health and Safety.

The proposed legislation seeks to explain the duty imposed on employers, controllers of premises, owners and operators of plant and equipment and manufacturers. The duty imposed will require persons to eliminate risks to health and safety so far as is reasonably practicable and if it is not reasonably practicable to eliminate the risk, it must be reduced to the lowest level reasonably practicable.

The following matters are taken into account in determining what is reasonably practicable:

- What the person knows or ought reasonably know about the hazard giving rise to the risk.
- The likelihood of the risk eventuating.
- The degree of harm that would result if the risk eventuated.
- What the person concerned knows or ought reasonably know about ways of eliminating or reducing the risk.
- The availability and suitability of ways to eliminate or reduce the risk.
- The cost of eliminating or reducing the risk.

In essence, the concept of reasonable practicability is introduced in relation to the duties imposed by the 2000 Act.

These changes have been modeled on equivalent provisions in the Victorian legislation.

Liability of Officers of Corporations

The OH&S Act 2000 provided a regime where persons concerned in the management of corporations were deemed to have committed the same offence as a company if the company contravened any occupational health and safety legislation or regulation. A new provision will be introduced.

The new legislation will alter the position. If a corporation contravenes the OH&S Act or regulations and the contravention of the provision is an offence, then an officer of the corporation will be guilty of an offence if the contravention is attributable to an officer failing to take reasonable care.

In determining whether or not an officer fails to take reasonable care, regard must be had to the following:

- What the officer knew about the matter concerned.
- The extent of the officer's ability to make, or participate in the making of, decisions that affect the corporation in relation to the matter concerned.
- Whether the contravention by the corporation is also attributable to the act or omission of any other person.
- Any other relevant matter.

A prosecution can be brought against an officer may be pursued even if the corporation is not prosecuted or convicted. Once again, the new provision models the approach adopted in Victoria.

A New Concept - Enforceable Undertakings

In an attempt to change the focus from prosecutions to safety enforcement, the new legislation introduces the concept of written undertakings that can be provided by employers following the contravention of OH&S legislation.

An employer will be able to enter into an undertaking which will be in the form of a written agreement to behave in a particular way in the future. If the employer enters into a written undertaking with WorkCover, the undertaking will be lodged with the Industrial Registry of the New South Wales Industrial Commission and the Industrial Commission will have the power to enforce the undertaking.

There is a benefit for employers who enter into enforceable undertakings as WorkCover will be prohibited from prosecuting the employer for a breach of the OH&S legislation and regulations where that breach or contravention is the subject of the undertaking.

The undertaking will have effect as if it were an order of the court and the Industrial Commission will have wide powers to deal with any breach of an undertaking. Undertakings can be withdrawn with the consent of WorkCover but the withdrawal of an undertaking would in all probability lead to a prosecution.

WorkCover may well seek onerous conditions in undertakings over and above the obligations imposed upon employers and the Occupational Health and Safety Act and regulations. Nevertheless spending on safety is likely to be more palatable to an employer than payment of a fine.

WorkCover Will Now Consult

Employers have complained that WorkCover no longer participates in consultations with employers in relation to specific duties. To address this concern the new legislation will permit employers to consult WorkCover and receive advice on safety issues.

There will be capacity for WorkCover to provide compliance advice which will give persons, upon whom OH&S duties are imposed, the opportunity to seek advice from WorkCover about relevant duties. The intention is to allow WorkCover to provide practical guidance to specific employers. Nevertheless, any advice given by WorkCover will not give rise to any liability or other claim against WorkCover or a defence to any WorkCover prosecution.

WorkCover Interviews

It is proposed that WorkCover inspectors will now have the capacity to record oral evidence given by a person during interviews. The recording can be by audio, video or other recording and the consent of person to the recording is not required.

Entry and Inspection Powers

Authorised representatives of unions will have powers to enter premises that the representative has reason to believe is a place of work where its members or persons who are eligible to be its members work and the entry can be for the purpose of discussing matters relating to occupational health and safety. The representative can discuss health and safety issues with any person who wishes to take part in that discussion but any such discussion may take place only when the member or person is on a work break (including a meal break).

The authorised representative is required to give the occupier of the place of work written notice of the entry and the reasons for the entry at least 24 hours before entering the premises.

New Powers for the OH&S Committee

The chairperson of the OH&S committee and the OH&S representative for the purposes of protecting employees represented by that OH&S representative (being employees not represented by an OH&S committee) will have the capacity to issue safety recommendation notices. The safety representative can issue a notice if they believe on reasonable grounds that an employer is contravening the OH&S Act or regulations or has contravened such a provision and it is likely that the contravention will continue or be repeated.

A safety notice may include a safety recommendation about remedying the contravention within a period of at least 8 days after the issue of the notice.

The safety recommendation notice cannot be issued until the safety representative has consulted the employer in accordance with applicable consultation arrangements established at the place of work. The safety recommendation notice must state the safety representative's belief on which the issue of the notice is based, the grounds for that belief, the provision of the Act or regulations in respect of which the belief is held, include information about the employer's right to seek a review of the notice by an inspector and be in the form approved by WorkCover.

An employer who has received a safety recommendation notice may, within 7 days, request WorkCover to arrange for an inspector to attend the place of work to inquire into the matters the subject of the notice. If the employer has not acted on the notice in 7 days the safety representative can request the attendance of a WorkCover inspector.

A WorkCover inspector must attend the place of work as soon as possible after the request but not later than 14 days after the request and may determine whether or not the notice conforms to the Act and the inspector may confirm the notice or withdraw the notice.

The Inspector will issue improvement notices or prohibition notices if the notice is to be confirmed and the usual consequences of such notices will flow. If the notice is withdrawn reasons will be provided by the Inspector. There are rights of appeal to the Industrial Magistrates Court in respect to the inspector's decision.

It is an offence for an employee safety representative to misuse their powers with the maximum penalty of \$4,950 for a repeat offender or \$3,300 for a first offender. In addition, WorkCover has the power to withdraw the authority conferred on any person to issue safety recommendations if it is satisfied that the person has misused their power.

General

The proposed legislation is likely to pass through parliament quite quickly and the government intends to have the entirety of the provisions commence before 1 October 2006 with the majority of the provisions commencing as soon as the legislation has passed, perhaps as early as the June sittings of Parliament.

The landscape in New South Wales is changing as occupational health and safety legislation in Australia continues to evolve.

Definition of "injury" under CTP legislation continues to contract

In our special edition of GD News April 2006 we highlighted changes made by the NSW Government to tighten the definition of 'injury' under the *Motor Accident Compensation Act 1999* ('MACA').

Essentially, those changes removed that part of the existing definition which related to "defects" in motor vehicles. One of the effects of the change was to limit the circumstances where an employee injured at work could bring a Motor Accident claim against his or her employer.

Now the Courts seem to be following a similar line in limiting the circumstances where an injury can qualify for the right to damages offered under MACA - but this time with a result that allows a claim for damages to proceed rather than be defeated.

In *Inasmuch Community Inc v Bright [2006]NSWCA 99* (2 May 2006) the plaintiff was inspecting goods at the defendant's premises. A truck of the defendant was parked nearby, with its rear doors open and unsecured. A gust of wind blew a door so that it struck the plaintiff. She was injured.

The defendant sought to defeat the plaintiff's claim by saying that her injury was the result of and caused during a 'collision' with a motor vehicle, and was as a result an 'injury' under MACA. If so, the defendant argued, her claim could not be maintained because she had failed to comply with the detailed procedural steps to bring a motor accident action.

The NSW Court of Appeal disagreed with this reasoning. It said:

- 'injury' under MACA requires both a temporal (caused during) and a causal requirement (result of)
- the definition of injury is to be construed in accordance with the intention of the legislature;
- an intention of the legislature relevant to 'injury' is to restrict previous overbroad interpretations of CTP legislation
- 'collision' must be construed so as to give effect to the objects of MACA as a whole

On the facts of this case, and in accordance with the objects of the legislation, there was no 'collision', and hence no 'injury' within MACA. The plaintiff then was free to pursue her claim.

It is of interest to see how the Court placed such emphasis on the 'object and purpose' of the legislation. CTP insurers have long wished that courts would do this more often. Some cynics might suggest though that the "purposive" approach here was adopted because it saved the injured plaintiff's claim. We can only wait and see if the same approach will be used to the benefit of defendants.

Breach of Construction Safety Regulations Leads To Damages

Jamie Adams was injured on 18 May 2000 when he fell more than 7 metres from the roof of a residential property that was under construction in Strathfield. At trial Adams sued five defendants: Jenny Ekonomou, the owner; John Ekonomou, her husband; Jem Builders Pty Limited, the company that was owned and controlled by Mr Ekonomou; Vaga Pty Limited T/as Raftarail, a firm that had fixed a safety rail near the edge of the roof; and Balesfire Pty Limited T/as The Gutter Shop ("Gutter Shop"), a guttering firm. Gutter Shop had contracted to supply and install the guttering on the property and had engaged Adams as a sub-contractor to do the installation.

At trial, Adams was successful in his claim against Gutter Shop but unsuccessful against all other defendants. The trial judge found that Gutter Shop owed a duty of care to Adams and there had been a breach of duty of care.

Gutter Shop appealed. The appeal was on two bases. Gutter Shop challenged Adams' verdict against it. In addition, Gutter Shop sought indemnity and/or contribution from the other defendants to the original trial with the exception of Raftarail.

The site belonged to Mrs Ekonomou and Mrs Ekonomou had obtained an owner-builder permit under the *Home Building Act 1989*. The work that was being carried out involved erection of a new residence intended for occupation by Mr and Mrs Ekonomou and their family. Mrs Ekonomou was involved in the decision-making but performed no hands-on role. She also attended the site on occasions. Mr Ekonomou performed a role equivalent to that of head builder and organised the tradesmen and contractors. Jem Builders, his company, had received invoices to Gutter Shop.

Adams arrived on site on 18 May 2000. When Adams arrived at the site he saw the safety fence around the roof. The fence was set back about half a metre from the edge of the rafters. The setback of the safety fence prevented Adams from working inside the rail as he had done on many occasions previously. When Adams found the site in this condition he contacted Mr Pike of Gutter Shop, and indicated that there was no way for him to attach his harness to the roof. Nevertheless, Adams commenced installing the guttering without the protection of any harness or scaffolding. Adams fell to the ground more than 7 metres when he brushed against a protrusion on the fence and lost his balance.

The Court of Appeal noted that Adams was a skilled and relatively experienced gutterer and had his own safety harness and knew how to use it. Adams was able to perceive the risk involved at the site himself. The Court noted that Gutter Shop had quoted for a job before the roof was erected and it was never intended that Gutter Shop would organise a safety rail or scaffolding. The Court ultimately concluded that Gutter Shop owed no duty of care to Adams in the circumstances. In relation to Mr and Mrs Ekonomou, the Court concluded that both were occupiers but had discharged their duty of care in the circumstances.

The Court also examined the allegation that there was a breach of the Construction Safety Regulations 1950 (which have now been repealed), in particular regulation 73 and 74.

Regulation 73 provides that:

"Any person who directly or by servants or agents carries out any construction work shall take all measures that appear necessary or advisable to minimise accident risk and to prevent injury to the health of persons engaged in construction work and for this purpose, without limiting the generality of the foregoing, he shall, subject to Regulation 74:

"Provide suitable and safe scaffolding, which shall conform to the requirements of these regulations, for all work which cannot be done safely by a person standing on permanent or solid construction, except when such work can be done safely from ladders constructed in conformity with these regulations (3) provide the means by fencing otherwise for securing the safety of any person working at the place from which he would be liable to fall a distance of more than 1.8 metres. "

Regulation 74 provides that:

"Where there is a risk a person engaged in construction work may fall because there is no adequate handhold or foothold, the person in charge of the construction work shall provide:

- (a) a safety belt and safety line or safety harness and safety line complying with requirements of AS1891 for the use of that person; or*
- (b) a safety net complying with requirements of BF3193 while the work is being carried out."*

If the regulations were applicable to the defendants then the regulations were not complied with.

The Court found that the regulations were applicable to the defendants.

The Court ultimately concluded that Gutter Shop, Mr Ekonomou and Mrs Ekonomou were liable to Adams for breaches of the Construction Safety Regulations. Gutter Shop had authorised Adams to work outside the safety rail without a harness. 65% of liability was attributed to Gutter Shop and 35% to Mr and Mrs Ekonomou. The defence of contributory negligence was not available as the defendants' breach was of a statutory count. Contributory negligence is available as a defence to a statutory cause of action where the cause of action accrues after December 2002, but this was not the case.

The result is an interesting one. The Court determined that Gutter Shop and Mr and Mrs Ekonomou did not owe Adams a duty of care but this was not sufficient for them to escape liability for a breach of a statutory duty. All three breached the Construction Safety Regulations and so were liable on this basis. It should be noted that the Construction Safety Regulations were repealed on 1 October 2001 and replaced by the Occupational Health and Safety Regulations 2001 which is a very different regime.

Taxi Driver Negligent for Hitting Drunk Pedestrian

In a decision that gives some hope to plaintiffs, the New South Wales Court of Appeal has recently found a taxi driver who struck a drunken pedestrian was negligent.

Jess Jiminez was severely injured at about 11.45 pm in July 1998 when he was struck by a taxi in Park Street in the city, between the intersection of Pitt and Castlereagh Streets. Jiminez suffered brain damage as a consequence of the collision and therefore had no recollection of the collision. After the collision Jiminez was found to have a high blood alcohol content of .268 grams per 100 mls.

The driver of the taxi, Jarzebski, disappeared prior to the trial and was therefore unable to give evidence. The precise circumstances of the accident therefore remained unknown.

At the trial, evidence was given by an independent witness who was the proprietor of a coffee shop on Park Street. According to the independent witness it was not unusual for pedestrians to cross Park Street in the area where Jiminez had and lots of pedestrians were generally around on a Friday night. The trial judge found that had the taxi driver been keeping a proper lookout, he would have been able to see Jiminez crossing the road. The solicitors for the taxi driver's insurer appealed.

The Court of Appeal agreed that the taxi driver was negligent. The Court commented:

"The collision occurred at a very busy time and place. The area of Park Street in question was surrounded by places serving alcohol. It is not unreasonable to suppose that the taxi rank was located there to assist persons, who have been drinking, to go home by taxi. There were many pedestrians in the vicinity at the time. It was not unusual for pedestrians to cross the road at points other than the controlled intersections. As a taxi driver, the first appellant knew or should reasonably have known these things."

The Court of Appeal did however determine, as a consequence of the pedestrian not keeping a proper lookout, his damages should be reduced by 60%.

Drivers should take note. In busy city areas it is not sufficient to simply expect pedestrians to cross at pedestrian crossings.

No MAS Certificate Required

In what is undoubtedly a welcome decision for workers compensation insurers in NSW seeking to recover payments from CTP insurers, the New South Wales Court of Appeal has recently determined that in recovery claims brought against CTP insurers a certificate from the Medical Assessment Service of the Motor Accidents Authority deeming the injured worker to have a greater than 10% permanent impairment is not required.

Under New South Wales motor accident legislation, a person injured in a motor vehicle accident can only be awarded damages for non-economic loss if their permanent impairment is assessed at being greater than 10%. It is necessary for the permanent impairment to be assessed by the Medical Assessment Service ("MAS") of the Motor Accidents Authority. An ordinary medico-legal assessment is not sufficient.

This left workers compensation insurers seeking to recover payments made to, for or on behalf of the worker in a quandary. Pursuant to Section 151Z of the *Workers Compensation Act 1987*, a workers compensation insurer is entitled to recover damages made to, for or on behalf of the worker up to a notional assessment of damages had the worker commenced proceedings against a negligent third party in their own right. The motor accidents legislation contains no provisions for examination of injured workers by non-parties. This meant that where a workers compensation insurer attempted to recover compensation payments from the CTP insurer, it would be difficult if not impossible to assess the worker's non-economic loss if the worker did not consent to a MAS assessment.

In the decision of *Fuller v K & J Trucks Pty Limited* the Court of Appeal has determined that a certificate from MAS is not necessary where proceedings are brought pursuant to Section 151Z of the *Workers Compensation Act*. A medico-legal report or report from the worker's treating practitioners is sufficient for the Court to determine that the worker's permanent impairment is greater than 10%.

In coming to this decision the Court of Appeal noted that a claim pursuant to Section 151Z of the *Workers Compensation Act 1987* is in fact a claim for indemnity rather than damages and in these circumstances the procedural requirements of the *Motor Accident Compensation Act 1999* did not apply.

The decision will undoubtedly make things easier for workers compensation insurers bringing recovery proceedings against CTP insurers.

Changes to Domestic Assistance Claims

Since 1977 when the High Court handed down the decision in *Griffiths - v - Kirkmeyer*, a claimant has been entitled to recover damages for the cost of nursing and domestic services provided in the past and to be provided in the future by family and friends. Section 15 of the *Civil Liability Act, 2002* in NSW limits the right of recovery for damages for domestic assistance to a situation where the domestic assistance is provided for at least 6 hours a week and for at least 6 months following the injury.

In 1999 the NSW Court of Appeal held in the decision of *Sullivan - v - Gordon* that a claimant who has a claim for personal injury damages can recover damages to compensate the claimant for their loss of capacity to be able to provide domestic assistance to a dependant.

In 2005 the High Court handed down the decision of *CSR Limited - v - Eddy* which overruled *Sullivan - v - Gordon* type cases. As a consequence, in Australia, a claimant in a personal injury claim, cannot recover special damages to compensate the claimant for any loss of capacity on the part of the claimant to provide domestic services to his or her dependants.

The *Civil Liability Amendment Bill, 2006* that has been introduced into Parliament effectively retreats from the *CSR v Eddy* decision. The Bill underwent the second reading speech on 10 May 2006 but as at the time of print the Bill had not yet been passed but is likely to be passed in the next few weeks.

Essentially, the Bill operates to amend the *Civil Liability Act, 2002* to allow certain claimants with personal injury claims (including motor accidents) to recover damages for loss of their capacity to provide gratuitous domestic services for their dependants. The Bill will also provide a cap on the hourly rate for calculating the amount of *Griffiths - v - Kirkmeyer* damages that claimants with personal injury claims in respect of dust related conditions may recover. It should be noted however that the Bill does not apply to workers compensation claims.

The Act will allow a Court, in special circumstances, to award damages similar to the kind recognised by the Court of Appeal in *Sullivan - v - Gordon*. The proposed section gives the Court power to award damages to a claimant for the loss of the claimant's capacity to provide gratuitous domestic services to a claimant's dependants, but only if the Court is satisfied of the following factors:

- (a) the claimant provided the services to those dependants before the time the liability in respect of which the claim is made arose for those dependants that were born at that time, no such restriction applies for unborn children; and
- (b) the claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity; and
- (c) there is a reasonable expectation, that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant's dependants:
 - (i) for at least 9 hours a week; and
 - (ii) for a period of at least 6 consecutive months;
- (d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

Dependants of a claimant are defined to include husband and wife, de-facto partner, child, grandchild, sibling, uncle, aunt, niece, nephew, parent or grandparent or any other person who is a member of the claimant's household. Interestingly, "dependants" of the claimant includes any unborn child of the claimant.

The changes will undoubtedly astronomically increase damages in some claims.

It will be interesting to see whether or not other States follow the New South Wales lead. It will also be interesting to see what the courts make of the words "unborn child". Will the words mean a conceived child yet to be delivered or a child that can be born at any time in the future. Surely the second interpretation cannot prevail. We will wait and see.

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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