

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

Are Claims For The Interim Payment Of Damages Here To Stay?

In previous editions of GD News we have discussed the mechanism in the Civil Procedure Act in New South Wales whereby a claimant who brings a claim for damages can make an application for an interim payment whilst their claim is pending. The theory is that if an injured person does not have access to worker's compensation or another form of income whilst they are waiting for their claim to come before the Court then they can be advanced money against the judgment that they will ultimately obtain. Interim payments can also be sought in property damage claims.

Section 82 of the Civil Procedure Act, 2005 in New South Wales provides that a Court can order a defendant to make one or more payments to a plaintiff on the application of a plaintiff 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.

The Supreme Court of NSW ordered that an interim payment be made in the case of *Matouk – v – Hungry Jacks Pty Limited*, which was the first case where an interim payment was made against a defendant where liability had not been admitted. In *Hardwick – v – McSweeney (No. 3)*, another case where an interim payment of damages was sought and liability had not been admitted, the NSW Supreme Court declined to order an interim payment as the claimant was unable to establish that the claimant would obtain judgment for substantial damages. That decision held out some hope for insurers.

However, this issue has recently been considered by the NSW Court of Appeal in the decision of *Forster – v – Hunter New England Area Health Service* and the Court of Appeal ordered an interim payment even though liability was a hotly contested issue.

In this case the proceedings arose out of the death of Matthew Foster, who was the son of the first applicant and the stepson of the second applicant in the proceedings. On 11 August 2007 the deceased was taken to Manning Base Hospital at Taree suffering from abdominal pain. The hospital examined the deceased and then discharged the deceased later that day. Unfortunately the deceased died as a consequence of peritonitis, secondary to a perforated duodenal ulcer. It is alleged that the deceased's death was caused by the negligence of the hospital in a number of respects, including the failure of the hospital to properly diagnose the deceased's condition, adequately act upon the deceased's blood test results, conduct an appropriate radiological examination and properly treat the deceased. The applicants contend that as a consequence of the deceased's death they have suffered significant psychological trauma resulting in severe depression.

In December 2009 the hospital consented to an order for an interim payment to the applicants in the sum of \$20,000.00. This was received and disbursed by the applicants. On 15 February 2010 the applicants sought a further interim payment. This was refused by the hospital. During

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Issue

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the course of the application there was unchallenged evidence of a strong financial need on the part of the applicants. Expert's reports in relation to liability were tendered in the application for the interim payment of damages by both the applicants and the hospital.

The initial application for an interim payment was listed before Justice Hulme in the Supreme Court. Justice Hulme referred to the *Matouk* decision and the fact that in order for the Court to make an order under Section 82 the Court should be "comfortably satisfied" of the matters referred to in the section. This was accepted by the parties as being the appropriate test to be applied. The applicants however argued that although saying that he would, Justice Hulme did not in fact apply that test. This argument was accepted by the Court of Appeal.

The applicants also contended that there was difficulty with the expert evidence tendered by the hospital in relation to liability and argued that no weight should have been given to that report due to an absence of reasoning in that report. The Court of Appeal accepted that there was an absence of reasoning in the report and found that the trial judge was in error in giving weight to that report.

The Court of Appeal therefore determined that the only significant evidence in relation to negligence strongly favoured the applicants. The Court was therefore satisfied, on the balance of probabilities that "if the proceedings went to Trial, the plaintiff would obtain judgment for substantial damages against the defendant."

A further interim payment of \$20,000.00 was therefore ordered by the Court of Appeal.

The *Forster* decision demonstrates that a clear dispute with competing expert evidence is not enough to resist an application and it is not simply sufficient that liability is an issue and that there are competing expert opinions. It will be interesting to see if the *Forster* decision opens the floodgates that the *Hardwick* decision may have gone some way to closing.

The *Forster* decision 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.

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.

So will the floodgates open with a significant increase in applications for interim payments of damages, particularly where liability has not been admitted? Time will tell but with the added work needed for an application for interim payment of damages resulting in increased costs for injured workers lawyers we suggest that you don't hold your breathe too long. The applications will come!

GST Changes On The Way

The Federal Government has recently released the Board of Taxation's report on its review of the application of GST to cross border transactions. The recommendations when implemented will simplify the GST treatment of cross border transactions particularly for insurers located outside Australia and coverholders operating within Australia.

The main recommendations which have been accepted by the Government include:

- amending the connected with Australia rules to exclude supplies by non-residents where the supply is made to a registered business and the non-resident has no business presence in Australia;
- the supply of goods within Australia by non-resident to non-resident will not be connected with Australia where a

- recipient will not be connected with Australia;
- the registration process for non-residents will be streamlined;
- the GST Act will be amended to remove the requirement for non-resident agents to register for GST where they only make supplies for a resident agent.

The Government notes:

'the package will significantly reduce the number of non-residents who are unnecessarily drawn into Australia's GST system, through limiting the connected with Australia provisions.'

Stay tuned for developments as the legislation is prepared. The reforms in this area will take effect from 1 July 2012.

Defective Equipment – Trade Practices Act Claims

The law of negligence and the Trade Practices Act often interact where a loss eventuates as a consequence of defective equipment. The Trade Practices Act includes provisions designed to permit compensation where the person who has suffered injury ultimately dies leaving dependants who might seek to bring a claim or where other persons suffer from “nervous shock” or loss as a result of the injury. But can a negligent party who has contributed to the injuries rely on this provision to seek indemnity from the manufacturer for the compensation that must be paid? The simple answer is no however that did not avert the need for the NSW Court of Appeal to determine the issue.

The Trade Practices Act contains section 75 which applies where:

- a corporation, in trade or commerce, supplies goods manufactured by it;
- the goods have a “defect”, taking into account the matters identified in section 75(AC);
- because of the defect, an individual suffers injuries;
- a person, other than the individual, suffers loss because of the injuries; and
- the loss does not come about because of the business relationship between the person and the individual.

So does section 75AE have an extended operation which would allow a tortfeasor who is liable to compensate an injured person to recover compensation from the manufacturer pursuant to this provision? A claim of this type was recently rejected by the New South Wales Court of Appeal in *Erwin v Iveco Trucks Australia Limited*.

Erwin was the owner and driver of an international transport prime mover and semi-trailer. Iveco Trucks Australia Limited was the manufacturer of the vehicle. In November 2002, the truck was being driven by its owner when it collided with a car when the truck crossed over onto the incorrect side of the road. The driver of the car sustained serious injuries in the collision and sued both the owner of the truck and its manufacturer.

There was ultimately no dispute at the trial that the crash was caused by the failure of the steering mechanism of the truck. The truck was manufactured in 1989. It was purchased second hand by Erwin in 1999 and, by that time, had travelled over 1 million kilometres. The truck was maintained by the owner after its purchase until the crash in 2002, but there was never any preventative maintenance.

The case that was run against the owner of the truck was that he breached his duty by failing to properly inspect or maintain the truck. It was alleged that the manufacturer was negligent in the design of the steering mechanism. The owner of the truck filed a cross-claim seeking contribution from the manufacturer as a joint tortfeasor and also relied on section 75AE which was argued gave rise to an entitlement to be indemnified by the manufacturer for the compensation it may be liable to pay to the injured car driver.

At trial, the owner of the vehicle was held liable, principally as the trial judge held:

“In my view the steering did not fail as the result of any absence of reasonable care by the [manufacturer] in the manufacture or design of the truck. It was not required to design a vehicle that would continue to be safe for use after two million or so kilometres and be accident proof in the face of no servicing to the steering mechanism for at least three years and where there has been independent conduct by a third party inappropriately adjusting the universal joint pinch bolt to allow for abrasive and adhesive wear to occur and to compromise the effectiveness of the joint. The availability of another, different design that would have obviated the risk is not automatically or necessarily co-extensive with the existence, or a finding, of a breach of duty. The [manufacturer] did not breach the duty that it owed

to the plaintiff.”

At trial, the injured person succeeded against the owner of the vehicle as a consequence of the failure to maintain the vehicle. An appeal followed.

When the Court of Appeal was called on to consider the issue of negligence on the part of the manufacturer, the Court of Appeal noted that:

“..any assessment of the design precautions required of a reasonable manufacturer in 1989 must take into account the fact that the design was the industry norm at that time. While this is not decisive, in the absence of evidence that the industry practice itself was deficient or that potential safety issues had been identified at the time but not acted upon, the respondent’s adherence to the industry norm is a strong indication that a reasonable person in the respondent’s position would not have adopted additional precautions to guard against the risk.”

The Court of Appeal found that negligence could not be made out against the manufacturer as it could not be established that a reasonable manufacturer/designer would have taken one or more other precautions identified by Erwin when designing the steering system for the truck. The accident was held to be a result of a series of mistakes committed by others other than the manufacturer.

In relation to the claim under section 75AE, the Court of Appeal rejected the contention that such a claim could be maintained by a person injured by a defect in goods. Sackville JA, with whom all other judges of the Court of Appeal agreed, concluded:

“Clearly, the injuries suffered by the plaintiff, of themselves, have not caused the appellant to suffer any loss. The appellant was not, for example, a dependant or employer of the plaintiff and, indeed, had no pre-existing relationship with him at the time of the crash. Nor would the fact that the plaintiff suffered injuries, without more, give rise to any liability in the appellant. Even if the appellant’s conduct caused the plaintiff to suffer injuries, the appellant would not incur a liability to the plaintiff unless the latter could establish a breach of duty or additional facts giving rise to some other cause of action.

If one were asked to identify the cause of the appellant suffering a loss (assuming that his liability to compensate the plaintiff can be described as a “loss”), the answer would be: the appellant is liable because he breached the duty of care he owed to the plaintiff. It is true that the plaintiff would not have a cause of action against the appellant unless the appellant’s breach of duty caused the plaintiff some harm. But it is, at best, a very strained use of language to say that the appellant has incurred a liability because of the injuries sustained by the plaintiff.

The conclusion that s 75AE (1) is not intended to create a right of indemnity (see s 75AE (1) (f)) in a tortfeasor against a manufacturer who has supplied defective goods, where both have contributed to the plaintiff’s injuries, receives support from the statutory context.

In my view, s 75AE(1) of the TP Act is not intended to create a right of indemnity in a party whose negligence has caused injuries to an individual against a manufacturer who has supplied defective goods which have also caused the same injuries. Any claim for indemnity or contribution by the negligent party would fall to be determined under general principles of law or equity, or under applicable legislation.”

At the end of the day, section 75AE of the Trade Practices Act was not available to sheet home liability to the manufacturer. In the absence of negligence on the part of the manufacturer, the cross claims brought by the owner of the vehicle failed. The injured person received compensation from the owner who failed to properly maintain a very old vehicle.

Defendants will continue to seek to sheet home liability to others for losses but a negligent party who has contributed to the cause of injuries cannot rely on s75AE of the Trade Practices Act to seek indemnity from the manufacturer for the compensation that must be paid.

No Joy In Claims Against Home Owners

The NSW Court of Appeal has recently dismissed two entirely different types of claims against homeowners, both decisions again demonstrating that negligence must be proven in order for a claimant to succeed.

In the first case the Court of Appeal determined that the NSW Land and Housing Corporation was not liable in an action for personal injury suffered by Betty Vasilikopoulos, the wife of a tenant of public housing, in which the NSW Land and Housing Corporation was the landlord.

Vasilikopoulos' husband had been a tenant of public housing since 1987. In 2007 Vasilikopoulos underwent two knee replacement operations and noticed problems when using the shower in the premises particularly between September and December 2007. The shower was over the bath which had high walls which persons who used the shower had to step over. As a consequence of her knee condition Vasilikopoulos had a series of falls including in December 2007 as a consequence of which she sustained significant injury. Following the fall Vasilikopoulos was in plaster for many months. Vasilikopoulos alleged that NSW Land and Housing Corporation was aware of her condition and the fact the shower was unsafe. The NSW Land and Housing Corporation examined the bathroom and took measurements but did nothing before December 2007. It appears that work was in fact carried out in 2008.

Vasilikopoulos sued the NSW Land and Housing Corporation in negligence. The trial judge determined that the NSW Land and Housing Corporation did not owe Vasilikopoulos a duty of care and in any event, if a duty was owed, such a duty had not been breached.

This was not a case where a person was sued under a contract of tenancy or a case of a visitor slipping or falling. The incident happened inside the tenant's unit. At trial the trial judge found that the landlord had let the premises in a condition that were fit for use and the problem had come about because of Vasilikopoulos' own physical condition. The Court of Appeal commented:

"It cannot be the situation that merely because the landlord considers that it has some sort of public obligation or mild obligation or it feels sympathetic towards its tenants and thus agrees to fix something and takes longer than the tenants would like for that problem to be fixed that thereupon there is some legal burden or legal duty laid upon the landlord for which it will be liable in damages if there is a breach."

The appeal was therefore dismissed. The Court of Appeal determined that NSW Land and Housing Corporation did not owe a duty to Vasilikopoulos and even if it did there was no negligence. It was not sufficient for Vasilikopoulos to demonstrate that she had fallen and that the bath was rectified after her fall.

The second case involved a claim by neighbours against their neighbouring owner/builders.

Let and Lenore Pollard owned a property located at 63 Tamworth Street in Dubbo. The adjoining property was owned by the Wilsons. After moving in the Wilsons decided to upgrade the property including the erection of a new garage with a widened driveway on the eastern boundary of the property. Mrs Wilson, as owner/builder, sought and obtained development approval from Dubbo City Council for various building works. In order to alter the garage and driveway access it was necessary to significantly lop the Jacaranda tree that was adjacent to the boundary with the Pollard property and remove a Pistachio Nut tree that was also close to the boundary.

In August 2003 the Jacaranda tree was heavily lopped but not removed but some three months later the Pistachio Nut tree was removed. The Pollards contended that the disturbance of the Jacaranda tree and the removal of the Pistachio Nut tree disturbed the sub surface adjacent to the foundations of a portion of the western hall of their house, causing cracking. The Pollards sued Mrs Wilson and the Council, claiming the costs of repairing their house. For some reason all contractors who assisted in removing the Pistachio Nut tree were not sued.

The matter proceeded to hearing in the District Court where it took 11 days. The Trial Judge found that Mrs Wilson did not owe a duty of care to the Pollards and that she was not vicariously liable for the acts of others carrying out activities in relation to her property. Further, even if Mrs Wilson did owe a duty then it had not been breached. The Trial Judge also concluded that the Pollards had not established the work on the Wilson land was the cause of any relevant damage to the property.

The claim by the Pollards therefore failed and an appeal followed.

Mrs Wilson owned the property, obtained an owner-builder licence, and lodged the relevant development applications. The Wilsons were said to have had a "common purpose" however it was Mr Wilson who ran the contractors.

Mr Wilson had effectively managed the engagement of the contractors but he had not been sued. It was therefore argued that Mr Wilson was the agent of his wife or alternatively that she sanctioned the conduct of her husband and was responsible for it. The evidence indicated that Mrs Wilson had negligible, if any, involvement in the selection and conduct of the contractors. There was no evidence that she subsequently authorised their actions in a manner that would render her liable as principal. To the contrary Mrs Wilson gave evidence of the single-minded and determined nature of her husband. Once he made up his

mind to complete a task he had a determination to pursue it and was unlikely to be deterred. Even when the prospect of trouble from the Pollards was apparent, Mr Wilson determined, with appropriate caution, to remove the pistachio nut tree. There were four crucial arguments presented by the Pollards in the Appeal that were ultimately rejected and as a result the appeal failed.

The Pollards had argued that:

- Mr Wilson was an agent of Mrs Wilson
- The contractors were the agents of Mrs Wilson and had been negligent
- The contractors were employees of Mrs Wilson and had been negligent
- Mrs Wilson owed a non-delegable duty and was therefore responsible for negligence on the part of the contractors.

The Court of Appeal in considering the allegation of agency as between husband and wife noted:

“There is not currently, nor has there ever been, any general rule of agency as between married or cohabiting couples. The question is whether in the circumstances of a particular case one is the agent of another.”

In rejecting the argument that the husband was the agent of Mrs Wilson Chief Justice McClellan noted:

“In the present case there is no evidence that Mrs Wilson was involved in the tree removals in any meaningful sense. Indeed, all the available evidence suggests the contrary. There is no evidence that Mrs Wilson was at the Wilson property at any point at which the tree works were undertaken. There is no evidence that she spoke with any of the contractors about the tree works, nor that she even spoke with her husband about which contractors would perform the work. The evidence of the conversation between Mrs Pollard and Mrs Wilson regarding the planned removal of the pistachio nut tree is at odds with an agency arrangement: the Wilsons were, it appears, not in agreement about the removal of the pistachio nut tree, but Mr Wilson was determined that it should go. There is nothing in the evidence to support a conclusion that the Wilsons impliedly agreed that Mr Wilson would act on his wife’s behalf in relation to the trees.....

If Mrs Wilson subsequently approved of conduct that was initially unauthorised, an agency relationship may arise by ratification. In that case, Mr Wilson’s actions in coordinating and supervising the tree works would be treated as though they were originally authorised by Mrs Wilson and effective to bind her as a principal It is clear that ratification may be established from the principal’s acquiescence It would seem in the present case that Mrs Wilson acquiesced in Mr Wilson’s conduct in the cutting or removal of the trees. However, there must also be evidence that the alleged agent professed to act on the principal’s behalf: “there must be some description of the principal which amounts to a reasonable designation of the principal”..... There is no evidence to this effect in the present case.”

It was also argued that the conduct of Mrs Wilson was such that she should be prevented from denying her husband was her agent. The Court of Appeal disagreed. Chief Justice McClellan with whom the rest of the Court agreed concluded that an argument based on estoppel could not succeed. Chief Justice McClellan said:

“It may be that there is an estoppel which would prevent Mrs Wilson from denying that her husband was acting as her agent To establish an estoppel there must be evidence that Mrs Wilson made a representation to one or both of the Pollards amounting to a “holding out” Such a representation may be by words or conduct, including acquiescence, but must be to the effect that Mr Wilson had authority to act on Mrs Wilson’s behalf. There is no evidence of such a representation in the present case. Mrs Wilson did not, by words, conduct or by positive act or omission, instil in the Pollards any belief that her husband had authority to act on her behalf in relation to the tree works. Whilst I am satisfied that the Pollards may have believed that Mr Wilson had authority to represent Mrs Wilson, I am not persuaded that they were led to believe this as a result of any representation on the part of the latter.”

So Mr Wilson was not the agent of his wife. As he had engaged the contractors Mrs Wilson could not be liable for the contractor’s actions even if they were agents of the person that engaged them. This finding was also fatal for the argument that the contractors were employees of Mrs Wilson. The Court of Appeal concluded:

“The principle of vicarious liability makes employers liable for the negligence of their employees where such negligence is committed within the scope of the employment. To make good liability on this basis, the Pollards would have to establish that Mr Wilson or any of the contractors were employees of Mrs Wilson. It is not enough that they may have been employees of Mr Wilson (which in itself is unlikely) because as I have found, Mr Wilson was not acting as agent for Mrs Wilson.”

The Court of Appeal also concluded on the facts that the contractors were independent contractors and not employees of the Wilsons.

Finally the argument that the home owner owed a non delegable duty failed. Justice McClellan with whom the other Court of Appeal judges agreed concluded:

“A non-delegable duty will not arise simply because one party to a joint task leaves it to the other party to perform certain aspects of that task, whether or not the second party is an agent of the first. Nor is there any general principle that a landowner or occupier owes a non-delegable duty of care to owners or occupiers of adjoining premises. The occupier’s non-delegable duty is a duty towards contractual entrants to the property, a class to which the Pollards plainly do not belong: Watson v George (1953) 89 CLR 409. Excavation and tree lopping are not, to my mind, so inherently dangerous as to merit a discussion of the “extra hazardous activities” non-delegable duty (which in any event forms no part of Australian law: Stevens v Bodribb). It is instructive to note that the High Court was of the opinion that even if an “extra hazardous activities” category of duty did exist, it would not extend to excavations conducted next to adjoining land boundaries (Stoneman v Lyons (1975) 133 CLR 550; 8 ALR 173 at 184).

I see no basis upon which it could be concluded that Mrs Wilson owed a non-delegable duty of care to the Pollards.”

Mrs Wilson had no liability for the Pollards claim.

In both cases the homeowners escaped liability. Neither of the claimants got to first base; the Court found in the circumstances the claimants were not owed a duty of care by the homeowners. The consequences of ownership of property do not include strict liability for losses flowing from injuries or damage flowing from incidents on a property. Each case will turn on its facts and a duty of care will not necessarily be owed in all situations.

The Cap On Economic Loss Claims Remains.

In New South Wales the Motor accidents Compensation Act 1999, the Workers Compensation Act 1987 and the Civil Liability Act 2002 prescribe regimes for capping the amount of damages that can be recovered for economic loss by an injured person. The Acts prescribe regimes for the calculation of damages for past and future economic loss and awards for past and future economic loss due to loss of earnings or the deprivation or impairment of earning capacity or for the loss of expectation of financial support which include caps. Essentially the Court is to disregard the amount (if any) by which the injured or deceased person’s net weekly earnings would have exceeded a set amount.

It is not uncommon to see a person derive income from their efforts through various sources including the improvement of capital assets. The NSW Court of Appeal in *Fkiaras v Fkiaras* has recently confirmed that when considering the cap it is necessary to take into account all sources of income when determining the pre accident earnings and post accident earning capacity.

Fkiaras suffered multiple injuries of an orthopaedic nature and significant brain damage. At the time of the accident in conjunction with his wife he owned either directly or indirectly a number of properties and businesses. He had become a successful business man and he had acquired skills in building construction and development and he and his wife ran businesses including a Hungry Jack’s outlet, leasing land on which he had constructed buildings, an arcade with nine shops and a nursery, a retail business known as Sportsland, an industrial development and another rental property. He controlled or operated the various businesses through a number of companies, trusts and partnerships.

The Court of Appeal noted that the starting point for the consideration of a claim for economic loss is summarised by the Court of Appeal in *Kallouf v Midis* where McColl J A summarised the principles as follows:

*“Damages for both past loss and future loss are allowed to an injured plaintiff ‘because the diminution of his earning capacity is or may be productive of financial loss’...; As McHugh J said in *Medlin v The State Government Insurance Commission* ‘the loss of earning capacity principle more accurately compensates a plaintiff for the effect of an accident on the plaintiff’s ability to earn income’.*

Although it is loss of earning capacity and not loss of earnings that is the subject of compensation, the rate of wages being earned and the rate of wage likely to be earned in the future afford a basis for assessing compensation for a loss of earning capacity ...

It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position he or she would

have been in if the injury had not been sustained ...”

The Court of Appeal also noted that in *Kaplintzi v Pasco* the New South Wales Court of Appeal when considering a claim under the Motor Accidents Act concluded:

“In my opinion, the Motor Accidents Compensation Act in general, and s.125 in particular, shows a clear legislative intention that there be an effective limit put on claims by dependants of persons whose efforts would have produced very high financial benefits to those dependants, irrespective of how the remuneration or financial gains of those persons is structured or how their wealth-creating capacity is exercised. In my opinion it would be inconsistent with this intention to give a narrow construction to ‘net weekly earnings’. It is common for persons who generate great financial benefits that these benefits not be received weekly or monthly or even yearly, and that some of these benefits be received by way of capital gains rather than income. In so far as the financial loss of dependants derives from the loss of the capacity of the deceased to generate assets for their benefit, all contributions to those assets that would have occurred through the exercise of that capacity are properly considered as earnings; and in my opinion, in so far as those earnings, when calculated as a net weekly figure, exceed the figure specified pursuant to s.125, those earnings are to be disregarded.”

The Court of Appeal concluded that earnings as referred to in the capping section is a reference to income earned by the exercise of the injured person’s earning capacity and is not merely wages or loss of wages.

In *Fkiaras’* case the earnings from his earning capacity prior to the accident substantially exceeded the economic loss cap and as his earning capacity post accident was nil he was entitled to past economic loss calculated at the rate set by the statutory caps.

Interestingly, in this case an independent claim for loss of servitium was not maintained by the various companies owned or operated by *Fkiaras*. A company is entitled to bring a loss of servitium claim when it loses the services of an employee. It claims damages from the tortfeasor responsible for injuring the employee and depriving the company from the services of the employee. This is an action known as an action per quod servitium amisit. Mitigation is always a significant issue in such a claim as the company is obliged to mitigate its damage and mitigation should include replacing that employee.

A NSW Supreme Court decision in *Mathew Chaina v The Presbyterian Church (NSW) Property Trust* is the only judgement that has dealt with the application of the economic loss capping provisions in the Civil Liability Act 2002 to such a claim. Justice Howie in that case determined that the claim for the loss of services of an employee which resulted in economic loss was not subject to the cap found in the legislation. Justice Howie concluded that it was not the intention of parliament that s 12 apply to a “quod per servitium amisit” claim. This decision was not subject to an appeal.

It would have been interesting to see whether a different result would have resulted in a loss of servitium claim was made by one of the *Fkiaras* companies. The cap on economic loss may have been side stepped by this style of claim. No doubt the time will come when the Court of Appeal is called on to consider this issue.

However, for now, it is clear that when calculating economic loss and the caps imposed by the various legislative regimes in NSW it is necessary to take into account the entire earning capacity of the injured person before and after the accident including any capital gains that would have been derived as a consequence of the exercise of that earning capacity when calculating economic loss and the caps imposed by the legislative regimes regulating awards of damages.

Watch Out For Extended Jurisdiction

The various Courts throughout Australia derive their jurisdiction from legislation in Each State and Territory. Each State and Territory has its own collection of Courts exercising power in varying ways. In New South Wales claims can be brought in the Local Court, the District Court and the Supreme Court as well as other specialist courts. The Local Court and District Court have limited jurisdictions in that there is a cap imposed on the award of damages they are entitled to make. In the District Court that cap is currently \$750,000.00 for personal injury claims under the Civil Liability Act, 2002.

Nevertheless, there are provisions in the Civil Procedure Act in New South Wales which permit the Court to enter a judgment in an amount equivalent to 50% above the jurisdictional limit where it is known that the claim made exceeds the jurisdiction and no objection to the Court’s jurisdiction has been raised by any of the parties prior to three months before the trial of the action commences.

Effectively, if a plaintiff has made a claim which will exceed the jurisdiction of the District Court and has made it clear to the defendant that it is seeking an amount that is in excess of that jurisdiction, the Court will have an extended jurisdiction unless the defendant prior to three months before the trial of the action raises an objection to jurisdiction.

In the past, some defendants thought that plaintiffs potentially placed a portion of a claim at risk where they proceeded with claims in a Court with limited jurisdiction as judgments could not exceed the jurisdictional limit. The New South Wales Court of Appeal in *Richards v Cornford* however has confirmed that the extended jurisdiction is available where a disclosure of the nature of the claim has been made to the defendant and there is no objection to jurisdiction.

So what must a plaintiff do to trigger the entitlement to extended jurisdiction?

The Court of Appeal in *Richards v Cornford* confirms that it is not necessary to identify in the Statement of Claim that the claim will potentially exceed the jurisdiction, rather it is open for a plaintiff to communicate the relevant particulars to the defendant and if the defendant does not object to the jurisdiction, the power of the Court to give judgment for an amount up to 50% above the jurisdictional limit will be enlivened.

The Court of Appeal rejected the argument that a specific amount in a Statement of Claim exceeding the jurisdictional limit was necessary to make a defendant aware that the claim would exceed the jurisdiction.

In Richards case in the District Court a claim by a truck driver who was injured resulted in an assessment of damages of \$959,670.00, exceeding the District Court's jurisdictional limit of \$750,000.00 and the Trial Judge gave judgment in the sum of \$772,818.00, that being \$750,000.00 (the jurisdictional limit) plus interest.

Richards' appealed and succeeded on the appeal. The Court of Appeal noted:

"It may be sufficient if the fact that the amount claimed exceeds the jurisdiction limit can be found in a document provided to the defendant by the plaintiff, separately from the originating process and any document containing particulars required as part of the pleadings or the disclosure exercise provided by the Uniform Civil Procedure Rules".

Defendants need to be mindful of the wish list which is often provided to a defendant by a plaintiff. If that wish list demonstrates that a plaintiff's claim exceeds the jurisdictional limit of the Court, the defendant will need to challenge the Court's jurisdiction or face an extended jurisdiction in the District Court uplifting its jurisdiction by 50%. If there is an objection to jurisdiction a plaintiff will need to remove the claim to the Supreme Court which has an unlimited jurisdiction or cop the jurisdictional limit of the District Court if the assessment of damages exceeds the jurisdictional limit. So do you play in the Supreme Court?

Workers Compensation

Christmas Party Shenanigans

Christmas parties are constant source of concern for employers and alcohol served during a Christmas party can lead to behaviour that puts a worker at risk of injury. If injuries occur during the party the worker may well have an entitlement to workers compensation benefits as was seen in a recent decision in the NSW Workers Compensation Commission.

The Commission in *Whittingham – v – Ascot Air Conditioning Pty Limited [2010]* examined the conduct of an intoxicated worker at a staff Christmas party and the unruly behaviour which led to an injury. The worker was a casual sheet metal employee who had commenced his employment in November 2008. On 19 December 2008 the employer held a Christmas party at its workshop. Approximately 10 people attended the party which commenced at midday. During the course of the party the worker became particularly intoxicated and was carrying on in a foolish manner. This included "charging" fellow workers as if he were playing a game of football. As the party continued in the afternoon the managing director of the employer also was drinking in an excessive fashion. The worker eventually suffered an injury when he "charged" the managing director, the managing director sidestepped and the worker crashed into a concrete gutter.

The employer disputed a claim for workers compensation benefits and argued that the worker's employment was not a substantial contributing factor to the injury, the conduct by the worker was outside the scope of his employment and the worker's conduct was serious and wilful.

Deputy President Roche examined the circumstances of the party and was satisfied that the worker should be entitled to compensation. He noted the party was organised and funded by the employer with the alcohol being supplied free of charge. The employees were not limited in any way to the number of drinks they could have and the managing director was also well affected by alcohol.

The Deputy President noted that the worker's behaviour at the party was obnoxious and irritable. However, this bad behaviour was fuelled by an unlimited supply of alcohol provided free of charge by his employer at a social function where his boss was also well affected by alcohol. The employer impliedly encouraged the excessive consumption of alcohol and took no effective steps to stop it when it was in a position to do so. Whilst the worker's conduct at the party was characterised as "boorish and inappropriate", it was not sufficient to take him outside the course of his employment.

With respect to serious and wilful misconduct, the Deputy President noted the word "wilful" denoted that a worker must have acted deliberately. The worker must have had knowledge of the risk of injury and in light of that knowledge proceeded to act without regard to the risk. In view of the worker's level of intoxication he was incapable of assessing the risk involved in his actions and his actions could not be described as wilful.

Furthermore, given the time and place of the injury and the general circumstances of employment, the Deputy President was comfortably satisfied that the worker's employment was a substantial contributing factor to his injury.

We would be not surprised if the employer sought to appeal the matter further. Although employees acting in a foolish way whilst drunk is often common at a Christmas party, we are of the view the particularly aggressive and violent "charging" by the worker could take the conduct outside the course of his employment. Nevertheless, as the decision currently stands, it is a timely reminder for employers to impose boundaries on their staff at staff functions. This should include a limit on the supply of alcohol at the function, intervention to stop unruly behaviour and management must lead by example.

Workers Compensation Claims- Where Does The Journey Begin Or End?

Recently whilst investigating liability for a worker's compensation claim we had cause to look at the concept of "journey" under the *NSW Workers Compensation Act, 1987* - in particular the definition of the "boundary" for a worker's place of abode or residence. Section 10 of the *Workers Compensation Act, 1987 (NSW)* provides that compensation will be payable to a worker when they receive a personal injury whilst on a journey. Specifically, sub-section 3 provides for the payment of compensation for a journey which is the daily or other periodic journey between the worker's place of abode and place of employment. A worker will cease his journey once he crosses the boundary of his property. Whilst this is clear in circumstances where the worker is living in a private, free-standing dwelling, when does the worker cross his property boundary line when he lives in a block of units or strata townhouses?

A decision of *Smith v Captain Cook Cruises (NSW) Pty Limited t/as Captain Cook Cruises and Others (2007) NSW WCC PD 123* examined the concept of a boundary for the purposes of commencing and ceasing a journey. The worker was on his way home from work to his residence in an apartment in Potts Point. Whilst walking along McLeay Street in Potts Point, the worker spotted a couple of "thugs" who he suspected were following him. He became concerned for his safety and started to run whilst being chased by the "thugs". As he tried to get inside his apartment block he was caught by the "thugs" on the top step outside the front door to the unit block. The evidence tendered in the matter made it clear that the stair and entrance were well within the boundary of the block of units in a common area of the unit block, short of the personal boundary of the worker's unit.

Deputy President Kevin O'Grady determined that consistent with a 1994 decision of *Calvert v Snow (1994)* there was no distinction between the boundary of a block of units and the boundary of a private home. Accordingly, once a worker crosses the property boundary of a block of units the worker had ceased his journey. Accordingly, he would not be entitled to compensation for an injury whilst on a journey.

The worker also framed an alternative argument that the assault had begun prior to him crossing the property line. In this regard he contended the psychological injury was the result of assault that actually commenced when he first apprehended violence when he was walking down McLeay Street in Potts Point, well before he crossed the boundary of the units. The common definition of an assault is "any act which intentionally or recklessly causes another person to apprehend immediate and unlawful violence". Accordingly, as the violence was apprehended prior to the crossing of the boundary line, he argued he would still be entitled to compensation. This argument failed as the medical evidence revealed that the physical attack suffered by the worker after he crossed the boundary resulted in a consequential psychiatric injury, not the apprehension of an

attack whilst he was still on the journey.

It is clear from this decision that there is no difference in the commencement or termination of a journey for a normal private home or units/townhouses. In both cases the termination or commencement of the journey is the boundary of the land upon which either the private house or the unit building stands.

Workers Compensation - Is Pain & Suffering Payable After Death?

Pursuant to Section 67 of the *Workers Compensation Act 1987* a worker in NSW is entitled to receive compensation for pain and suffering for a work injury irrespective of fault on the part of the employer when an assessment of whole person impairment reaches 10%. Although the legislation has always contained a provision in Section 67(5) to remove the entitlement to pain and suffering once a worker was deceased, the amendment of some of the procedural aspects of the legislation in late 2001 cast some doubt as to exactly which point in time the entitlement to Section 67 would arise and consequently be extinguished when a worker died.

In the matter of *Pintecello (as Executrix of Estate of Gino Pintecello) – v – De Martin & Gasparini*, the question of when the entitlement to compensation under Section 67 arises was examined. The worker suffered a number of injuries and received lump sum compensation pursuant to Section 66 for various parts of the body. This included compensation pursuant to Section 67 for pain and suffering.

The worker alleged he had suffered deterioration in his condition and filed an Application in the Workers Compensation Commission in early 2009. The matter was listed for teleconference on 12 June 2009 and the worker was referred to an Approved Medical Specialist (AMS) for determination of the further losses under Section 66. The AMS, Dr Wilding, examined the worker on 22 July 2009 and a Medical Assessment Certificate dated 10 August 2009 was issued. This detailed additional Section 66 compensation that was payable to the worker. The matter was set down for a further teleconference on 14 September 2009 but prior to the teleconference Mr Pintecello died on 4 September 2009.

The worker's Estate claimed that they were entitled to receive compensation under Section 67 in circumstances where the worker had died after the Medical Assessment Certificate had been issued even though a final determination of the claim for Section 67 had not been made.

President Keating of the Workers Compensation Commission determined that whilst the Medical Assessment Certificate was conclusively presumed to be correct as to the degree of permanent impairment under Section 66, the Medical Assessment Certificate did not determine the party's rights and was not a Judgment or Certificate of Determination. Consequently, a worker would not be entitled to pain and suffering as he was not alive at the time of the judgment. The judgment or settlement in relation to pain and suffering would most likely have been facilitated at the scheduled teleconference of 14 September 2009, some 10 days after the death of the worker.

President Keating commented it was the Parliament's intention that when amending the statutory workers compensation scheme in 2001 through the modification of various procedural aspects of the system it would have expressed it in clear terms if the entitlement to Section 67 would also be modified. Specifically, the provision extinguishing the right to the payment of compensation under Section 67 was retained when the balance of the section was amended in 2001. President Keating specifically rejected the alternative argument that as the Commission is "a front end loaded system" (all evidence filed at the beginning of proceedings), the worker died during the proceedings (after all evidence was filed), this was akin to a "reserved judgment" and thereby entitle the Estate to an amount under Section 67. Although this submission had merit, the entitlement to Section 67 would be the subject of a further teleconference which would entail submissions, either orally or in writing, in order for proceedings to be concluded, a Certificate of Determination issued and any entitlement to crystallise.

Although this was a particularly unusual matter, it is pleasing to note the Commission will not beneficially construe legislation in favour of a worker (or in this case a worker's Estate) when the legislative intent is clear to disentitle a potential claimant.

Overseas Layovers – Are Workers Entitled To Workers Compensation Benefits

Two recent decisions involving Qantas have further muddied the waters as to whether a worker will be entitled to workers compensation benefits in connection with injuries sustained when on a "layover" on an overseas trip. Both decisions involved claims by Qantas employees, Watson a long haul airline pilot and Da Ros, a long haul flight attendant. The injuries both arose in Los Angeles USA whilst the workers' were on "slip time" or "layover".

Watson, who had flown to Los Angeles in the course of his employment, was returning to his employer supplied hotel after dinner with a friend when an intoxicated driver collided with his vehicle causing him serious injuries. Da Ros, who had been an attendant on a flight to Los Angeles, suffered injuries returning to his hotel when was knocked off his bicycle by a courier.

At first instance, Watson was able to demonstrate employment was a substantial contributing factor to his injuries whereas Da Ros did not. Both findings were reversed on Appeal. It is interesting to note the 2 different approaches taken by the respective judicial officers in the appeals.

Watson's claim for compensation was rejected by Deputy President Bill Roche of the Workers Compensation Commission on three alternate grounds. Firstly, the injury was not in the course of or arising out of his employment. He was returning to his hotel after meeting a friend and discussing horses. This could not be construed to be in the course of or arising out of his employment. Secondly, employment was not a substantial contributing factor to the injury. The cause of the injury was an intoxicated driver and employment did nothing to effectively contribute to it. The Deputy President further commented that even if the injury arose out of the employment, the employment was no more than a background matter that had limited causal relevance to the injury. The connection was "remote and tenuous". The factual circumstances also distinguished Watson's situation to the 2009 decision of Badawi. In that matter Ms Badawi was skiing with her boyfriend when she was contacted by telephone to return to the resort to discuss business matters. In the course of responding to that request from her superior she received an injury without third party involvement. In contrast, Watson was spending his free time visiting friends discussing a common interest in horses. He was not expected to return to the crew hotel, but chose to do so. In addition, the injury could have occurred anywhere. That it happened outside Los Angeles during an overall period of work was a coincidence, not a substantial contributing factor.

Finally, the injury was not received within a recess. We should point out that when an injury is received in a recess, employment does not have to be a substantial contributing factor to the injury. The Deputy President commented the slip time was 39 hours long and accordingly was not an ordinary recess as intended by the legislation. It was not a brief interruption in an otherwise continuous period of work.

The Court of Appeal decision in Da Ros adds little clarity to the position, especially in terms of substantial contributing factor. Although the worker was unsuccessful at the level of Presidential Appeal, the reasoning for the decision has been criticised by the Court of Appeal. Deputy President Byron had found the employment factors "were not important, nor serious, weighty, sizable or large" and accordingly found employment was not a substantial contributing factor to the injury. Quite simply, the Deputy President has incorrectly used those terms as the law on Section 9A. The Court of Appeal remitted the case to be re-determined by the Commission. What can be seen in the meantime is that "weightiness" is the wrong test.

Although, the two cases contain some similar factual scenarios, the main difference between Da Ros and Watson was that while Da Ros was injured on a bike whilst maintaining fitness necessary for work on an employer supplied bicycle whereas Watson was injured on the way home from an acquaintance's house where they discussed horses. We watch with interest if the Workers Compensation Commission ultimately determines that this factual difference is sufficient for the worker to demonstrate employment was a substantial contributing factor to his employment. At this stage, the only thing that is certain is the entitlement to compensation for layover injuries remains a grey area of the law.

Section 74 Notices – A Recent Decision

A recent decision of Deputy President Roach in the Workers Compensation Commission in *The Great Taree City Council v Moore (2010) NSW WCC PD 49* has confirmed that where there is no dispute that a worker has received an injury and there is no claim for weekly compensation, jurisdiction as to the extent of the injury and whether any impairment resulted from the injury rests solely with an Approved Medical Specialist and not with an arbitrator.

The worker, Kay Moore, alleged that she sustained an injury to her back on 16 September 2004 whilst moving a very heavy potted plant in the Council's foyer. The incident was reported to the Council's General Manager. The Council did not dispute that the incident occurred or that Ms Moore injured her back. It did dispute the nature and extent of the injury. Ms Moore continued to perform her clerical duties with the Council but did not seek medical treatment for her back until she saw her general practitioner in November 2004. She completed a claim form on 28 January 2005 and liability was initially accepted. Ms Moore underwent an L5/S1 laminectomy in October 2005. However, her back and leg symptoms worsened and in May 2007 she underwent an L5/S1 decompression and lower lumbar fusion. The Council's workers compensation insurer met the costs of both operations.

In September 2007 Ms Moore's solicitors claimed work injury damages from the Council. Liability was denied in a Section 74 Notice disputing inter alia whether Ms Moore suffered from at least 15% whole person impairment.

At some stage Ms Moore claimed lump sum compensation under Section 66 and Section 67. In a further Section 74 Notice liability was disputed for that claim. The Notice stated, among other things, that liability was disputed on the ground that Ms Moore had suffered only a "minor soft tissue injury or strain" in the incident of 16 September 2007 and any incapacity beyond "a few days" from the date of injury resulted from causes other than the incident. At no point was it disputed that Ms Moore had injured her back on 16 September 2004.

In the Application to Resolve Dispute Ms Moore sought lump sum compensation in respect of 22% whole person impairment as a result of her back injury together with compensation for pain and suffering. She made no claim for weekly compensation or for hospital and medical expenses.

In its Reply the Council disputed liability on the grounds set out in the Section 74 Notices previously served.

In due course the matter was listed for conciliation and arbitration during which the arbitrator identified the "real issue" to be whether Ms Moore damaged a disc in her lower back when she moved the pot plant on 16 September 2007. In a reserved decision the arbitrator found Ms Moore's injury was "a strain" and that it "did not involve further damage or rupture to the disc". He then referred the assessment of Ms Moore's whole person impairment to an Approved Medical Specialist.

In her appeal Ms Moore sought leave to challenge the arbitrator's determination that she had only suffered a strain. The Council opposed the granting of leave to appeal on the grounds that the arbitrator's decision was an interlocutory order that had not finally determined the parties' rights. This argument was accepted by Acting Deputy President Snell.

The Council then requested the arbitrator to reconsider his determination arguing that the result of the arbitrator's determination was the effects of the work injury had resolved within one or two weeks and consistent with *Total Steel of Australia Pty Limited v Waretini [2007] NSW WCC PD 32*, the arbitrator should have entered an award for the Council and should not have referred the assessment of whole person impairment to an Approved Medical Specialist. Ms Moore's solicitors opposed the reconsideration application and submitted that as there was no dispute that Ms Moore received an injury and there was no claim for weekly compensation "the jurisdiction as to the extent of the injury rested with an Approved Medical Specialist".

The arbitrator declined to vary his previous determination and the matter was referred to an Approved Medical Specialist who issued a Medical Assessment Certificate assessing a 22% whole person impairment from which he deducted 40% for degenerative and disc changes at L4/S1, certifying Ms Moore to suffer a 13% whole person impairment as a result of the initial injury.

Both parties appealed to a Medical Appeal Panel without success.

The Council then filed an appeal seeking leave to challenge all the prior determinations of the arbitrator. Deputy President Roach indicated that as there was no claim for weekly compensation and there was no dispute that the worker had received an injury, jurisdiction rested solely with the Approved Medical Specialist to determine the extent of impairment and any deduction therefrom. The decision is consistent with the Court of Appeal's findings in *Haroun v Rail Corporation NSW & Ors [2008] NSW Court of Appeal 192*.

The Deputy President distinguished the decision in *Peric v Chul Lee Hyuang Ho Shin Jong Lee and Mi Ran [2009] NSW WCC PD 4* as the dispute in that case concerned weekly compensation, medical expenses and lump sum entitlements; all factual and legal matters incapable of determination by an Approved Medical Specialist. There, the Section 74 Notice had disputed injury. He also distinguished *Total Steel of Australia Pty Limited v Waretini* as the dispute there concerned a claim for lump sum compensation and weekly compensation. Then the arbitrator determined the claim for weekly compensation, finding the effect of the injury had ceased and there was an award for the respondent in respect of the claim for weekly compensation. The arbitrator referred the assessment of lump sum compensation to an Approved Medical Specialist. On appeal, Acting Deputy President Snell held that once the finding on causation was made there was no dispute to be referred to an Approved Medical Specialist because the dispute had been resolved by the finding on causation.

In relation to the factual circumstances in *Moore*, Deputy President Roach indicated that had the employer disputed injury, the

Commission would have determined that the dispute. In a claim restricted to lump sum compensation only, the Commission has jurisdiction to determine if the worker received an injury, only where injury is disputed. Ultimately the Deputy President determined that the arbitrator's findings were incorrect based on the medical evidence as a whole and Ms Moore's evidence.

The decision comes as a timely reminder of the importance of succinctly stating in the Section 74 Notice all matters in issue. In circumstances such as presented in Ms Moore's case where there was a not insubstantial history of prior complaints of sciatica and lower back pain followed by a work related injury, it may be worthwhile raising injury as an issue in a Section 74 Notice where the worker then proceeds to claim lump sum compensation for whole person impairment in proceedings where there is no claim for weekly compensation. In cases of doubt it may be worthwhile seeking legal opinion with a view to avoiding the not inconsiderable ramification of the matter proceeding to assessment by an Approved Medical Specialist in circumstances where there is some doubt as to whether the initial incident was of a minor nature only.

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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