

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.

High Court Determines That Litigation Funders Are Not Liable For Costs

In a landmark decision for litigation funders the High Court has confirmed that the NSW Supreme Court cannot order a litigation funder to pay the costs of another party where the litigation which was funded is unsuccessful and the funded party is unable to pay the costs that are awarded against it. During the proceedings a party will be entitled to seek security for costs from an impecunious plaintiff and if successful in an application for security there will be some protection for costs however if the security is not sufficient to discharge the costs payable the NSW Supreme Court cannot order the litigation funder to pay the shortfall in costs.

In *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* and *Jeffery & Katauskas Pty Limited v Rickard Constructions Pty Limited* (subject to a deed of company arrangement) the High Court was called on to determine whether the Supreme Court of New South Wales has power to order costs against a non-party which, for a contingency fee, has funded an impecunious corporate plaintiff without providing the plaintiff with an indemnity for adverse costs orders.

Rickard Constructions Pty Ltd ("Rickard") commenced proceedings against various defendants. Jeffery & Katauskas Pty Limited ("J&K") was the second of these defendants. Monies were advanced by SST Consulting Pty Ltd ("SST") for the purpose, of prosecuting those proceedings. Those advances, or some of them, took place before 13 October 2000, when a Deed of Charge was granted by Rickard to SST to secure those and other advances. At all material times, Rickard was unable to meet any order which might be made that it pay J&K's costs of the proceedings. SST had not given any indemnity to Rickard against any liability that Rickard might come to have to J&K under a cost order. The financial arrangements between Rickard and SST appeared to be either SST had advanced \$300,000 on terms that if the litigation succeeded it would be repaid that sum, together with a further \$630,000 "success fee" or the advance was only \$200,000 and the success fee \$730,000. J&K succeeded in some applications for security for costs against Rickard and obtained security for \$187,750. Rickard failed at the trial. Rickard was ordered to pay J&K's costs of the trial, which totalled \$653,470.71. That left J&K out-of-pocket, once the security had been realised, in an amount of over \$450,000. Rickard sought an order pursuant to r 42.3(2)(c) of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") that the party that funded the litigation- SST pay J&K that shortfall.

Under section 98 of the *Civil Procedure Act 2005* ("CP Act") the costs of civil proceedings in the Supreme Court of New South Wales are "in the discretion of the court" subject to rules of the court. One of those rules, r 42.3(1) of the UCPR, provides that "the court may not, in the exercise of its powers and discretions under section 98 of the CP Act, make any order for costs against a person who is not a party". A qualification to that prohibition follows immediately in r 42.3(2), which provides:

"This rule does not limit the power of the court:

...

(c) to make an order for payment, by a person who has committed contempt of court or an abuse of process of the court, of the whole or any part of the costs of a party to proceedings occasioned by the contempt or abuse of process ..."

November 2009
Issue

Inside

Page 1

Litigation Funders Are Not Liable For Costs

Page 2

Litigation Funders And Class Actions

Page 3

What Is Forseeable? -The High Court Has Spoken

Page 5

Voluntary Advice Provided By Financial Advisers Can Result In Damages

Page 6

Oil Slick On Road -No Motor Accident Claim

Page 7

D&O Insurance - Trustees of Deeds Of Arrangements - Right To Make A Claim

Page 8

Concerns For Retailers - Defamation And False Imprisonment Claims

Page 9

Costs Payable By Tutor In Unsuccessful Claims

Page 10

Consequential Loss-Damages for Penalties

Page 11

Business Trips And Workers Compensation Claims

Page 14

OH&S Roundup

Page 15

Employment Roundup

We thank our contributors

David Newey dtn@gdlaw.com.au

Amanda Bond asb@gdlaw.com.au

Stephen Hodges sbh@gdlaw.com.au

Michael Hayter mkh@gdlaw.com.au

Nicholas Dale nda@gdlaw.com.au

Michael Gillis mjg@gdlaw.com.au

Marcus McCarthy mwm@gdlaw.com.au

Naomi Tancred ndt@gdlaw.com.au

David Collinge dec@gdlaw.com.au

Gillis Delaney
Lawyers

Level 11,
179 Elizabeth Street,
Sydney 2000
Australia

T +61 2 9394 1144

F +61 2 9394 1100

www.gdlaw.com.au

J&K argued "an abuse of process would occur where a non-party with a commercial interest in the fruits of the litigation funds proceedings by an insolvent plaintiff without providing the plaintiff with an indemnity against cost orders in favour of successful defendants". This argument was rejected by the Court of Appeal. J&K appealed to the High Court.

At the hearing before the High Court J&K argued the abuse of process was identified in the combination of two circumstances:

- a plaintiff unable to meet an adverse costs order;
- the provision of that plaintiff with funds to litigate by a person who would not be liable to meet an adverse costs order.

These circumstances were said to render the prosecution of the proceedings "seriously and unfairly burdensome, prejudicial or damaging"

The majority judgment of the High Court concluded:

"the bare fact that a plaintiff may be unable (even will be unable) to meet an adverse costs order does not mean that further prosecution of proceedings by that plaintiff is an abuse of process. Secondly, the fact that, absent a finding of abuse of process or contempt of court, the funder of the litigation would not be liable to meet an adverse costs order is a product of the applicable rules of court"

In determining that there was no abuse of process and that a cost order could not be made against the litigation funder the majority judgment of the High Court concluded:

"Once it is recognised first, that the UCPR precludes ordering costs against a non-party save in exceptional cases, and secondly, that the plaintiff's inability to pay costs goes only to questions of security, the appellant's contention that prosecution of the proceedings constituted an abuse of process can be seen to depend upon one of two propositions:

- *a general proposition condemning the funding for reward of another's litigation;*
- *a proposition that despite the provisions and principles governing security for costs and the UCPR's general inhibition against ordering costs against non-parties, those who fund another's litigation for reward must agree to put the party who is funded in a position to meet any adverse costs order.*

.....

The proposition that those who fund another's litigation must put the party funded in a position to meet any adverse costs order is too broad a proposition to be accepted. As stated, the proposition would apply to shareholders who support a company's claim, relatives who support an individual plaintiff's claim and banks who extend overdraft accommodation to a corporate plaintiff. But not only is the proposition too broad, it has a more fundamental difficulty. It has no doctrinal root. It seeks to take general principles about abuse of process (and in particular the notion of "unfairness"), fasten upon a particular characteristic of the funding arrangement now in question, and describe the consequence of that arrangement as "unfair" to the defendant because provisions and principles about security for costs have been engaged in the case in a particular way and the rules will not permit the ordering of costs against the funder unless the principles of abuse of process are engaged. And to point to the particular feature of a funding arrangement that the funder is to receive a benefit in the form of a success fee or otherwise, adds nothing to the proposition that would break that circularity of reasoning or otherwise support the conclusion that there is an abuse of process."

SST was not shown to have committed an abuse of process of the court. The power of the Supreme Court of New South Wales to order costs against SST or its directors was not enlivened. Litigation funders can now breathe a sigh of relief as they will not be exposed to cost orders in unsuccessful proceedings in the NSW Supreme Court. No doubt as a result of the High Court's judgement applications for security for costs will receive closer attention as defendants seek to deal with claims by impecunious plaintiffs that have litigation funding.

Litigation Funders and Class Actions

The Full Federal Court of Australia in a two to one majority judgment has recently determined that litigation funding arrangements and lawyers retainer agreements in relation to representative proceedings commenced against Brookland Multiplex amounted to a Managed Investment Scheme pursuant to the Corporations Act.

Managed Investment Schemes must be registered under the Corporations Act if the Scheme has more than 20 members or the Scheme is promoted by a person who is in the business of promoting Managed Investment Schemes. A Managed Investment Scheme must have a responsible entity that holds an Australian Financial Services licence that authorises the entity to operate the Scheme. The Managed Investment Scheme must also have a Constitution, a Compliance Plan and a

Product Disclosure Statement.

The Federal Court's decision in *Brooklyn Multiplex Limited - v - International Litigation Funding Partners* examined the funding arrangements of the class action against Brookfield Multiplex relating to the alleged disclosure failures in 2004 and 2005 concerning the re-development of Wembley Stadium.

All the members of the class action entered into a funding agreement with International Litigation Funding Partners and the plaintiffs did not have to pay any of the lawyers fees or expenses. Those costs were to be met by the litigation funder. The funding arrangement also covered costs payable by the plaintiffs for adverse cost orders. The litigation funder, in return would receive a percentage of damages or settlement monies together with reimbursement of the costs it had paid.

The plaintiffs did not have day to day control of the legal proceedings. They contributed money or monies worth to acquire an interest in the ultimate outcome, the settlement of all claims and their contributions were pooled to produce financial benefit. In those circumstances the arrangement amounted to a Managed Investment Scheme.

The litigation funders will now need to consider whether they seek registration of the Managed Investment Scheme or appeal the decision.

The decision has potential to affect a large number of cases which involve litigation funding and the way in which litigation funders put together funding arrangements. The decision will by no means sound an end to litigation funding arrangements but will result in a significant change in the approach of litigation funders and could provide some impediments to class action litigation. Or perhaps the Government will move to exempt litigation funding arrangements from the Managed Investment Scheme provisions. Only time will tell.

What Is Foreseeable? -The High Court Has Spoken

When a tree falls causing an injury a person is quick to look for others to blame for their injuries. Tree falls that cause damage often result in actions for damages against statutory authorities such as Councils and Supply Authorities who carried out work in the vicinity of the tree that fell. Sometimes the work that was carried out was completed many years before the tree fall. So can the authority that carried out the work near the tree be held liable for an injury caused by a tree fall? This issue was recently considered by the High Court in *Sydney Water Corporation v Turano* and the judgment in that case clarifies the way that a Court must approach the question of what is foreseeable when determining the existence and scope of a duty of care, breach of the duty, and remoteness of damage.

The High Court concluded that when assessing Sydney Water Corporation's duty it was necessary to determine what Sydney Water should have foreseen at the time of its actions and when considering the liability of Sydney Water it was necessary to take into account the lapse of time after the works and the control which Sydney Water or the Council had over the years after the works.

Mr Napoleone Turano sustained fatal injuries when a eucalyptus tree fell onto the car that he was driving. His wife and their two children were travelling in the car at the time and each sustained injury in the incident. Mrs Turano brought proceedings in negligence in the District Court of New South Wales on her own behalf and on behalf of the two children against the second respondent, the Council of the City of Liverpool, and the appellant, Sydney Water Corporation, claiming damages for physical and psychological injury and for loss of dependency.

The case against Sydney Water was that the tree fell because its root system had been compromised by the intermittent water-logging of the surrounding soil over an extended period. This environment created the conditions in which a pathogen entered the root system and flourished. The installation of a water main by Sydney Water was said to have diverted drainage from a nearby culvert causing the periodic water-logging. Sydney Water's negligence was said to lie in its failure to take into account the impact of the installation of the water main on drainage in the area, which required that it depart from its usual method of laying water mains in order to avoid adversely affecting the surrounding vegetation including the tree.

The tree was growing on the grassed section of a road reserve. Property in the tree and the road were vested in the Council. The tree fell approximately 20 years after the installation of the water main. There had been no complaint relating to the water main, or its effect on drainage in the surrounding area, in the intervening years.

The liability of the defendants was determined as a separate issue by the primary judge in the District Court who found that the

Council was liable in negligence and that Sydney Water was not liable. He considered that in the circumstances Sydney Water did not owe a duty of care for the benefit of Mrs Turano. The Council appealed in relation to the finding made against it and Turano appealed in relation to the finding against Sydney Water. The Court of Appeal reversed the District Court's judgement holding Sydney Water liable and not the Council.

The Court of Appeal noted the tree that fell was located in a semi-rural area, with no houses or buildings in the immediate vicinity, and that the tree population was sparse. The case that was brought against the Council was based on an alleged failure to periodically inspect the tree. The Court of Appeal noted the evidence demonstrated *"Not all tree failure is predictable. Not all tree failures can be explained even after the event. No tree is completely safe. Trees are living organisms which are anchored to the ground and so are subject, in situ, to activities and stresses from man and nature. ... For a tree hazard to exist there must be a potential for failure and a potential for injury or damage to result. Dead trees in remote locations are often less hazardous than healthy trees in built-up areas"*.

Sydney Water appealed to the High Court. Turano did not appeal against the finding that the Council was not negligent so the fate of the damages award turned on the liability of Sydney Water.

The proposition that at common law a public authority may be subject to a general duty of care arising out of its conduct of works pursuant to a statutory power was not in issue. Sydney Water acknowledged that it may be liable in damages to a person who suffers injury as the result of the rupture of a carelessly installed, defective, water main.

It was necessary for the High Court to identify the scope of the duty owed and whether there had been a breach of that duty and to that end it was necessary to identify the impact that the question of foreseeability had on these issues.

The High Court noted:

"Reasonable foreseeability of the class of injury is an essential condition of the existence of a legal obligation to take care for the benefit of another. The concept is relevant at each of the three, related, stages of the analysis of liability in negligence: the existence and scope of a duty of care, breach of the duty, and remoteness of damage"

When turning to the question of the duty owed the High Court noted:

"It was not necessary that the precise sequence of events leading to Mrs Turano's injury be foreseen. However, it was necessary to show that in 1981 it was foreseeable by Sydney Water that laying a water main in a bed of sand in this location involved a risk of injury to road users. The evidence was that in 1981 it was foreseeable that laying a water main in a sand-filled trench transversing the culvert outlet pit would create a drain carrying water that collected in the pit north/south along its length. There was no evidence that it was foreseeable by Sydney Water that altering sub-surface drainage in this way was likely to undermine the integrity of the roots of nearby trees."

The High Court found that the Court of Appeal had been wrong in finding Sydney Water had been negligent when it stated Sydney Water's duty in absolute terms: "not to compromise the integrity of the culvert drainage system". The Court of Appeal had determined it was foreseeable that laying a water main in a trench that acted as a conduit for water could have "an effect on the surrounding area such as might cause harm" and a duty therefore existed.

The High Court noted that to identify the scope of the duty the correct question was "whether in 1981 a water authority acting reasonably ought to have obtained the advice of an arborist on the impact of its proposed works on vegetation growing in an unpopulated, semi-rural area".

In reaching the conclusion Sydney Water had not been negligent the High Court found that:

"The impact of the altered drainage from the outlet pit was such that over a lengthy period the tree's stability was compromised. The conditions that produced its fall in the windstorm took effect after 20 years. It is reasonable to consider that those conditions might have caused the tree to fall in a windstorm after a lesser or greater number of years. The point to be made is that the laying of the water main in this location did not create an immediate risk of harm to road users. The temporal relation between Sydney Water's conduct and Mrs Turano's injury was relevant to the determination of whether the relationship between them gave rise to a duty. A related factor relevant to this inquiry was the circumstance that in the interval between the conduct and the injury the tree was growing on land that was owned by the Council."

Sydney Water was empowered to remove trees in the course of carrying out works. Since the tree was not an obstacle to the installation of the water main and the water main did not create an immediate danger of compromise to the tree,

its removal may not have been justified pursuant to the power. (It will be recalled that Sydney Water was required in installing the water main to inflict as little damage as may be.) Sydney Water had the power to enter upon land in order to carry out an inspection of works. However, no occasion arose for it to exercise this power in the absence of any report concerning the operation of the water main."

The fact that Sydney Water's conduct happened 20 years ago and the Council owned the land and had control over the area after the completion of Sydney Water's works was particularly relevant to the inquiry into whether Sydney Water owed a duty and had breached that duty. The High Court concluded:

"Nonetheless, it was necessary in considering the liability of Sydney Water to take into account that, in the years between the installation of the water main and Mrs Turano's injury, the risk of the tree's collapse was one over which the Council and not Sydney Water had control. It is true that the Council was not on notice that the water main was laid in a sand-filled trench. However, it would not be right to characterise Sydney Water as having created a hidden danger by the installation of the water main in this location. Its presence transversing the outlet pit was observable. The adverse impact on vegetation brought about by altered drainage might be expected to be apparent to the owner of land. The circumstance that the presence of the pathogen in the tree was not readily observable does not provide a justification for holding Sydney Water liable after an interval of 20 years for the injury occasioned by the tree's failure."

The lapse of time was crucial in the High Court's findings as is seen in the majority judgements reasoning that:

"Sydney Water's conduct in laying the water main in this location in 1981 with the consequential alteration to drainage flows from the culvert and any foreseeable risk to the health of the tree did not impose on it a legal duty of care for Mrs Turano's benefit. The reason for this may be expressed as a conclusion that injury to road users as the result of the tree's eventual collapse was not a reasonably foreseeable consequence of laying the water main..... Alternatively, it may be expressed as a conclusion that in the absence of control over any risk posed by the tree in the years after the installation of the water main there was not a sufficiently close and direct connection between Sydney Water and Mrs Turano, (for her to be owed a duty of care)".

Turano is not entitled to recover damages from Sydney Water Corporation. The High Court has highlighted that the question of foreseeability needs to be considered at all three stages of determining tortious liability. Foreseeability must be examined when considering the existence and scope of a duty of care, breach of the duty, and remoteness of damage. The timing of an act and what was foreseeable at that time are crucial factors in that analysis as is any control over a situation that may rest with another person after the act. When this analysis was applied to the facts the only conclusion that was available was that an injury to road users as the result of the tree's eventual collapse was not a reasonably foreseeable consequence of laying the water main.

Voluntary Advice Provided By Financial Advisers Can Result In Damages

A financial adviser that provides gratuitous advice to his client owes a duty of care to his client even where he has not been paid for that advice and the provision of advice was not part of the service that was agreed to be provided. The financial adviser is in a position of trust and should realise that his client may act upon the information or advice provided and the relationship is therefore one that gives rise to a duty of care in respect to advice provided as was seen in a recent decision of the NSW Court of Appeal in *Samuel Mbakwe v Sam George Sarkis*.

Sam Sarkis had a successful business as a technician servicing X-Ray film processing machines and associated equipment but lacked financial expertise, and wanted to obtain the services of someone who could help him in this area. A mutual friend introduced Samuel Mbakwe as a suitable person for this purpose and Mbakwe agreed to help. At a follow up meeting Mbakwe said that he would charge \$300 a month "to look after your business and keep an eye on things" and Sarkis agreed to this arrangement.

The relationship developed in the following years. Mbakwe visited Sarkis' office once or twice a week to review mail and other documents left in his in-tray which he would later discuss with Sarkis. In the second half of 2000 Mbakwe suggested to Sarkis that he purchase an investment property at Surry Hills. Sarkis agreed, and after inspecting three properties in the area Sarkis agreed to purchase one. Mbakwe made the arrangements for the purchase, the finance, and the letting of the property. Other real estate investments were investigated the following year but the transactions did not proceed.

In 2002 Mbakwe gave Sarkis a brochure promoting Mr Orehek and his companies which were involved in property development. Mbakwe told Sarkis that a loan to Mr Orehek would be safe and secure, the borrower would have no problem in

paying back the loan and the deal was “a great opportunity”. He said that Mr Orehek had been in this business for over 10 years and the plaintiff would get a 30% return after twelve months. Sarkis lent Mr Orehek and his companies \$245,000 in three tranches on the terms of a Deed of Loan. The moneys invested were totally lost and within a relatively short time the companies went into administration or liquidation, and subsequently Mr Orehek became bankrupt, and went to goal.

Sarkis successfully sued Mbakwe in the District Court where the Trial Judge’s found that Mbakwe owed a duty of care in giving Sarkis financial advice despite arguments that the advice concerning the unsecured loans were outside the scope of the Mbakwe’s retainer, that he had not charged for his work in relation to these loans, and that the advice, which he had volunteered, was given as a friend on a social or casual basis where legal relationships were not in contemplation. Mbakwe appealed.

The Court of Appeal confirmed that the fact that the advice was volunteered is relevant and there is no blanket immunity to volunteered advice and a duty of care may be recognised in appropriate cases.

The Court of Appeal noted that given Mbakwe’s position as Sarkis’ financial adviser and their continuing relationship the fact that the advice about the Orehek transactions was volunteered provides no basis for rejecting a duty of care.

The Court of Appeal noted that the classic statement in Australia of the circumstances which will give rise to a duty of care in the giving of information and advice is that of Barwick CJ in *Mutual Life and Citizens Assurance Co Ltd v Evatt* where it was said:

“... the circumstances must be such as to have caused the speaker or be calculated to cause a reasonable person in the position of the speaker to realise that he is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access or to give advice, about a matter upon or in respect of which the recipient believes the speaker to possess a capacity or opportunity for judgment, in either case the subject matter of the information or advice being of a serious or business nature. It seems to me that it is this element of trust which the one has of the other which is at the heart of the relevant relationship. I should think that in general this element will arise out of an unequal position of the parties which the recipient reasonably believes to exist. The recipient will believe that the speaker has superior information, either in hand or at hand with respect to the subject matter or that the speaker has greater capacity or opportunity for judgment than the recipient ... the speaker must realise or the circumstances be such that he ought to have realised that the recipient intends to act upon the information or advice ... in connection with some matter of business or serious consequence ... Further it seems to me that the circumstances must be such that it is reasonable ... for the recipient to seek, or to accept, and to rely upon the utterance of the speaker.”

The Court of Appeal noted this was a classic case for the recognition of a duty of care in utterance.

There was no doubt that Mbakwe had breached his duty that he owed Sarkis as was seen in the Court of Appeal’s comments that:

“If (Mbakwe) made no enquiry his recommendation of the investments without appropriate qualification and disclosure was a breach of duty. If he did make enquiries they were clearly inadequate. The most cursory examination of the 2001 accounts would have revealed that an unsecured loan to the group was an extremely risky investment.”

The Court of Appeal also noted that the law also recognises that representations may continue without being expressly repeated, unless modified or withdrawn, so long as they remain relevant to the dealings between the parties.

At the end of the day Mbakwe was unsuccessful in his appeal.

Advisers must take care when they provide advice to their clients even where that advice falls outside the scope of their retainer as the position of trust that they find themselves in can give rise to a duty of care for activities that fall outside their retainer.

Oil Slick On Road Does Not Give Rise To A Motor Accident Claim

A motor vehicle accident often results in debris and oil remaining on the road following the collision. If a person travelling through the scene of the collision after the accident is involved in an accident as a result of debris on the roadway can they bring a motor accidents claim against the driver at fault in the original incident.

The recent NSW Court of Appeal decision in *Zotti - v - AAMI* concludes that a Motor Accidents Act Claim does not lie against the driver at fault in the original accident (although that does not necessarily end a claim based on negligence against the driver rather it ends the right to make a CTP claim under the Motor Accidents Regime).

Zotti suffered serious injury when he lost control of his bicycle at an intersection. Less than 2 hours beforehand there had been a motor vehicle collision at the intersection involving a vehicle driven by Bassa. Zotti alleged that an oil slick remained on the road following the motor vehicle collision and this caused his accident. Zotti brought a claim against the CTP insurer. It was necessary for Zotti to seek leave from the Court to commence proceedings as he had not complied with the procedural requirements to bring a claim and his application for leave was dismissed because the trial judge concluded there was no temporal connection between the oil spillage and the bicycle accident and hence there was no injury attracting the operation of the *Motor Accidents Compensation Act*.

The *Motor Accidents Compensation Act* provides that a motor accident is an accident or incident caused by the fault or the owner or the driver of the motor vehicle in the use or operation of the vehicle which caused the death of or injury to a person.

Injury at the time of Zotti's accident was defined in the Motor Accidents Compensation Act to mean:

"personal bodily injury caused by the fault of the owner or driver of the motor vehicle in the use or operation of the vehicle, if, and only if, the injury is the result of and is caused during:

- (i) the driving of the vehicle,*
- (ii) a collision or action taken to avoid the collision with the vehicle, or*
- (iii) the vehicle running out of control;*
- (iv) such use or operation by a defect in the vehicle."*

The Court of Appeal when it considered the scenario relied on the High Court's judgment in *Allianz Australia Limited - v - GSF Australia* and in particular the findings of the High Court that one criteria in the definition of injury is that the injury be sustained during certain events, including the driving of the vehicle or a collision with the vehicle or its running out of control. The other criteria is that the injury be sustained as a consequence of those events. The phrase "as a result of" is linked to the first or temporal criterion; the phrase "is caused" is linked to the second criterion.

The Court of Appeal determined that the cause of injury must occur during the event or occurrence.

The Court of Appeal noted that the words "during" create a temporal criterion for the definition of injury and the purpose of the legislation was to narrow the concept of injury. It was noted that in this case the injury was not caused during a collision, even if it were possible to describe the collision as a "proximate cause" of injury. It was noted that whilst a collision does not refer only to the point of impact, whilst the vehicle remain in their post collision positions, the collision is perhaps still in existence however a submission that a collision continues until all affects of the collision have been removed must be rejected.

At the end of the day Zotti did not have a *Motor Accidents Compensation Act* claim which could be made against the driver of the vehicle which was covered by the statutory regime in the *Motor Accidents Compensation Act*.

Zotti cannot resort to the Motor Accidents Compensation Scheme to recover compensation as the definition of injury is designed to limit access to the CTP scheme to specified circumstances. But that does not mean that Zotti did not have a claim against Bassa rather it means the CTP insurer is not liable for such a claim. Without insurance to cover the claim there seems little point in pursuing Bassa unless he has sufficient personal assets to meet the claim.

Directors And Officers Insurance - Trustees In Deeds Of Arrangements for Bankrupts Have The Right To Make A Claim

The NSW Court of Appeal has recently had cause to consider whether or not a Trustee of a Deed of Arrangement under the Bankruptcy Act was entitled to enforce a Director and Officers Liability Insurance Policy issued by CGU and in *One.Tel Limited (In Liquidation) - v - Watson and CGU* the Court of Appeal determined that they could.

The policy issued by CGU indemnified a former One.Tel director - Greaves against certain claims made against him in his capacity as a Director of One.Tel. Greaves covenanted to assign his rights under the policy to a trustee, pursuant to a Deed of Arrangement made under Part 10 of the Bankruptcy Act. The original trial judge held that the Trustee was not entitled to maintain the proceedings against CGU because the Deed of Arrangement had terminated by the effluxion of time. An Appeal was brought not by the Trustee but by One.Tel which had an interest in pursuing the appeal because the Deed of Arrangement provided that the Trustee was to apply proceeds received by him under the Policy in payment of any liability of

Greaves to One.Tel. Greaves had incurred the liability to One.Tel under an earlier judgment in the Supreme Court in proceedings brought by ASIC following the collapse of One.Tel.

Watson was the trustee of a Deed of Arrangement entered into by Greaves after a Special Resolution of meetings of the Creditors. Pursuant to the Deed Greaves had caused to be conveyed, transferred and assigned to the trustee all the property specified in a schedule. The schedule included Greaves' rights under and in relation to the CGU policy including any rights to damages in respect thereof.

The Court of Appeal after considering the terms of the Deed found that there had been an effective assignment of the chose in action against CGU which was complete at law before the Deed of Arrangement terminated. There was nothing in the Deed to suggest that the Trustee would be divested of the right to maintain an action in its own name once the Deed of Arrangement terminated. As the cause of action had been validly assigned and a notice of that assignment had been given to CGU, the trustee was entitled to maintain a claim against CGU in the trustee's name. The Deed of Arrangement may have given rights during the term of the Deed to maintain an action in the debtor's name, and if the Deed had terminated the Trustee could not do so however this was not necessary in this case as the assignment to the debtor had been completed before the Deed terminated.

Accordingly the Court of Appeal determined that the termination of the Deed of Arrangement did not prevent the trustee from maintaining the proceedings against CGU. The Trustee under the Deed of Arrangement was entitled to continue with the claim against CGU despite the termination of the Deed of Arrangement. On termination the Trustee held the rights to the proceedings on trust for either One.Tel and ASIC or alternatively for Greaves.

The *Bankruptcy Act* was amended in December 2004 and the pre-amended Act applied to the facts in this case. Since the amendment Part X of the *Bankruptcy Act* replaces the three forms of arrangement that existed - deeds of assignments, deeds of arrangements and compositions - with a single form of agreement known as "person insolvency agreements". The analysis of the situation in this case in respect to the deed of arrangement will equally apply in relation to personal insolvency agreements which have been entered into after 1 December 2004 as a result of the amendments to the *Bankruptcy Act*.

Concerns For Retailers - A Report To The Police About A Customer Can Result In Defamation And False Imprisonment Proceedings

Retailers need to carefully consider their actions when dealing with customers who are suspected of illegal or fraudulent conduct as the action taken by employees in relation to those customers can result in defamation proceedings and an action for false imprisonment which can prove to be very expensive. This was confirmed by the NSW Court of Appeal in its decisions in *Coles Myer Limited - v - Carl Webster and Stewart Thompson*.

Thompson and Webster were detained and searched in the Ashfield Shopping Mall by two police constables. The two police officers suspected Thompson and Webster of having attempted to obtain a gift voucher or vouchers from K-Mart by using a credit card that possibly had been stolen and also had at an earlier time attempted fraudulently to obtain a gift voucher or vouchers worth \$1,500.00 from the Target store in the mall. The store manager of K-Mart gave the police officers the information that led to the suspicion. The store manager told the police the two men had tried to obtain gift vouchers using "possible stolen or fraudulent credit cards" and had also attempted to obtain \$1,500.00 worth of gift vouchers from Target by similar means. A few hours later the police officers after investigation concluded there was insufficient evidence to justify the continued detention of the two and released them.

Both men suffered serious psychological effects as a result of the incident and sought damages for defamation and false imprisonment from Coles. It was alleged the statements made by the store manager were defamatory and Coles were vicariously liable for the defamatory remarks. The detention by the police officers on the afternoon was the basis of the claim against Coles for damages for false imprisonment. In the District Court proceedings Webster and Thompson succeeded in their claims with Webster recovering \$80,267.00 and Thompson \$253,949.00. Coles appealed.

The Court of Appeal noted that it was not in dispute that there was no ground whatsoever to suspect either of Thompson or Webster of having committed the offences in question. They were undoubtedly innocent. The trial judge found that the store manager's allegations made to the police officers were made up and that she did not believe that the two were guilty of the alleged acts that she informed the police they had committed. It was also noted the store manager had not told police that the customers had made her feel angry and threatened by their conduct in wanting to return a DVD. After considering the evidence presented before the trial judge the Court of Appeal determined that the store manager had invented and made up

the version that Thompson and Webster had attempted to purchase a \$500.00 gift voucher and had done so fraudulently by attempting to use a credit card that was not his. The trial judge made no error in finding that way and accepting that malice on the part of the store manager had been proven. There was no valid defence to a claim for defamation where the allegations made against Thompson and Webster were untrue and made with malice.

In relation to the question of false imprisonment the Court of Appeal noted in *Myers Stores Limited - v - Soo* a store detective had been held liable for false imprisonment even though the plaintiff was arrested by police officers alone. The store detective had told the police officers that the plaintiff was guilty of a shoplifting incident that occurred a number of days earlier. The store detective led the police officers to where the plaintiff was in the store and directed them towards him. The store detective knew that the results of what he was doing would be that the police officer would speak to the plaintiff and request him to accompany them to the security offices in the store and that he might be arrested if he refused.

The Court of Appeal in Thompson and Webster's case noted the promotion of and causing of the detection of persons can result in a viable cause of action for false imprisonment against a person. The Court of Appeal concluded that the store manager's conduct was such that she caused and procured the wrongful detention of Thompson and Webster.

It was noted by the Court of Appeal that to be liable for false imprisonment it must be the act of a defendant or his action that imprisons the persons or the defendant must be active in promoting and causing the imprisonment. It was also noted that being active in promoting and causing the imprisonment of a person must be the proximate cause of the imprisonment as distinguished from the mere giving of information to police or the mere signing of a charge sheet.

The store manager in this case actively sought the result being imprisonment and Coles were liable for damages for false imprisonment.

At the end of the day Thompson and Webster keep the damages they were awarded by the trial judge. Retailers need to be careful when they have suspicions that a customer has engaged in illegal activity as inappropriate actions by employees of the retailer can result in defamation proceedings and actions for false imprisonment which can result in substantial damages being payable by the retailer.

Infants And Persons Of Unsound Mind - An Unsuccessful Claim And Costs Are Payable By The Tutor

Infants and persons of unsound mind are unable to maintain proceedings in Court on their own account due to their disability. It is necessary for a tutor or next friend to be appointed to maintain those proceedings. A tutor must sign a consent to act as a tutor in the proceedings.

Quite often the person who claims damages will have little or no assets and in the event that their claim for damages is unsuccessful a Cost Order made against them is of little benefit to the defendant. However in some circumstances a tutor who brings a claim will have substantial assets and if the Cost Order is made against the tutor the defendant will be able to recover costs if an order is made against the tutor.

The Court of Appeal in *Yakmor - v - Handoush* has recently confirmed that a tutor is a party to proceedings where he brings a claim for damages and that a Cost Order can be made against the tutor as a party.

The Court of Appeal noted:

"A tutor represents the person under incapacity, and does on the person's behalf in relation to the conduct of the proceedings whatever the person could do. A tutor is on the record at least in the sense that consent to act has been filed. The person under incapacity is named on the record, but cannot do anything for himself or herself. The tutor cannot have any conflicting interest. There is practical identity between the tutor and the represented party in bringing and conducting the proceedings, albeit the name on the record as plaintiff or defendant (in this case, as appellant) is the name of the person under incapacity. The costs liability of the tutor, as an incident to the office, gives legal identity for costs purposes, on the rationale that one of the reasons a tutor is required is that there should be a person answerable for costs. For costs purposes, then, the tutor is to be regarded as a party."

In this case the Court of Appeal held that it could make an order that the tutor pay the costs of the unsuccessful Appeal or alternatively that the appellant pay the costs and that the appellant's tutor pay to the respondent the costs the appellant is ordered to pay. The later approach was adopted by the Court although it was noted that it could have simply ordered the tutor

to pay the costs of the proceedings.

Those who bring claims for the young and disabled will now need to carefully consider their position as they will be exposed to an order for costs if those proceedings are unsuccessful.

Consequential Loss - Damages for Contractual Penalties

A recent decision of the Victorian Court of Appeal is sure to send chills down the spines of negligent persons who cause loss of business income in the form of performance penalties under contracts as the Court of Appeal's decision in *Metrolink Victoria Pty Ltd v Inglis* has determined that such a loss is reasonably foreseeable and recoverable.

Metrolink commenced proceedings in the Magistrates' Court to recover damages from Ryan Inglis arising from a collision between a tram owned by Metrolink and a motor vehicle driven by Inglis. Inglis admitted liability and paid for the cost of repairs to the tram. As a result of this collision the passage of the damaged tram was blocked until the motor vehicle was removed. In consequence of this the operation of a number of trams also operated by Metrolink was delayed. Pursuant to its Franchise Agreement with the State of Victoria Metrolink was required to pay Operational Performance Penalties when its services were delayed and paid \$7,000.77 in Operational Performance Penalties.

The only issue before the Magistrate related to damages claimed to arise from the loss which Metrolink alleged they had suffered pursuant to the franchise agreement. Inglis denied liability for the Operational Performance Penalties arguing the damages were not foreseeable and too remote.

The Magistrate decided that "the loss suffered by Metrolink under the Franchise Agreement would not be reasonably foreseeable because it is not only unlikely but also far-fetched. It is a kind of damage that would not occur to the reasonable person in the position of the defendant." Metrolink appealed. The Supreme Court held it was open to the Magistrate to find the loss was not foreseeable. Metrolink appealed again.

The Victorian Court of Appeal noted it was common ground between the parties that the test for remoteness of damage is whether the damage is 'of such a kind or genus that a reasonable person should have foreseen' the loss. The Court of Appeal noted:

"this involves a two stage process. First, it is necessary to identify the particular kind or genus, to which the loss belongs ('the categorisation question'). Second, once the particular kind or genus has been identified, it is necessary to determine whether a reasonable person in the position of the defendant ought to have foreseen loss of that particular kind or genus"

A defendant can only escape liability if the loss or damage sustained can be regarded as 'differing in kind' from what was foreseeable.

The Court of Appeal concluded when categorising the loss that :

"The appropriate categorisation was simply one which required foreseeability of 'revenue lost as a result of the inability to operate the tram service'".

After categorising the loss the Court of Appeal then considered the question of foreseeability and in concluding the Operational Performance Penalties were a foreseeable loss noted:

"It was conceded by the respondent in the Supreme Court that if a claim was made by Metrolink in respect of fares lost, then that sort of loss was reasonably foreseeable as a loss suffered in the operation of business. A loss of fares is, I observe, of precisely the same kind or genus as loss arising by operation of the Franchise Agreement. They are both 'revenue lost as a result of the inability to operate the tram service'. It should not be otherwise, as there is no sound policy reason to treat direct remuneration from fares differently from that part of remuneration calculated under the Franchise Agreement. They are both part of the overall payment for the operation of the tram service.

I consider in the present case, that it is in no way 'far-fetched' that the collision of a car with a tram, causing an inability to operate trams on the network, might result in a loss of revenue. It is in fact highly likely, or at least a real risk, that the disruption of the provision of any service might result in a loss of revenue to the person who is responsible for the provision of that service."

Effectively the Court of Appeal determined that a contractual penalty was a foreseeable result of the collision with the tram and business losses arising from contractual arrangements can be the foreseeable result of property damage. The Court of Appeal noted:

"In the modern world, however, complexity of contracts, and the provision of items such as key performance indicators and other performance targets, could hardly be said to be unusual.

There is nothing unusual about the expectation that Metrolink would receive remuneration for the operation of its part of the tram network or that it would lose revenue in the event that it could not operate a part of its service. There is no reason of policy that compels a different approach to the recovery of losses calculated by reference to targeted performance obligations which have not been met because of the inability to conduct the service,"

The three judges of the Court of Appeal were not unanimous in their view that the loss was foreseeable however the majority view prevails. The majority view can be seen as extending the boundaries for the types of losses that are recoverable in a property damage claim and no doubt will cause concerns for insurers. The quantum of the amount in dispute would suggest that a further appeal is unlikely. No doubt defendants and insurers will argue that this decision has a limited application and a defendant will not ordinarily foresee that contractual arrangements that impose penalties are a loss that would flow from a property damage claim. But will those arguments succeed. Only time will tell.

Business Trips And Workers Compensation Claims Become A Real Issue

The NSW Court of Appeal has sounded a warning to employers who send employees on business trips that injuries sustained by those employees whilst performing activities unrelated to their employment will result in viable claims for workers compensation. This will include lay overs in overseas locations.

The Court of Appeal has recently delivered judgments in *Watson - v - Qantas Airways Limited* and *Badawi - v - Nexon Asia Pacific Pty Limited trading as Command of Australia Pty Limited* where the Court examined an employee's entitlement under the NSW workers compensation regime when the employee is injured when he is away from home on a business activity but is injured during what appears to be a leisure activity.

In *Watson's* case the Court of Appeal considered a scenario where Watson, a pilot employed by Qantas, was injured in a motor vehicle accident which occurred when he was returning to his hotel after visiting friends. The accident occurred whilst he was in Los Angeles on a compulsory break from flying.

Badawi on the other hand was on a business trip at the Perisher Blue Ski Resort attempting to secure the resort as a client for his employer's information and technology business. Badawi was due to go skiing with a representative from the Resort on the final day of the business trip but the representative of the Resort withdrew and Badawi and her partner went skiing with her rental gear being paid for by the Resort but she paid for her own lift tickets. Badawi was injured when she fell and injured her knee whilst skiing.

In *Badawi's* case the Deputy President of the Workers Compensation Commission concluded that the Badawi did not sustain his injuries in the course of his employment. The Deputy President also found that the injury was not sustained arising out of the employment. In *Watson* the President of the Workers Compensation Commission had determined that employment was not a substantial contributing factor to the injury. For these reasons the claims for compensation were rejected by the Workers Compensation Commission.

The worker in each case appealed. It was necessary for five judges to determine the matter on appeal as the workers argued that a previous decision of the Court of Appeal in *Mercer* which is a leading authority on the meaning of "substantial contributing factor" was incorrect and the High Court had rejected an application for leave to appeal the decision in *Mercer's* case.

Effectively the Court of Appeal was required to determine the interaction of the definition of injury in the legislation, and the need that the injury must arise out of or in the course of the employment and coupled with the interaction with Section 9A of the *Workers Compensation Act 1987* which requires that employment must be a "substantial contributing factor" to the injury to give rise to an entitlement to compensation. The Court of Appeal also needed to determine whether or not its previous decision in *Mercer* was correct and if not what was the true meaning of "substantial contributing factor".

Interestingly each appeal succeeded with the Court of Appeal finding the wrong legal principles had been applied when the

Commission had considered the claims. However unfortunately for Badawi and Watson their cases have been returned to the Workers Compensation Commission to be reconsidered but this time in line with the principles set out in the judgements of the Court of Appeal in the cases. It is also interesting to note the Court of Appeal has now moved away from the position expounded in *Mercer*.

The Court of Appeal noted that in section 9A the terms "employment concerned" and "substantial contributing factor" involve a causative element. The question is whether it is a different or added requirement to that involved in determining injury which defines injury as "arising out of employment".

The Court of Appeal noted:

*"First, and perhaps most importantly, the word "substantial", must be given effect. It is a word of ordinary English meaning. It is a word of evaluative concept. The word substantial has been said to be not only susceptible of ambiguity, but also to be a word calculated to conceal a lack of precision. Which of the various possible shades of meaning the word bears is determined by the context....: Here, the concept and purpose of the introduction of s 9A was to remove the possibility of compensation for injury with only a "remote or tenuous connection with work". This was the purpose the amendment: see the Second Reading Speech at [34] above. We would endorse the .. comments in Dayton v Coles Supermarket (that) something which is minor is not substantial, or.. "substantial" as it appears in s 9A means "in a manner that is real and of substance" and does not apply where, as a matter of practical reality, the contribution of the employment to the injury was of, or had, "little substance". We agree .. that it is not useful to search for or use other terms, such as "large", or "weighty", or by way of further example, other concepts such as "predominant". We consider that to do so may carry the vice of introducing concepts with different nuances from the words used by the legislature and which would take the meaning of the word beyond that needed to fulfil the purpose of the provision in its legislative context. ... The words of the statute should be adhered to: "a substantial contributing factor". The "proper link" in the legislative context was a causal connection expressed by the words "a substantial contributing factor", meaning one that was real and of substance. Given the conflict in the existing authority (*Mercer*, *Bulga* and *Dayton*), we think it important to clarify this issue"*

The Court of Appeal also noted that the addition of Section 9A in the legislation adds to the need that the injury must be in the course of employment. The insertion of the provision must be seen to have added a requirement of "substantial contribution" such that for compensation to be payable it must not only be in the course of employment but the employment must be a substantial contributing factor.

The Court of Appeal noted that "arising out of employment" and "substantial contributing factor" were both factual tests that must be applied.

The Court of Appeal noted in weighing up whether or not employment was a substantial contributing factor reference must be had to the factors specified in Section 9A(2) which are:

- the time and place of injury;
- the nature of work performed and the particular task of that work;
- the duration of the employment;
- the probability that the injury or similar injury would have happened anyway, at or about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
- the worker's state of health before the injury and the existence of any hereditary risk; and
- the worker's lifestyle and his or her activities outside the workplace.

In *Badawi's* case the Court of Appeal noted that Badawi's employment had taken her to Perisher where she was required to attend her employer's business by way of business meetings, setting up social contacts and undertaking any activity incidental to that. During the course of her employment she was entitled to engage in personal activities, eating, sleeping, shopping, relaxing and recreational activities such as skiing.

It was noted the location of employment at the time of the accident was somewhat exotic. She was injured leaving one place, that is the ski slopes where she was not engaged in a particular employment and was asked to return to the Resort which was the principle site where the employer's business was being undertaken.

The Court of Appeal concluded that the President of the Workers Compensation Commission was wrong when he determined that "*Badawi was not performing any work activity at the time when she received the injury but was skiing with her partner*"

because they had time on their hands".

The Court of Appeal noted:

"the President was not considering the employment concerned, nor what the appellant was doing at the time of the accident, which was going to meet her supervisor to discuss business matters in direct response to the supervisor's request. Rather, the President was considering some other activity that had preceded the accident and was seeking a linkage with the employment from the standpoint of that preceding activity. In our opinion, this is an incorrect application of s 9A. Section 9A requires a consideration of "the employment concerned" to ascertain whether it was a substantial contributing factor to the injury given the relevant circumstances in which the injury occurred, including the matters in s 9A(2). His Honour's comment that there was no question of the appellant being distracted by the telephone call from Mr Russell, or of hurrying, is perhaps the most obvious indication that he was looking at the preceding recreational activity, and looking to see if there was a link back to the employment."

What the employee is doing in any interval or interlude is a consideration to which the decision maker will have regard in determining whether the employment is a substantial contributing factor to the injury. In Badawi's case it was at least arguable that a factor relevant to the determination whether the employment was a substantial contributing factor to the injury was that shortly before the injury occurred, the appellant had been skiing, recreationally with her partner, because she had time on her hands. The Court of Appeal noted that in Badawi's case the President did not have regard to the nature of the work performed or the particular task of that work in determining whether the employment concerned was a substantial contributing factor, rather he had regard to the recreational skiing activity. It was noted the fact that immediately prior to responding to the direction of her supervisor to return to the Resort to discuss business the appellant had been skiing in a recreational capacity and that at some stage she would have descended the mountain, were likely to be considerations relevant to the determination. The Court of Appeal therefore remitted Badawi's case to the Workers Compensation Commission for a re-determination this time to take into account the specific analysis applied by the Court of Appeal on the Section 9A(2) factors.

In Watson's case the Court of Appeal noted that the test that was required to be applied by the Deputy President but was not was the test as stated in the *Hatzamalious'* case, a decision of the High Court. *Hatzamalious'* provides that an injury sustained during an interval in an overall period or episode of work will ordinarily be seen as occurring in the course of employment when the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or engage in a particular activity and the injury occurs at that place or during that activity, unless the employee is guilty of gross misconduct. The Court of Appeal noted that when applying this test it is important to determine whether or not there is a period of work or two or more periods of work and once the work of the employee is characterised in that way it is then necessary to determine the circumstances of the injury including how the interval between actual performance of work was spent. As the Court of Appeal noted:

"In the first instance a determination of characterisation of the period or periods of work of the employee as one overall period or episode of work, or two or more, one does not first, before that task, examine aspects of, an employee's attitude to, how the period of work is spent. Once the period of work of the employee is characterised, the circumstances of what occurred are to be analysed within that framework."

The Court of Appeal noted that this analysis was not done by the Deputy President in Watson's case as nowhere does the Deputy President analyse the question whether the layover was to be characterised as part of the one overall period or episode of work. If that had been done, and if the view had been reached that Watson was engaged on one episode of work taking him to the USA and returning, the particular aspects of the way the layover was spent might take on a very different complexion. For that reason it was determined that the decision of the Deputy President in Watson was wrong and should be re-determined by the Commission.

Although there was no final decision for Watson or Badawi the Commission must now re-consider the cases with the findings of the Court of Appeal applying.

The Commission will now reconsider the claims examining:

- Whether or not there is one period of employment (eg was there a break in the period of employment with the layover)
- If there is but one period of employment an injury will be sustained in the course of employment if it is sustained during an interval occurring within an overall period or episode of work and while engaged, with the employers encouragement, in an activity which the employer has organised, reasonably requires, expects or authorises.

- Effectively where an injury is sustained in an interval, the injury will be within the course of employment if it occurred at a place while the employee was engaged in an activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment.
- After identifying whether or not the injury was sustained in the course of employment it is then necessary to determine whether or not the employment was a substantial contributing factor and the court must examine the factors identified in Section 9A(2)(a) of the Act. (It must be remembered that Section 9A(2)(a) will not apply to recess claims or claims under section 10, 11 and 12 of the Act).
- What must be considered is what the worker is doing at the time of the injury not the activity he is involved in, for example, in Badawi's case at the time of the accident although she was skiing she was actually going to meet her supervisor to discuss business matters when the accident occurred.
- The fact that someone has to do something in any event is irrelevant to the consideration of the factors under Section 9A(2). For example the fact that Badawi had to descend the mountain anyway was irrelevant to the determination of whether or not the employment was a substantial contributing factor to her injury.
- The worker's employment has to have a substantial contribution that is, in these cases, in "a manner that is real or of substance". As was noted by the Court of Appeal the fact that there was a recreational aspect to the skiing during the course of employment does not diminish the contribution of the employment as being real or of substance. This is particularly so when the skiing was authorised by the employer and expressly subject to the employer's requirements.

Whilst we will have to wait for the ultimate decisions of the Workers Compensation Commission in Badawi and Watson one must speculate that the hearings may not take place as the matters may ultimately resolve as a consequence of the Court of Appeal findings. But for now employers who send their employees on business trips must face up to the fact that the requirement to have employees at a location for the purpose of a business will in most scenarios result in an entitlement to compensation where the employer has organised, reasonably requires, expects or authorises an activity. So what can employers do to reduce the risk? Clear and concise written policies on prohibited activities (Eg during your layover you must not engage in dangerous recreational activities including Bungy jumping) will go some way to identifying activities that are not approved or expected by an employer. Those policies are likely to be the best way to minimise the risk of a compensation claim from injuries sustained when workers suffer injuries from riskier activities during layovers and business trips however businesses will need to face up to the reality an injury whilst away on business is likely to give rise to a valid compensation claim under the NSW workers compensation scheme.

OH&S Roundup

Roofing Contractor Fined \$120,000

A roofing contractor was recently prosecuted for a breach of the Occupational Health & Safety Act resulting from an incident when a contractor fell through an asbestos roof sheet and the wire mesh beneath it. At the time of the incident there were no anchor points or safety lines on the warehouse roof and the contractor had not been provided with a safety harness.

The roofer through its director had conducted an on-site inspection. In one part the roof was brittle and the safety mesh under that part was not in good condition. The Safe Work Method Procedure which was prepared did not address these two risks. The Court noted that the Safe Work Method Statement specifically referred to the need for appropriate harness equipment. The company argued that the failure to ensure appropriate attachments to the roof was a failure of the sub-contractor rather than the company.

The Court noted that a corporate defendant cannot rely on its sub-contractors. The Court noted "I accept that in accordance with modern industrial practice, it may be a sensible decision for a head contractor to contract out the performance of particular skilled tasks within its contract with the principal. However, this company operates all its successful tenders through sub-contracting out the work it tenders for, so on-site supervision was and is its major obligation."

In such contracting out, a head contractor must ensure rigorous instruction and training of employees at their work site as to their job specifications and ensure that at work sites there is full compliance by the sub-contractor with its safe working obligations. The contractor was under an obligation to ensure there was proper implementation of its safe work system.

The contractor entered a plea of guilty at an early stage and received a discount of 25% on the fine. At the end of the day after discount a fine of \$120,000 was imposed on the company and a fine of \$15,000 on the director of that company.

Electric Shock Leads To \$200,000 Fine

Hanna's Civil Engineering Pty Limited ("HCE") and its director, Affron Hanna, were recently prosecuted for breaches of the Occupational Health & Safety Act NSW arising out of an electric shock suffered by a contractor who came into contact with an 11,000 volt energised electric cable and suffered burns to 18% of his body and was placed on life support and an induced coma as a result of swelling to his lungs and throat arising from the electric shock. Both the director and HCE pleaded guilty to the charges.

HCE had been engaged by a principal contractor to undertake car park extension work. The director of HCE was the site foreman and he was a self-employed contractor to HCE. HCE engaged a sole trader sub-contractor who in the course of performing work came across four orange conduit pipes which were exposed, protruding above the finished levels of the car park and the sub-contractor was directed to cut and clean up the conduit. The sub-contractor suffered an electric shock as the conduits were energised. The director was prosecuted for a breach of Section 10 of the OH&S Act and it was alleged that he had control of the premises and had not ensured the premises were safe and without risk to health. The company was prosecuted for failing to ensure the health and safety of persons other than employed employees.

The Court noted that the four orange conduit pipes had been exposed in a location that corresponded with a plan of the work site that displayed electrical easements. Electric cables were usually encased in orange conduit pipe and the company's work instructions directed that when excavating these services contact should be made with "Dial before you Dig" and the areas of the services should be recorded and identified. Neither the contractor nor Hanna undertook that basic and obvious task and performed no more than a visual inspection of the four orange conduit pipes and did no more than expose the end of the conduit by moving the sand at that point and concluding that it was empty.

The company had previous convictions under the Occupational Health & Safety Act. The Court regarded the breach was serious but did not fall into the worse category of case. The company received a discount of 25% before the penalty was determined and Hanna 20% for the early guilty pleas. The reduced discount for Hanna arose as he originally pleaded not guilty to the offence. The Court noted there was a need to impose a penalty to reflect general and specific deterrence and imposed a fine of \$200,000 on the company and \$10,500 on the director after applying the discounts.

John Holland Liable Under NSW And Victorian OH&S Legislation

The High Court of Australia has recently determined that John Holland was liable for prosecution for breaches of the Occupational Health & Safety legislation in Victoria and NSW for alleged breaches of the Act occurring before John Holland became a "non-Commonwealth licensee" within the meaning of the Commonwealth Occupational Health & Safety Act. That Act provides that the Commonwealth legislation is to apply to the exclusion of any law of a State or Territory to the extent that the law of a State or Territory relates to occupational health or safety or would otherwise apply in relation to employers, employees or the employment of employees. John Holland argued that once it had opted into the Commonwealth scheme which it could do as it had entered the Commonwealth Government's workers compensation regime, it ceased to be liable to prosecution for offences allegedly committed under State occupational health and safety legislation before it became a non-Commonwealth licensee. The High Court rejected this argument.

The High Court noted that the Commonwealth legislation provided that if the Commonwealth legislation did not apply in relation to a particular situation the Commonwealth Act was not intended to affect the application of the State or Territory laws to that situation.

The High Court confirmed that the Commonwealth legislation will relieve employers from the observance of the concurrent operation of multiple sets of legislative imposed duties whether imposed by State or Territorial law. However, the legislation will not absolve those who become employers from liability to prosecution for offences against the State occupational and safety laws allegedly committed before the status as a non-Commonwealth licensee was acquired. John Holland will now face prosecutions under the NSW and Victorian Occupational Health and Safety legislation which arise from activities that John Holland undertook before they became a non-Commonwealth licensee under the Commonwealth occupational health and safety legislation.

Employment Roundup

Avoiding The Costs Of Sexual Harassment & Sexual Discrimination Claims

Employers should be aware that a failure to implement policies to deal with sexual harassment behaviour and maintain proper grievance procedures to deal with sexual harassment allegations may prove very costly to businesses who will, in effect, be uninsured for any verdict or settlement arising from a claim against them.

There is a range of legislation that protects employees from sexual harassment and sexual discrimination in the workplace. The legislation includes:

Commonwealth

- The Sex Discrimination Act, 1984;
- The Racial Discrimination Act, 1975

NSW

- The Anti Discrimination Act, 1977

The *Sex Discrimination Act*, 1984 (Commonwealth) provides that a person sexually harasses another person if:

- "(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the harassed person; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated."

"Conduct of a sexual nature" includes making a statement of a sexual nature to a person or in the presence of a person, whether the statement is made orally or in writing.

The Act prohibits sexual harassment of an employee or a person seeking to become an employee. It is also unlawful for an employee to sexually harass a fellow employee. Commission agents or contract workers are also protected under the legislation from being sexually harassed.

It is not necessary for the sexual harassment to take place at the employer's workplace. An employer can be held liable for harassment of employees by co-workers even though the harassment takes place away from the work premises. There also the risk of harassment at sanctioned events such as conferences and/or other work functions.

In *South Pacific Resort Hotels Pty Limited - v - Trainor* [2005] EOC, an employer was held liable for harassment of an employee by a co-worker at employer-provided accommodation, even though the employees were not working when the harassment occurred. The harassment occurred when a male employee entered a female employee's room uninvited. Whilst the incident occurred at night when both employees were off duty, the conduct occurred "in connection with employment" and as such the employer was vicariously liable.

An employer will be liable for sexual harassment if it is in connection with the employment of the employee. An employer, to avoid vicarious liability for the actions of their employees must demonstrate that they took "all reasonable steps to prevent the employee or agent ... " from engaging in the sexual harassment.

The *Sexual Discrimination Act*, 1984 also provides that an employer or person shall not victimise an employee who has made, or proposes to make a complaint for a breach under this Act. There is the defence to prosecution for an offence of victimisation if the person can prove the allegation of sexual harassment was false and was not made in good faith.

Under the *Anti Discrimination Act*, 1977 ("ADA") sexual harassment is defined as:

- "(a) the person making an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
- (b) the person engages in other unwelcome conduct of a sexual nature in relation to the other person; in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the other person would be offended, humiliated or intimidated."

The ADA provides that an employer is liable for a breach of the ADA by its employee unless:

- the employer did not either before or after the doing of the act, authorise the employee either expressly or by invitation to do the act; and
- took all reasonable steps to prevent the employee from doing the act.

Employers should be aware of two recent decisions where complaints have been brought by employees regarding sexual harassment.

In a matter of *Poniatowska - v - Hickinbotham* [2009] FCA 680, Mansfield J ordered the employer to pay damages to the applicant in the sum of \$466,000.00 for unlawful discrimination and breach of the *Australian Human Rights and Equal Opportunity Commission Act, 1986*. There were findings of sexual harassment and sexual discrimination in breach of the *Sex Discrimination Act, 1984*.

The Court found:

- the employer had no formal policies governing the investigation and handling of complaints of sexual harassment or discrimination;
- the complaints of the applicant were not properly handled;
- the employees who had offended the applicant were not reprimanded or disciplined;
- the applicant was not treated like a victim of sexual harassment rather she was discriminated against by the employer;
- the applicant was ultimately dismissed by her employer.

It was accepted the applicant developed and continued to suffer from severe depression and anxiety following on from the sexual harassment and unlawful discrimination. Her award of damages consisted of:

- \$90,000.00 for pain and suffering;
- \$200,000.00 for past loss of earning capacity;
- \$30,000.00 for interest;
- \$140,000.00 for future loss of earning capacity; and
- \$3,000.00 for future medical expenses.

The judgment is currently under appeal.

In a matter of *Whitlock - v - Bunnings*, the Queensland Anti-Discrimination Tribunal accepted a complaint by an employee that she had been sexually harassed. It did not accept the complaints of the employee that she had been victimised were made out. The applicant was awarded \$25,000.00 in damages.

However, the hearing of the matter took more than eight days. The applicant's costs exceeded \$130,000.00. The Tribunal found the evidence in the second and third respondent's case was false. The employer made no apology to the applicant or any offer designed to properly compensate her despite the fact it knew or ought to have known her claim against the employer would have succeeded. Consequently the Tribunal ordered the employer to pay the applicant's costs on an indemnity basis, amounting to \$132,818.00.

The Australian Human Rights Commission has published a Code of Practice on sexual harassment. The Code emphasises the importance of treating sexual harassment as a serious infringement of a person's right to work with dignity and respect. The Code emphasises the importance of prevention, the need for induction programs for new employees and early intervention by managers.

The legislation also provides employers with defences if:

- the employer did not know or authorise the unlawful acts; and
- the employer took all reasonable steps to prevent the occurrence of the unlawful act.

In the matter of *Caton - v - Richmond Club Limited* [2003] EOC, it was found the employer was vicariously liable for an employee's behaviour as there was sufficient knowledge amongst staff and middle management of the employee's "usual conduct" towards female staff at the Club. Ultimately the employee sexually harassed the receptionist at the Club. The Club

after receiving a formal complaint acted swiftly and investigated the complaint. It dismissed the employee once he admitted his behaviour. The Club also arranged counselling for the applicant and initiated an injury management plan to assist her to return to work. However, the Tribunal emphasised that taking reasonable steps was not enough. It noted employers must take all reasonable steps to avoid liability.

Preventing Sexual Harassment Claims

Employers should have at least:

- A written sexual harassment policy which is readily available for employees to read.
- Employees should be educated about the types of behaviour which constitute sexual harassment.
- It should be made clear to employees that sexual harassment will not be tolerated and that any employees who engage in sexually harassing conduct can and will be dismissed.
- Employees should be made aware of their right to complain and the fact that any complaint made to management will be listened to, taken seriously and resolved in accordance with the policy.
- Employees should be assured that any complaints made will not lead to that employee being victimised in any way.
- A culture of being proactive in stopping sexual harassment rather than waiting for a formal complaint to be made.

In determining what is reasonable, employers should take into consideration the size of their organisation, available resources, the level of supervision and the gender imbalances of the workplace.

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.

Gillis Delaney Lawyers specialise in the provision of advice and legal services to businesses that operate in Australia. We can trace our roots back to 1950. The name Gillis Delaney has been known in the legal industry for over 40 years. We deliver business solutions to individuals, small, medium and large enterprises, private and publicly listed companies and Government agencies.

Our clients tell us that we provide practical commercial advice. For them, prevention is better than cure, and we strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service. The changing needs of our clients are met through creative and innovative solutions - all delivered cost effectively. We make it easier for our clients to face challenges and to ensure they are 'fit for business'.

We look at issues from your point of view. Your input is fundamental to us delivering an efficient, reliable and ethical legal service. We like to know your business, and take the time to visit your operation and develop an in depth understanding of your needs. Gillis Delaney is led by partners who are recognised by clients and other lawyers as experts in their fields. Our service is personal and 'hands on'.

Our clients receive the full benefit of our ability, knowledge and effort in our specialist areas of expertise. We provide superior and distinctive services through a team approach, drawing the necessary expertise from our specialists. Our mix of professionals ensures that clients enjoy high level partner contact at all times.

We are committed to delivering a quality legal service in a manner which will exceed your expectations and we maintain a focus on business and commercial awareness whilst delivering excellence in legal advice.

We have a proven track record of delivering commercially focused advice. Whether it is advisory services, dispute resolution, commercial documentation or education and training, a partnership with Gillis Delaney offers:

- practical innovative advice
- timely services
- expert insight
- accessibility
- cost effective solutions

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtm@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.