

Welcome to our latest edition of **GDNEWS** that brings to you information on new trends and issues that impact on the employment and insurance market in Australia. In this month our feature article deals with developments affecting independent contractors with a focus on the Federal Government's recent review of the labour hire industry and independent contractors. We can be contacted at any time for more information on any of our articles.

Independent Contractors in Focus

In late 2004 the Federal Government established a committee to inquire into independent contracting and labour hire arrangements in Australia. The Government subsequently published a discussion paper in March 2005 which prompted 77 written submissions and the inquiry received evidence from over 100 witnesses. In September 2005 the Federal Parliament received the report of the committee and will now consider the implementation of recommendations which have been made.

There has been substantial growth in Australia in independent contracting and labour hire employment over the last 10 or so years. Currently over 10% of the workforce identifies themselves as independent contractors and approximately 3% of the workforce is employed in labour hire.

Generally the growth in these sectors has been attributed to the need for agility in the workforce to meet changing work demands and the focus by some on maximising independence with a balance between risk and return.

The committee investigated whether labour hire and contracting arrangements have been used to evade responsibilities particularly in the area of occupational health and safety and employee entitlements as well as considering the methodology of the determination of the status of independent contractors.

The committee's report is comprised of a majority opinion and an opinion of the committee members who dissented on some of the recommendations. The majority made 16 separate recommendations.

Fundamental in the considerations were the different definitions of employee, independent contractor and employer in Commonwealth and State jurisdictions which has been the case for a long time. Generally in the past where there has been difficulty in differentiating between employees and independent contractors matters are left to the Courts to determine on the basis of an assessment of various indicators. Unfortunately there is no unanimously accepted understanding of how many indicators or what combination of indicators will point towards an employment relationship rather than a contractor relationship.

The committee received evidence from the ACTU that approximately 25% of independent contractors are in a dependent employment relationship in that those independent contractors are almost exclusively reliant on one entity for their income. The Productivity Commission provided evidence to the committee that 72% of independent contractors were in skilled occupations and 72% of dependant contractors were in lower skilled occupations such as plant machine operators and drivers.

The focus of the committee turned to the common law tests of balancing the indicators to determine employment status and the personal service income test set out in the alienation of Personal Services Income Act 2000 which was designed to ensure that employees remain in the PAYG installment system rather than adopt an ABN and pay tax as a business.

The tests are commonly known as the 80/20 rule and the results tests. Each test has different elements which must be satisfied to bring a person within the tests so that the tax payer will be taken outside the PAYG system and entitled to claim benefits as a truly independent business.

The Australian Taxation Office provided anecdotal evidence that 75% of those that are independent contractors pass the "personal service" business test with 19% passing the unrelated client test. In addition one third of the independent contractors who have been audited by the Australian Taxation Office have required adjustments to tax returns as a consequence of failing to satisfy requisite tests which they had believed they had passed on self assessment.

We thank our contributors

David Newey dtn@gdlaw.com.au
David Collinge dec@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
Cameron Cuffe cgc@gdlaw.com.au

October 2005
Issue

Inside

Page 1
Independent contractors in focus

Page 2
Watch those emails!

Page 3
Domestic assistance for injured workers in NSW

Page 3
OH&S penalties snapshot

Page 5
Failure to signpost subway

Page 6
Fund management fees in injury damages claims.

Page 6
Just who is covered by a policy

Page 7
Council liable following incorrect inspection

**Gillis Delaney
Lawyers**
Level 6,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

The committee's report recommended that:

- The Government conduct further research and gather better statistics concerning the prevalence of independent contracting and labour hire arrangements.
- The Government maintain the common law indicators test to determine employment status and distinguish between employees and independent contractors.
- In addition to the common law test, the Australian income tax assessment alienation of personal income test be utilised to identify independent contractors.
- The Federal Government pursue national consistency in identifying independent contractors.
- A voluntary best practice guide for the labour hire industry be developed.
- Improved data collection on injury rates of labour hire and independent contracting be pursued.
- Initiatives be developed to clearly delineate responsibilities among labour hire agencies and host businesses in relation to occupational health and safety.
- Initiatives be developed to clearly delineate responsibilities among independent contractors and host businesses in relation to occupational health and safety.
- The Federal Government review workers compensation schemes across the States and Territories to assess and improve the consistency of employment service categories measuring injury rates for labour hire and independent contractors.
- The labour hire industry develop an industry code of practice by 2007.
- The Workplace Relations Act 1996 be expanded to extend the description of independent contractors beyond natural persons.
- The Government incorporate legislation that protects the legal status of independent contractors, provides a broad description of independent contractors to cover all forms of business structures, that regulates independent contractors as small businesses within a framework of commercial law and institutions rather than industrial laws and institutions.
- Resources be allocated to provide assistance on setting up small businesses, financial and reporting requirements and dispute resolution.
- A national regulatory consistency for independent contractors providing clarity in relation to working arrangements and responsibilities be pursued if a National Industrial Relations systems is implemented.

The committee did not find in favour of the suggestion that there be an approval system and register for independent contractors. Rather the committee noted that the changing nature of a commercial relationship was such that registration as an independent contractor and maintaining a register was inappropriate.

Interesting times are afoot. The Federal Government continues to flex its muscles and intends to implement legislative change to establish a national industrial relation system. Substantial changes are very close. Whether or not those changes will deal with independent contractor issues and implement some or all of the recommendations of the committee is yet to be seen.

The Government's move to a national system may well be based on an exercise of the Governments constitutional powers to deal with corporations. If this occurs this may also result in a drive of independent contractors towards incorporation so that the contractors can opt into the Federal Scheme.

Watch Those Emails!

With the recent media attention in relation to the salacious emails between two female co-workers at a Sydney law firm, it is a timely reminder that inappropriate emails can lead to the dismissal of even long standing employees.

In the matter of *Rogers -v- State Rail Authority of New South Wales*, the Industrial Relations Commission held SRA lawfully dismissed an employee who had been employed for 17 years. By way of facts, in May 2004 Rogers sent an email entitled "funny sexual positions" from his home email address to his work email address. He then forwarded this email to a fellow employee, let's call him E. Soon afterwards Rogers found some caricature pictures of staff drawn by E displayed in the booking office at Springwood. Rogers found the pictures offensive and removed them. E then produced another caricature to see if Rogers found it offensive.

On 9 June 2004, Rogers found a sexually explicit drawing of himself which E had drawn and placed in or on his locker. Rogers complained about the picture and E's conduct was investigated and he was interviewed. During the interview E produced a copy of the email Rogers had sent him earlier. SRA considered the email was a breach of the Code of Workplace Standards. Rogers submitted that the only reason E had reported the email was because Rogers had complained about E, and agreed in mitigation that E had asked for the email and was aware of its content, however this was not seen as relevant. The Commission found the request by E did not imply Rogers had not breached the policy in sending it. The Commission also took into account the fact Rogers had sent emails in breach of the policy on 6 previous occasions. Whilst this evidence was not presented to Rogers at the time of his termination, the Commission found it relevant in considering whether the termination was justified.

This should serve as a warning to employees that even a voluntary request for inappropriate material to be forwarded in emails will not provide adequate grounds for reversing an alleged unfair dismissal. It should also show long standing service is no defence to behaviour contrary to a reasonable code of conduct.

Domestic Assistance for Injured Workers in NSW

Since the significant amendments to the NSW worker's compensation system in November 2001, there has been considerable emphasis placed on the 15% whole person impairment threshold for common law claims and the ability for claims to be finalised with a commutation settlement. It is worth remembering that a worker with 15% whole person impairment is also entitled to domestic assistance on an ongoing basis.

WorkCover's aim in providing domestic assistance to injured workers is driven by its focus on returning injured workers to employment as soon as possible and mitigating the effects of their injury on their health and wellbeing.

The *Worker's Compensation Act 1987* allows for compensation to be paid for domestic assistance that is reasonably necessary for an injured worker. This domestic assistance includes but is not limited to general household cleaning, laundry tasks, meal preparation, shopping, simple essential home maintenance and even child care. An injured worker is eligible to receive domestic assistance where a medical practitioner has certified that it is reasonably necessary for the worker to receive the assistance and that necessity arises directly as a result of the worker's injury. The certification must provide for the type and the amount of assistance to be provided and the worker must have undertaken the domestic tasks with which assistance is to be provided prior to the injury.

It should be remembered that whilst the provision of this domestic assistance must be reasonable and necessary, the fact that someone residing with the worker gains a subsidiary indirect benefit from the service does not of itself prevent the service from being approved as domestic assistance. WorkCover in their Guidelines has specified there must be evidence that the assistance required:

- (a) arises from the worker's injury/illness, incapacity and those related factors that are hindering the worker's recovery and return to work;
- (b) there is a clear link between the worker's needs for the purpose of its assistance and its likely benefits;
- (c) is likely to be more effective than alternative intervention;
- (d) is cost effective in that it substantially reduces the worker's dependency on further treatment, rehabilitation and worker's compensation benefits;
- (e) represents an accepted intervention for those needs arising from the worker's injury and incapacity. Simply there must be evidence to support its efficacy.

The worker will be entitled to domestic assistance on a permanent basis once the worker has been certified with at least 15% whole person impairment. There is no limit on the length of time that domestic assistance can be provided. In the period prior to the whole person impairment assessment, the legislation allows for a maximum of 6 hours per week domestic assistance for a maximum period of 3 months. This can be a single block of 3 months or can be accumulated by several shorter periods of assistance adding up to 3 months. The WorkCover Guidelines have also specified payments can be made on a "without prejudice" basis if a qualified specialist determines a worker's injury will be at least 15%, even if it has not stabilised. This Guideline seems to suggest greater flexibility than the current legislation strictly allows.

Finally, the compensation can also include gratuitous domestic assistance services. However, it should be remembered payment for gratuitous domestic assistance can only be made when the provider has lost income or foregone employment to provide domestic assistance. There must be evidence of the lost income or foregone employment and a domestic assistance diary must be completed to verify the provision of those services. The maximum amount payable for gratuitous domestic assistance is 35 hours per week and is calculated by reference to average weekly earnings. The WorkCover Guidelines provide the payment must be made to the provider of the gratuitous domestic assistance and not the injured worker.

It is interesting to note since the introduction of domestic assistance entitlements, there do not appear to have been any significant disputes in the Worker's Compensation Commission in relation either to the evidentiary or reasonable and necessary requirements for the provision of domestic assistance. Leaving aside the difficulty of worker's achieving the 15% whole person impairment threshold, it would appear WorkCover has succeeded in allowing for domestic assistance without any significant disputes occurring.

OH&S Penalties Snapshot

This month we review a number of OH&S prosecutions in the Industrial Relations Commission of NSW.

Baggy Pants are a Danger

On 21 December 2003, Mr Evans, an employee with the labour hire company Blue Collar Personnel Pty Limited while contracted by Qantas Limited ("Qantas"), sustained severe perineal injuries. Evans was contracted to manually break down freight units in the import section of Qantas's freight terminal located at Mascot, New South Wales. On that day Evans walked into a semi-restricted area located in the freight terminal to adjust a radio that was located on an area separating two roller decks which were used to move freight from the "air siding" of the terminal to the "breakdown area" of the terminal.

As Mr Evans adjusted the radio, he sat down and the roller deck was activated by the operator. As the rollers began to turn, the baggy three quarter pair of shorts Mr Evans was wearing became entangled and Evans sustained severe injuries.

Investigations carried out by WorkCover found Qantas had not undertaken a risk assessment of the roller decks or job safety analysis of the employment role Evans performed. WorkCover further concluded Qantas did not ensure Evans was wearing the long pants issued to him in accordance with best workplace practice. Furthermore, WorkCover led evidence that Qantas was aware of the presence of the radio in the semi-restricted area of the terminal and had not directed its removal.

Following the incident and prior to the Industrial Relations Commission's decision, Qantas implemented steps to reduce the risk of incidents occurring in the future including the following:

- All radios were removed from the workplace.
- Employees were educated as to the dangers of working near the roller decks.
- All power points near all semi-automatic equipment at the freight terminal were locked out.
- Signage was placed near roller decks warning of the dangers.
- All employees were issued with industrial style King Gee shorts.
- Guards were placed on the mechanical areas near the roller decks.

In reaching their final conclusion the Industrial Relations Commission noted Qantas had four prior convictions in relation to prosecutions under the OH&S legislation dating back to 1992, however these prior convictions did not indicate a propensity to re-offend. The Commission further noted Qantas was very cooperative with investigating the incident and showed considerable remorse for the incident taking place.

Qantas pleaded guilty to the charges which carried a maximum penalty of \$825,000, and Qantas received a fine of \$75,000.

Children in the Workplace

On 22 December 2003 Mr Edmunds, a director of a frame manufacturing company who sourced their timber from Transylvanian Timbers Pty Limited ("the Defendant") attended the Defendant's timber yard with his 2 year old daughter, Celeste. Whilst at the timber yard, Mr Edmunds was asked by a manager of the Defendant to assist in covering a 2 metre high and 5 metre long stack of timber with a tarpaulin to shelter it from the rain. While Mr Edmunds was covering the timber stack, two timber packs on top of the stack toppled over, and struck Mr Edmunds in the lower torso area pinning him on the ground. As a result of the accident Mr Edmunds sustained severe internal and spinal injuries including 7 broken ribs, 3 fractured vertebrae, 8 fractures to the pelvis and a pulmonary embolism to his lung. At the time of the accident Celeste was only metres away from Mr Edmunds and became significantly distressed at what she had witnessed.

The Defendant was charged by the WorkCover Authority under the *Occupational Health & Safety Act* for failing to ensure persons not in their employment, in particular Mr Edmunds and his 2 year old daughter were not exposed to risk to their health and safety arising from conduct within the timber yard.

WorkCover led evidence indicating there was no written system of safe work practice in place by the Defendant to ensure the stacking and covering of timber was carried out in a suitable manner. There were oral instructions in relation to the stacking of timber, however the instructions were inadequate.

Directly following the incident the Defendant engaged a senior OH&S training officer from the Timber Trade Industry Association to carry out a risk assessment and survey on the timber yard. Following the survey, the Defendant provided all employees with the recommended training and education outlined within the survey as well as implemented all the recommended safety improvements.

The Industrial Relations Commission noted the Defendant had had no previous convictions or any prosecutions under the *Occupational Health & Safety Act* to date. They further noted the Defendant's guilty plea at the first possible opportunity, however were unimpressed with the Defendant's lack of safety procedures which allowed a 2 year old child to enter a significantly dangerous area of the workplace. The Commission was of the opinion the Defendant was well aware of the risk of allowing unauthorised persons, including children into the timber yard, and no steps were taken to remove children, in particular Celeste, from the dangerous area. The Commission imposed a fine of \$65,000 on the defendant.

Workplace Mishap Causes Highway Accident

On 15 October 2002 a 6 metre long iron cement lined pipe weighing 434 kg found its way onto Nelson Bay Road just north of Newcastle. At approximately 7.00 pm a car being driven by Mr De Waard accompanied by his wife, Mrs De Waard while heading toward Nelson Bay, collided with the pipe. The collision caused the De Waard's vehicle to career head on into an oncoming vehicle heading towards Newcastle and driven by Mrs Meguyer and her husband, Mr Meguyer.

As a result of the collision, Mr De Waard suffered fractures, lacerations and head injuries. He required emergency surgery. Mrs De Waard suffered multiple fractures including a compound fracture to her right wrist and lacerations to the left forearm and face and long term disabilities. Mrs Meguyer ultimately needed a total knee replacement.

The pipes had been laid on the side of the road on an embankment approximately 1.5 metres above road level. The embankment sloped

towards the road. The pipes had been placed on the embankment by TCK Excavations Pty Limited ("TCK") who had been contracted by the Hunter Water Corporation ("Hunter Water") to carry out excavation and installation of some 9 kilometres of piping.

As a result of the collision the WorkCover Authority of NSW prosecuted Hunter Water and TCK for failing to protect the health and safety of individuals while in the workplace.

Directly following the incident both Hunter Water and TCK undertook extensive occupational health and safety reviews of their business operations.

The Industrial Relations Commission concluded that although the pipes may have been pushed down the hill as an act of vandalism, this was a foreseeable circumstance and one that should have been taken into consideration. Ultimately the commission concluded that although both Hunter Water and TCK had had previous convictions under the *Occupational Health & Safety Act*, the recent offence did not indicate a propensity to re-offend. Further to this, the Commission noted both Hunter Water and TCK had gone to commendable lengths following the accident to advance their occupational health and safety systems. Both Hunter Water and TCK were fined \$120,000 each.

Workplace Assault

In early January 2001 a psychiatric nurse with some 30 years experience as a registered nurse was assaulted whilst working in the psychiatric unit at the Morriston Hospital. As a result of the assault the nurse sustained swelling, bruising and lacerations to his chest, head, neck, shoulders and back as well as a sprained left wrist and post traumatic stress syndrome. At the time of the assault the nurse was employed by the Hunter Area Health Service.

As a result of the assault the Hunter Area Health Service was prosecuted under the *Occupational Health & Safety Act* by the WorkCover Authority of NSW. The WorkCover Authority led evidence before the Commission submitting the duress alarm systems in place at the hospital installed as part of the psychiatric unit's aggression management and occupational health and safety systems did not meet the Australian Standards on healthcare facilities nor the Australian Standards for mental health services. In particular the prosecution indicated the personal distress beacons did not have a "man down" function which would indicate to base control while a nurse was lying on the ground.

The Health Service indicated that in 1999 they had paid Dupont \$2.5 million to carry out an extensive occupational health and safety review of the hospital's OH&S risks and provide recommendations which they had implemented. Further to this Dupont had returned in February 2001 for further OH&S training and support in relation to their recommendations of 1999.

The Commission noted the Hunter Area Health Service had four previous convictions dating back to 1999 although their guilty plea and the steps they had undertaken to address the defects in their occupational health and safety systems together with the counselling they offered staff following the incident was a significant factor in mitigating the severity of the penalty that should be imposed. Ultimately the Hunter Area Health was fined the sum of \$105,000.

Summary

The above cases highlight the importance of not only being aware of the health and safety of employees within the workplace but individuals who may be brought into the workplace, who are not employees or who may find themselves in the workplace who are not employees.

RTA liable for Failure to Signpost Subway

The New South Wales Court of Appeal has again highlighted the importance of signs, albeit in a different context to the usual warning sign cases.

Suppachai Chotiputhsilpa was a 16 year old student from Thailand who had been studying in Australia for 5 months. Chotiputhsilpa attended college in the city and every day would catch the bus home to Pymont. On this particular occasion as the bus approached Chotiputhsilpa's usual stop he rang the bell but the bus failed to stop and continued onto the Anzac Bridge. The bus driver then stopped the bus in a disused bus stop on the bridge for Chotiputhsilpa to alight. In his attempt to cross the Anzac Bridge Chotiputhsilpa was struck by a motor vehicle and sustained serious injuries including brain damage.

Chotiputhsilpa brought proceedings in the District Court against the driver of the motor vehicle that struck him and against the Roads and Traffic Authority ("RTA"). The RTA had responsibility for the design and construction of the bridge including signage. The claim against the RTA was based on a failure to signpost a pedestrian subway that ran underneath the bridge. Chotiputhsilpa contended had he been aware of its existence he would have used the subway to cross the Anzac Bridge safely. No claim was brought against the bus driver.

The Trial judge found no liability on the part of either the driver or the RTA. Chotiputhsilpa appealed.

The Court of Appeal agreed with the Trial Judge that the driver was not liable as the driver was travelling within the speed limit and Chotiputhsilpa's appearance on the bridge was completely unexpected. The RTA on the other hand were liable. The expert evidence before the Court demonstrated that there was inadequate signage to advise pedestrians of the existence of the subway. The RTA ought

to have been aware that in the situation where there was inadequate signage advising pedestrians of the existence of the subway then pedestrians would take the risk of crossing the road, a treacherous path. The Court accepted that Chotiputhsilpa would have used the subway had he been aware of its existence. Damages were however to be reduced by 60% for Chotiputhsilpa's contributory negligence.

Chotiputhsilpa's damages are to be assessed in a re-trial in the District Court and given that Chotiputhsilpa sustained brain damage undoubtedly damages will be substantial even with the 60% reduction.

It is not just warning signs that are important. Signs should also be erected advising of the safe, appropriate route.

Fund Management Fees in Injury Damages Claims

The High Court of Australia has recently made clear what allowance is to be made in injury damages claims for 'fund management expenses'.

In *Willett v Fitcher [2005] HCA 47* (handed down on 7 September 2005), the plaintiff had been severely injured as a child through the negligence of the defendant. As a result of that negligence she was unable to manage her own affairs.

Her personal injury action was settled for a significant sum, with a term that the damages be managed by an administrator and that she also be allowed an amount to cover "*reasonable management fees of the administrator*". A dispute arose as to what that expression meant.

The Court (in a unanimous opinion) made the following clear:

- the expense of managing the financial affairs of a person with an impaired intellectual capacity - where the impairment has been caused by the negligence of a defendant - is not too remote to be compensated by damages;
- the amount properly allowable for such management is an amount assessed as allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund;
- the damages to be awarded are to be calculated as the amount that will place the plaintiff, so far as is possible, in the position he or she would have been in had the negligence not occurred;
- it is wrong, therefore, to compare the position of such an injured plaintiff with the position of a person capable of managing his or her affairs but with a similar lump sum to invest;
- accordingly, it is wrong to exclude from the allowance amounts charged by an administrator for such things as 'advisory portfolio management fees' or 'underlying investment manager fees - initial or ongoing brokerage fee (third party)' - if the negligence is the cause of these expenditures being payable, then they are recoverable.

The decision will no doubt see an increase in amounts sought for and allowed as damages for fund management in catastrophic personal injury claims.

Just who is covered by a policy?

The attempts to expand the category of who - apart from the named insured - is effectively covered by a policy of insurance continue. Often the attempt is successful, which makes the life of an underwriter interesting to say the least.

These efforts usually occur when the entity a claimant wants to sue is dead, insolvent or wound up and deregistered. *Morris v Betcke*, a decision of the NSW Court of Appeal handed down on 16 September 2005 is just such a case.

The claims arose from the crash of a light aircraft in 1998. All on board were killed. Widows of 2 passengers sought to claim against the owner of the aircraft and the pilot. The owner company had been wound up; the pilot was dead and his estate had been administered.

The owner company had taken out a liability policy with a syndicate of underwriters. An application was therefore made to join the local representative of the syndicate as a defendant.

As far as the owner company was concerned, the claim against it was one of vicarious liability for the alleged negligence of its servant or agent the pilot. The Court noted that under section 6 Law Reform (Miscellaneous Provisions) Act 1946 (NSW) (LRMPA) all the claimants had to show to join the syndicate as a defendant was that there was an arguable case against the owner and an arguable case against the insurer. This was described as "a relatively modest hurdle".

On the evidence the pilot was not only a shareholder but also a director of the owner. This was sufficient to establish an arguable case of vicarious liability of the owner. (Arguments over an arguable case for indemnity were also unsuccessful). The joinder of the syndicate in relation to the owner's potential liability was held to be appropriate.

As to the pilot, the application turned on the meaning of "any person who has entered into a contract of insurance" in s6 LRMPA. There was no evidence as to the pilot's involvement in taking out the policy; the proposal form was not tendered; and there were no personal obligations on the pilot in the policy wording. In those circumstances the application to join the insurer under s6 LRMPA for the pilot's liability was refused.

However, the Court held that s51 of the Insurance Contracts Act 1984 (Cth) assisted the claimants. That section provides an avenue of relief to a claimant against the insurer of a dead person - where the dead person is "the insured".

On the face of the policy the pilot was clearly not the insured - but the Court was persuaded that as the scope of this term under s51 was not clear, and as the legislation is 'remedial' in character, there was an arguable case, and hence the joinder of the syndicate was appropriate. (The Court made it clear that the issue could still be argued at trial - somewhat cold comfort).

The underwriters are faced with a claim that they are liable for the acts of the owner and the pilot. In all, underwriters would be forgiven for thinking that they face an impossible task in assessing the likely risks they must bear under a policy of liability insurance. The list just keeps growing.

Council Liable Following Incorrect Inspection

The Supreme Court in New South Wales recently found Randwick City Council liable in an unusual claim.

In December 2000 Mark Ward slipped and fell through railings on external stairs on a building in Coogee. The building was owned by T & H Fatouros Pty Ltd ("Fatouros") and was within the local government area of Randwick City Council. Ward sued Fatouros claiming damages for personal injury. The claim brought by Ward was resolved out of Court.

As a consequence of Ward's claim Fatouros cross-claimed against the builder of the stairway and the Council. The cross-claim against the builder also resolved out of Court with a verdict for the builder. Only the cross-claim against the Council remained for the Court to consider.

In November 1996 the Council had ordered Fatouros to fix the stairway and a new stairway was built in 1998. In March 2000 the Council carried out their annual inspection of the stairway. No complaints arose from this inspection. The handrails and balustrading were expressly found to be satisfactory.

In fact, the stairway on which Ward slipped did not comply with the Building Code of Australia. Fatouros alleged that the Council had failed to advise him that the stairway did not comply with the Building Code and had therefore breached their duty of care.

The Court noted that it was in fact the Council who had introduced necessary compliance with the Building Code of Australia as far back as 1996. By its conduct the Council had implied that the stairway did comply with the Building Code.

The Court found in a somewhat hesitant judgment that in approving the unsafe stairway the Council had breached its duty of care to Fatouros. It did not matter that the claim was essentially a claim for pure economic loss. The Court commented "The Council's statutory powers exist for the purpose, among other things, perhaps, of ensuring the safety of individuals who are not in a position to protect themselves; Council officers have the expertise to appreciate dangers that others might not recognise; Fatouros was entitled to, and did, rely upon the Council for advice as to what was required."

This case has considerable significance for Councils. If a Council inspection takes place and later the inspection is found to be wanting then Councils can be found liable for loss flowing from this inspection.

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 is a progressive medium sized law firm based in the Sydney CBD. **GD** also has offices in Newcastle and Ballina. **GD** delivers business solutions to small, medium and large enterprises, private and publicly listed companies and Government bodies that conduct business in Australia. **GD** provides legal services to a wide range of clients throughout Australia with a focus on clients in the insurance and construction industries. **GD** are specialists in insurance law, OH&S and employment law.

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

