Since the decision of the High Court in *Leighton Contractors Pty Limited v Fox* in 2009 it has been settled law in New South Wales that a breach of statutory duty does not in itself create a separate cause of action. Rather, any breach of statutory duty has been described as being indicative of negligence.

But is there now a move away from this position?

In *Deal v Father Pius Kodakkathanath* (24 August 2016) the High Court considered whether or not an employer had breached its statutory duty.

Katherine Deal was employed as a primary school teacher and she would teach classes from Kindergarten to Grade 6. In 2007 she was teaching Grade 3. On 19 September 2007 she had to remove a number of paper mache displays that were mounted on large sheets of “stock card” from a pin board on the classroom wall. The stock card would be one of two sizes, each of which was larger than A3. The “stock card” was thicker than copy paper but would buckle unless supported. Deal was short in stature (156cm) and was therefore unable to reach the pin board without assistance and so used a two step ladder to reach and remove the displays. At the time of the injury Deal was carrying more than one display and holding them with both hands as she descended the step ladder backwards. She couldn’t see the rungs of the step ladder due to the displays. As a consequence she fell and sustained injury to her knee.

Deal commenced proceedings for personal injury in the County Court in Victoria claiming that her employer had been negligent and also breached its statutory duty. In particular, Deal argued that her employer had breached regulations 3.1.1, 3.1.2 and 3.1.3 of the Occupational Health and Safety Regulations 2007. In essence, those regulations require an employer to identify tasks that involve hazardous manual handling, control the risk of musculoskeletal injury associated with a hazardous manual handling task and review any risk control measures.

In particular, Regulation 3.1.2 provides:
“1. an employer must ensure that the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee is eliminated so far as is reasonably practicable; and

2. if it is not reasonably practicable to eliminate the risk of such an injury, the employer must reduce that risk so far as is reasonably practicable by:

(a) altering –
   (i) the workplace layout; or
   (ii) the workplace environment ....; or
   (iii) the systems of work ....; or
(b) changing the objects used in the task ....; or
(c) using mechanical aids; or
(d) any combination of paragraphs (a) to (c).”

The matter proceeded to hearing before a judge and jury in the County Court in Victoria (it is standard in Victoria to have juries for personal injury claims). One of the first issues for the judge to determine was whether or not the Regulations were applicable.

The trial judge ultimately determined that the manual handling undertaken by Deal was not hazardous and therefore the Regulations did not apply. As such, Deal’s case in reliance on those Regulations could not be put to the jury.

The claim therefore proceeded as a claim in negligence only, not including the alleged particulars that was comprised of a breach of Regulations 3.1.1, 3.1.2 and 3.1.3.

Deal relied on an expert engineer, Mr Contoyannis, whose evidence was to the effect that Deal ought to have been provided with assistance by way of an assistant she could pass the displays to.

Deal was unsuccessful in her claim before the County Court.

She subsequently appealed to the Victorian Court of Appeal but that appeal was dismissed.

Deal appealed to the High Court.

Deal argued that it was evident removing the displays from the pin board was a “manual handling” task as defined in Regulation 1.1.5 of the Occupational Health and Safety Regulations 2004 and further, as the task involved manual handling of unstable or unbalanced loads it was a “hazardous manual handling” task as defined in Regulation 1.1.5.

It was also contended that the risk of Deal sustaining injury was a risk “associated with” that task within the meaning of Regulation 3.1.2.

It was accepted by the defendant that Deal had sustained injury that arose in whole or part from manual handling in the workplace and removing the displays from the pin board using the step ladder required the use of force and therefore was a “manual handling” task within the meaning of Regulation 1.1.5.

The two issues to be determined by the High Court were whether the risk of musculoskeletal disorder as suffered by Deal could properly be classified as a risk “associated with” the hazardous manual handling task of removing the displays from the pin board and if so, whether a jury could have inferred it was reasonably practicable to identify the risks and take steps to eliminate or reduce it as required by Regulations 3.1.1 and 3.1.2.

Chief Justice French and Justices Kiefel, Bell and Nettle delivered a majority judgment.

Their Honours stated:

“Given that the evident object of Reg 3.1.2 is to guard against the risks of hazardous manual handling tasks, and that hazardous manual handling tasks are defined in terms of the force necessary to lift, lower, push, pull, carry, or otherwise move, hold or restrain an object, needing to be applied repetitively or for sustained periods of time, being substantial, or needing to be applied to loads that for one reason or another are unpredictable, unstable, unbalanced or difficult to hold, the natural and ordinary implication of the text of Reg 3.1.2 is that it is confined to risks which arise from or, in other words, are caused by one or more of those hazardous manual handling task force factors.

As it was earlier noticed, it is not in dispute that the task of taking down the displays with the use of the step ladder was a hazardous manual handling task. It involved manual handling of unstable or unbalanced load or loads that were difficult to grasp or hold. Nor did the respondent contend that the jury could not have found that the instability or imbalance or difficulty of grasping or holding the displays caused the appellant to miss her step on the step ladder and thereby causing the musculoskeletal disorder which she alleged. On that basis, it would have been open to the jury to find that the risk of the appellant falling from the step ladder as she did in the course of carrying out the hazardous manual task of removing displays from a pin board with the use of a step ladder was a risk of musculoskeletal disorder “associated with” that hazardous manual handling task within the meaning of Regs 3.1.1 and 3.1.2.”

The employer attempted to argue before the High Court that risk of injury associated with a hazardous manual handling task within the meaning of Regulation 3.1.1 or 3.1.2 must be a reasonably practicable risk capable of identification and as such a “real risk” as opposed to a far fetched risk in terms of the Wyong Shire Council v Shirt calculus. However, in relation to that the High Court commented:

“In the second place, while Reg 3.1.1 limits an employer’s obligation to identifying the risks
associated with a hazardous manual handling task to the identification of risks which are reasonably practicably capable of identification, it does not assist in the comprehension of that limitation to invoke common law conceptions of reasonable foreseeability of the kind essayed in Wyong Shire Council v Shirt. Although there may be similarities in some contexts, in others there are likely to be significant differences. The test is whether it was reasonably practicable for the respondent to identify the task of removing displays from the pin board with a step ladder as involving hazardous manual handling. That is an objective question of fact which, in this case, was for the jury to decide.”

The High Court therefore found for Deal and remitted the matter to the Victorian Court of Appeal for determination.

So what does the judgment mean for personal injury claims in New South Wales?

The High Court has now categorised the dismantling of paper mache displays as a hazardous manual handling task. It is likely in Victoria at least that a breach of the Regulations will now be pleaded in all manual handling matters. In New South Wales there has been a trend to do this in any event. However, it is yet to be seen whether or not the employer will be liable for a breach of the Regulations where a claim for negligence fails, as was the case with Deal’s claim.

The High Court decision demonstrates a shift away from the Leighton v Fox approach – it will be interesting to see whether the shift continues and a breach of statutory duty is ultimately determined to create a separate cause of action.

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Section 45 of the Insurance Contracts Act 1984 (Cth) provides that where a contract of insurance contains a clause which seeks to limit or exclude the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, the “other insurance” clause is void.

What if two policies of insurance, taken out by an insured, contain such a clause?

This issue was recently considered by the NSW Court of Appeal in Lambert Leasing Inc & Anor v QBE Insurance (Australia) Limited & Ors.

As a result of a fatal aircraft accident in Australia in 2005, the relatives of the deceased crew and passengers commenced proceedings in the United States. Those claims were made against Lambert Leasing Inc and Saab Aircraft Leasing Inc (“Lambert & Saab”) who were engaged in the business of aircraft leasing.

In 2003, Lambert & Saab had sold the doomed aircraft to Mackellar Mining Equipment Pty Ltd and Dramatic Investments Pty Ltd (“Mackellar & Dramatic”) who were the second and third respondents in the appeal. The Purchase Agreement contained an indemnity clause in favour of Lambert & Saab and provided that an insurance policy be effected in relation to that indemnity.

Mackellar & Dramatic leased the aircraft to Lessbrook Pty Ltd (“Lessbrook”).

Lambert & Saab effected a policy of insurance with Global Aerospace Underwriting Managers Limited (“Global”).

Lessbrook effected a policy of insurance with QBE.

In respect of the claims for compensation in the USA by the relatives of the deceased crew and passengers, Lambert & Saab notified Global. Global, in turn, granted indemnity in respect of the defence of those claims and ultimately in respect of the settlement of those claims.

The settlement required the parties to enter into a Deed which contained a clause in which the settlement monies were advanced as a loan that was said to be repayable to Global, from any moneys that Lambert & Saab might obtain in proceedings that were to be commenced in Australia against QBE for indemnity under the QBE policy.

In the Australian proceedings, Lambert & Saab sought declarations that they were entitled to indemnity under the QBE policy that was effected by Lessbrook.

The position adopted by QBE both at first instance and on appeal was that it was premature to make a decision regarding its liability to indemnify Lambert & Saab under the QBE policy.

QBE had requested that it be provided with copies of 24 loss adjusters’ reports that were submitted to Global.

Lambert & Saab had resisted providing these documents to QBE on the basis that it would waive client legal privilege that was asserted to be maintained over those documents.

In any event, QBE relied on an “other insurance” clause in its policy, noting Lambert & Saab had already effected a policy with Global and had been indemnified pursuant to that policy.

Lambert & Saab argued that the other insurance clause in the QBE policy was void by reason of s45 Insurance Contracts Act.

They also sought to characterise the payments made under the Global policy, not as payments by way of an indemnity, but as a loan.
At first instance before Justice Rein of the NSW Supreme Court, his Honour held that the “other insurance” clause in the QBE policy was not void because s45 of the Insurance Contracts Act applies only where the insured party has ‘entered into’ both contracts of insurance.

In this case, Rein J held that Lambert & Saab did not enter into the contract of insurance with QBE, rather they were third party beneficiaries entitled to indemnity under the QBE policy.

Justice Rein also rejected the claim for indemnity by Lambert & Saab on the basis that QBE was correct in stating it was premature to decide indemnity in the absence of being provided with the 24 underwriters reports it had requested.

Lambert & Saab appealed to the NSW Court of Appeal. By a unanimous decision, the appeal was dismissed.

Payne JA delivered the leading judgment with which Ward & Glesson JJA agreed.

The reasons for the Court of Appeal dismissing the appeal were largely consistent with the reasons of the primary judge.

However, an interesting part of the appeal judgment concerned the Court’s interpretation of the “other insurance” clauses in both the Global and QBE policies and the effect of s45 of the Insurance Contracts Act.

The Court of Appeal upheld the reasoning of Rein J regarding the effect of s45. The section can only apply where the named insured has entered into both contracts of insurance.

The Court of Appeal found that the primary judge was correct to conclude that Lambert & Saab had not entered into the insurance contract with QBE.

The Court of Appeal noted that, if the above finding of the primary judge was correct, the parties were in agreement that the two “other insurance” clauses cancel each other out.

As Payne JA observed:

“That concession was correctly made…it is a rule of construction that you look to each policy independently and if each would be liable but for the existence of the other, then the exclusions would be treated as cancelling each other out, both insurers are then liable and the one who pays can claim contribution from the other.”

The importance of this statement by the Court of Appeal is that in circumstances where two other insurance provisions cancel each other out, the insured can elect which policy to seek indemnity under and that insurer has a valid claim for contribution against the other insurer pursuant to dual insurance principles.

In the present case, the proper course would have been for Global to seek contribution from QBE, rather than bring what was in effect a subrogated action in the name of Lambert & Saab seeking indemnity under the QBE policy.

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The NSW Court of Appeal has again considered liability in relation to an employee of a subcontractor, with very different facts but ultimately the same result.

Marinko Gulic sustained significant injury whilst performing cartage work for Boral Transport. Gulic was employed by GMG Transport Pty Limited, of which he was the sole director and shareholder. Gulic worked as the driver of a prime mover. GMG had entered into a cartage agreement with Boral to perform haulage services to supply bricks and pavers to building sites in New South Wales. Pursuant to the agreement Boral would supply a “serviceable body” and trailer for installation on GMG’s prime mover. Boral would retain ownership of the body and trailer and GMG were precluded from altering or modifying them. In fact, were GMG (or Gulic) to undertake any repairs the 12 month warranty may be “voided.”

The trailers had three gates that were approximately three metres long and 1.3 metres high, separated by removable posts. Gulic sustained injury on 4 February 2010 when he was attempting to close and lock a gate and lost control. As a consequence the gate fell on him.

Gulic commenced proceedings in the District Court against Boral contending that the design, manufacture and repair of the gates was negligent. Boral subsequently cross claimed against Gulic’s employer, GMG, seeking indemnity/contribution on the basis GMG was a joint tortfeasor and also for breach of the cartage agreement. As GMG

Boral also argued that they had delegated the repairs of the gates to Barker Trailers Pty Limited and in fact that company had delegated those works to Prancer Enterprises Pty Limited who had undertaken repairs on instructions from Barker in August 2009 and January 2010.

Neither Barker or Prancer were parties to the proceedings.

The matter initially proceeded to hearing before His Honour Judge Maiden in the District Court. His Honour found in favour of Boral and the cross claims were dismissed. Gulic failed on the issue of causation.

Gulic appealed to the Court of Appeal, who agreed with the trial judge that Gulic’s
The leading judgment was handed down by Justice McFarlan in the Court of Appeal.

On appeal Boral conceded it owed Gulic “a duty to take reasonable care to provide gates that would not subject experienced, adult users, taking reasonable care for their own safety, to unreasonable risk of injury when using the gates.”

Gulic’s evidence, which was unchallenged, was that the accident was caused by the bent character of the post to which the gate was to be locked. The obligation of Boral was to supply the gates and the post and according to Justice McFarlan, Boral had also assumed an obligation to maintain them. Justice McFarlan defined the risk as “that of injury to a driver arising in the course of attempting to close and lock a gate with a distorted post”. The evidence was to the effect that Boral had been told by Gulic that the post in question was distorted.

The argument that the design of the gates and post were negligent failed as Boral’s duty was delegable and in this case Barker Trailers had been engaged to design new equipment. Boral had collaborated with Barker Trailers in relation to the design and repairs were in fact undertaken by Prancer Enterprises Pty Limited on instructions from Barker Trailers in August 2009 and January 2010. The Court of Appeal noted that the evidence demonstrated although Gulic had complained prior to and following these repairs, he had not raised any safety issues, nor request that any repairs ought to be undertaken urgently.

His Honour Justice McFarlan concluded that a reasonable person in Boral’s position would not have perceived there was a relevant risk of injury, at least one to warrant precautions being taken beyond the steps to have the repairs undertaken that were undertaken.

His Honour Justice McFarlan therefore found that Boral did not breach the duty of care which it owed to Gulic.

The cross claim against the employer was therefore dismissed.

The end result was that although Boral owed Gulic a duty of care there was no breach of that duty.

Boral had delegated the task of repairs to another entity, a competent subcontractor. Once again a principal, even one who owed a duty, escaped liability where they had delegated the crucial task to another entity.

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In our September issue of GD News we reported on Justice Davies’ decision in the “slip and fall” case of Raad v VM & KTP Holdings Pty Ltd as Trustee for VM & KTP Nguyen Family Trust [2016] NSWSC 888.

Mr Raad was been awarded damages of just $75,547.00 after deciding not to accept the defendant’s offer of compromise of $320,000.00. Mr Raad’s lawyers had valued the case at just over $1.2 million plus costs.

Not surprisingly, Mr Raad has decided to appeal the decision.

Meanwhile, Mr Raad’s case was back before Justice Davies last month, as a number of costs issues arose for determination by reason of the judgment being far more modest than Mr Raad’s legal team ever anticipated. The defendant filed a Notice of Motion seeking various costs orders based on the provisions of Rule 42 of the Uniform Civil Procedure Rules 2005 (NSW) (“UCPR”) and the plaintiff’s solicitor also sought to claim a lien over the judgment sum.

The starting point for the determination of costs was that Section 338 of the Legal Profession Act 2004 (NSW) would apply to limit the plaintiff’s costs. Section 338(1) applies where a judgment for a claim for personal injury damages is less than $100,000.00. In that case the maximum costs for legal services provided to the plaintiff are fixed at 20% of the amount recovered or $10,000.00 whichever is greater.

The Legal Profession Uniform Law Application Act 2014 (NSW) repealed the Legal Profession Act 2004. However, for proceedings commenced before 1 July 2015, the provisions for court orders in relation to costs of the Legal Profession Act 2004 continue to apply, including Section 338. Because Mr Raad’s proceedings were commenced before 1 July 2015, this meant the plaintiff’s lawyers were limited to costs of $15,109.00 plus disbursements. Further, because counsel’s fees are not disbursements for the purposes of the section, solicitor and counsel fees have to fit within the limit of costs of $15,109.00.

The next issue caused by the size of the judgment sum was the order sought by the defendant that the plaintiff ought to have no costs at all of the proceedings in the Supreme Court. This is due to the effect of the UCPR Rule 42.34. That Rule provides that if a plaintiff obtains a judgment of less than $500,000.00 and the plaintiff is otherwise entitled to an order for costs against a defendant, costs will not ordinarily be ordered unless the Supreme Court is satisfied the commencement and continuation of the proceedings in the Supreme Court and not the District Court was warranted.

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Mr Raad’s proceedings were actually commenced in the District Court and had been allocated a hearing date for 27 May 2014. Two weeks before the hearing date, Mr Raad’s solicitors filed a Summons to transfer the proceedings to the Supreme Court. A Schedule of Damages totalling just under $1.3 million plus costs was tendered in support of the application. The medical evidence at the time was that the Mr Raad had clear fractures at T3 and T5 and there was objective evidence the fall was the cause of the disabilities. This gave rise to substantial claims for past and present economic loss and the defendant had objected to the jurisdiction of the District Court being increased. Justice Davies took into account that there was no objection from the defendant to the transfer of the proceedings, a factor that Justice Davies would later take into account when making costs orders in relation to the Supreme Court proceedings.

Unfortunately for Mr Raad, the medical position changed dramatically in August 2015, just two months before the proceedings were to be heard in the Supreme Court. A joint report of rehabilitation doctors dated 20 August 2015 and a joint report of orthopaedic surgeons dated 26 August 2015 both concluded that his ongoing problems did not relate to the accident.

Justice Davies took into account the approaching hearing date when considering whether it was reasonable for the proceedings to remain in the Supreme Court, together with the facts that proceedings had been removed to the Supreme Court on reasonable grounds and without objection from the defendant. In the circumstances His Honour did not consider that Rule 42.34 UCPR should operate to deprive the plaintiff of a costs order.

His Honour then dealt with the defendant’s application for indemnity costs to be paid by the plaintiff from the date of service of the defendant’s Offer of Compromise of $320,000.00. The plaintiff raised a number of objections to the form and content of the Offer of Compromise document. This included a submission that the period of the offer of 28 days was not reasonable because the matter had not been fixed for hearing in the Supreme Court at that time and the joint reports of the rehabilitation specialists and orthopaedic specialists had not yet been served.

Justice Davies did not agree. Firstly, the Offer of Compromise had been served in accordance with Rule 20.26(5), which provides that the closing date for the acceptance of an offer is:

“(a) in the case of an offer made two months or more before the date set down for the commencement of the trial – no less than 28 days after the date the offer is made; and

(b) in any other case, a date that is reasonable in the circumstances.”

However there is no element of reasonableness required if the offer is made more than two months before the commencement of the trial. Even though the offer complied with Rule 20.26(5)(a), Justice Davies went on to note that there was no evidence that the plaintiff had asked the defendant to keep the offer open until the service of the joint reports or because a longer period was required to consider it.

The plaintiff also submitted that the offer was not a genuine offer and was simply done to trigger the costs provisions in Rule 42.15. It was argued that the offer would have required capitulation on the plaintiff’s part in circumstances where the plaintiff was claiming $1.2 million and the offer was $320,000.00. It could be therefore not be said to represent compromise. His Honour disagreed, taking into account that the defendant had disputed liability and specifically put in issue breach and causation and had pleaded obvious and inherent risk under Sections 5F, 5H and 5I of the Civil Liability Act 2002 (NSW). His Honour noted the defences were not ultimately successful but at the same time were not without merit and also took into account that the defendant had served medicals that put in issue causation for the plaintiff’s claimed ongoing problems. While this Offer of Compromise sum may have been less than the plaintiff considered his claim was worth, the plaintiff would still be left with $320,000.00 and his costs and could be seen as a substantial sum in light of the defendant’s medical reports at the time.

In his Honour’s view, where a substantial sum was offered and there was no request for the offer to be kept open for a further period, whether to await the joint reports or otherwise, then the plaintiff’s refusal to accept the offer was not reasonable. As a result the plaintiff was ordered to pay the defendant’s costs on an indemnity basis from the date the Offer of Compromise was served.

The last issue dealt with by Justice Davies was the plaintiff’s solicitor’s claim for a lien over the proceeds of the settlement. A solicitor’s lien in respect of costs is a right over a substantial sum in light of the defendant’s medical reports at the time.

In his Honour’s view, where a substantial sum was offered and there was no request for the offer to be kept open for a further period, whether to await the joint reports or otherwise, then the plaintiff’s refusal to accept the offer was not reasonable. As a result the plaintiff was ordered to pay the defendant’s costs on an indemnity basis from the date the Offer of Compromise was served.

The last issue dealt with by Justice Davies was the plaintiff’s solicitor’s claim for a lien over the judgment sum. A solicitor’s lien in respect of costs is a right over both an amount of a judgment in favour of a client and an amount of an order for costs in favour of a client. In order to claim a lien there has to be a sufficient causal link between the work and effort by the solicitor and the judgment and costs obtained in the litigation.

Justice Davies relied upon the decision of Bergin J in Abbott v Pilot Development Cooperation Pty Limited [2006] NSWSC 1178 which sets out the various authorities governing the requirement for “sufficient causal link”. This includes the decision of McLelland CJ in Doyle Construction Lawyers v Harsands Pty Limited & Ors, unreported 24 December 1996, wherein His Honour noted that if a settlement to a client came about as a result of legal proceedings and the solicitor had acted for the client in those legal proceedings, this was sufficient to give rise to a lien.

While the defendant did not dispute Mr Raad’s solicitor had an entitlement to a lien, the defendant argued the lien will only arise when the solicitor’s costs including disbursements are determined as between himself and the plaintiff. The defendant’s submission was that...
there was no evidence as to what the solicitor’s costs and disbursements were and for that reason the judgment sum should be paid into Court until there was a determination of the solicitor’s entitlement to costs.

Justice Davies agreed. Whilst there was no doubt the solicitor would recover $15,109.00, being 20% of the judgment sum, the disbursements to which he was entitled at the time were undetermined. His Honour also took note of the fact that the costs agreement between the solicitor and plaintiff was not in evidence before His Honour.

We do not expect that this will be the end of Mr Raad’s litigation. Not only has his solicitor lodged an appeal of Justice Davies’ decision but once the issue of the lien has been resolved, Justice Davies has flagged that the defendant may be entitled to a set off to its entitlement to costs against the plaintiff’s judgment. His Honour declined to make any order in relation to a set off in the context of the arguments before him in relation to the Motion but noted the issue will need to be dealt with when an application is made by a party for the judgment sum to be paid out of Court.

The two factors which may have made a difference to His Honour’s determination as to costs so far as insurers are concerned are firstly that the defendant did not make any application for the transfer of the proceedings to the District Court once the joint medical expert reports were provided showing there was no link between the plaintiff’s ongoing problems and the fall. With the benefit of hindsight it would have been prudent for the defendant to put the plaintiff’s solicitor on notice that in the event an application was not made to transfer the proceedings to the District Court, then the failure to do so would be relied upon in support of an application for an order that the plaintiff receive no costs.

Secondly, insurers may wish to make a practice of considering whether it is appropriate on receipt of an Offer of Compromise from a plaintiff’s solicitor to write formally and ask for the period of the offer to be extended until such time as the medical evidence directed to be served has been received by both parties. Irrespective of whether or not the request is accommodated it certainly seems that Justice Davies would have taken that into account when deciding whether or not it was appropriate for indemnity costs in this circumstance.

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Cross Vesting and Court Procedure

The Supreme Court of NSW has recently considered the cross vesting legislation in a claim where proceedings will ultimately be transferred from the District Court at Lismore, New South Wales to the District Court at Brisbane, Queensland.

Gerard Moley and Orla Fox commenced proceedings in the District Court at Lismore as a consequence of injuries sustained on 2 December 2015. Moley contends that he was visiting friends in Woolloongabba in Brisbane when he leaned on a railing in a balcony which collapsed. Moley alleges the railing was not properly maintained by the defendants as lessors.

Despite the fact that the accident occurred in Queensland proceedings were commenced in New South Wales.

The pre-filing steps in New South Wales and Queensland in public liability claims are very different. In New South Wales there is no requirement for any disclosure and a Statement of Claim can simply be filed. In Queensland the Personal Injuries Proceedings Act requires that a number of pre-requisites be undertaken including service of documents described as Notices of Claim. The law in Queensland also requires that a compulsory conference, similar to a mediation in New South Wales, be undertaken prior to a Statement of Claim being filed.

Certain procedural steps had been undertaken so as to comply with the Queensland requirements however proceedings were ultimately commenced in New South Wales.

The application to transfer proceedings was filed on behalf of the defendant, Younger. Younger relied on a number of arguments as to why the proceedings should be transferred, including the fact that the alleged tort had occurred in Queensland and the substantive law was that of Queensland. Further, the only connection with New South Wales was that the plaintiff’s solicitors were based in New South Wales.

Interestingly it was not as simple as simply transferring proceedings between the District Courts as that was not permissible under the cross vesting legislation between the States. The proceedings would have to be transferred to the Supreme Court in Brisbane and then remitted to the District Court.

Moley and Fox argued that proceedings should not be transferred. A District Court judge sitting in Lismore would have little difficulty applying Queensland law. Further, procedural requirements in Queensland would not trouble a judge as it would be the substantive law of Queensland that would be applied when the case was decided rather than the procedural framework. It was also submitted that Younger was currently in Germany and any delays were the fault of the defendant and could not be sheeted home to the fact the proceedings were on foot in Lismore.

Ultimately the proceedings were transferred to the Supreme Court at Brisbane (with a view to proceedings ultimately being heard in the District Court of Brisbane). Younger however, although he was
successful in the Summons, was ordered to pay the costs of the Summons.

The case is a reminder to defendants that just because the plaintiff commences a case in a certain forum does not mean it is the correct one; location of experts and witnesses may be relevant considerations for making an application to transfer proceedings.

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Relevant considerations in work health and safety prosecutions

In our August newsletter we looked at some of the factors taken into account by the courts in assessing the appropriate penalty for a contravention of the Work Health & Safety Act 2011 which results in an injury to a worker on a construction site.

In the recent cases of SafeWork NSW v Ceerose Pty Limited [2016] NSWDC 184 and SafeWork NSW v DSF Constructions Pty Limited [2016] NSWDC 183, the District Court considered the relative level of culpability of each of the defendants in relation to the same incident which had led to the death of a worker.

Ceerose was the principal contractor at a project involving the refurbishment of a building in Camperdown for use as student accommodation. DSF Constructions had been engaged by Ceerose to design, manufacture, supply and install structural steel work for the building.

The refurbishment included the installation of skylight frames which were to be secured to the structural steel framework of the building. These skylight frames weighed around a tonne each. Pursuant to the relevant Australian Standard, the frames were to be bolted, welded or otherwise secured to the building to ensure they were not able to be dislodged or fall.

On the day of their installation, the engineering detail for the connection of the frames to the structural steel had not yet been provided by the engineer. Accordingly the frames were left resting on wooden beams in the roof area and the workers proceeded with other work on the site. Some of this other work was carried out by three labour hire employees, including the deceased. An hour and a half after the skylight frame had been lifted onto the beams, a crane being operated on the site knocked and dislodged one of the frames causing it to fall on the deceased, causing fatal injuries.

WorkCover commenced a prosecution against both Ceerose and DSF Constructions for their contravention of the work health and safety legislation in not preventing a foreseeable risk of injury to the deceased.

The Court noted that the risk of injury had been so foreseeable that even the Australian Standard had specified that an appropriate way to reduce the risk would be to set up a no go exclusion zone under the area of the skylight installation. During the time that the skylights had been lifted into place, such a no go exclusion area had been operating; however this exclusion area was lifted once the installation work had been completed for the day.

Ceerose had argued that DSF Constructions (amongst other contractors on site) bore a higher level of responsibility for the incident since it had had the specific task of installing the steelwork. The judge commented that the role played by others may be relevant to assessing the culpability of a defendant but it cannot of itself reduce the culpability of the defendant in any sharing or proportionate way (citing the decision in Inspector Howard v Baulderstone Hornibrook Pty Limited [2009] NSWIR Comm 92 at [241-242].) Whatever the culpability of others, it could not operate to diminish the obligation which Ceerose was bound to comply with.

Further, as head contractor, it had an overriding responsibility for safety on the site. It could have obviated the risk by the simplest of measures in the creation of a no go zone.

The Court also noted the sentence to be imposed on each defendant would need to include an element of deterrence. Both defendants had put in place improved systems to ensure the health and safety of their workers. However (as the Court noted) construction is a high risk industry with frequent cases involving people or objects falling from heights at construction sites, many regrettably involving fatalities. The Court made a note of a previous conviction of Ceerose; however the fact that over the course of the many years of carrying out such high risk work Ceerose had had only one conviction indicated to the Court that it usually operated at an acceptable level of ensuring the safety of its workers. DSF Constructions had had no prior conviction for any contravention of the work health and safety legislation.

It had been submitted that as a very small one employee company with limited resources any fine would have significant ramifications for DSF Constructions’ overall financial position. However, the Court considered that anything other than a substantial fine would constitute a failure to acknowledge the seriousness of the offence and the extent of the defendant’s culpability.

The judge commented that he thought the circumstances of the case required a substantial fine. Not to impose one would not give due weight to the objective seriousness of the offence constituted by the foreseeable risk, the foreseeability of the consequence in the event of the risk materialising, the readily available simple measure to eliminate the risk, the overarching duty of safety on Ceerose as principal contractor on site and the direct supervision and
control Ceerose had had in relation to the affected workers, and the awareness that DSF Constructions had that the skylight was not properly secured while a crane was operating in its vicinity. Further, a less than significant fine would not give due weight to the need for deterrence.

Each company had pleaded guilty at the first opportunity. The Court took this into account in discounting each company's fine that would be payable. After consideration of all these factors, Ceerose was ordered to pay a fine of $300,000 and DSF Constructions was ordered to pay a fine of $225,000. Each of these fines took into account a discount of 25% for the defendant's plea of guilty.

This case provides an interesting illustration of the factors taken into account by the Court and the roles that each party in a construction project plays to ensure the health and safety of the workers on the site. Subcontracting various tasks on the project is not likely to be effective to absolve the principal contractor from liability for an incident caused as a result of not ensuring the safety of the workers. Similarly, the financial resources of a particular defendant will not be effective to reduce the penalty where the circumstances of the case require a substantial fine in order to provide the necessary general deterrence to the industry and to provide a suitable punishment to the defendant.

Importantly, this case reminds us that each participant in a construction project should be aware that it is required to assume (and maintain) responsibility for safety, and not assume that this responsibility has been passed on by means of a subcontract or because it has only a small role to play.

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EMPLOYMENT ROUNDUP

Underpaying employees? Directors beware!

The reach of the penalty provisions of the Fair Work Act 2009 (the Act) continues to grow – something which all employers should note. It is fair to say that the Fair Work Ombudsman (FWO) is increasing its push to utilise the Act as an active and successful instrument in regulating the organisation of labour relations.

The employment of almost all employees in Australia is subject to minimum pay entitlements – set by on or more of the National Employment Standards, an award or a Modern Award, an enterprise agreement, or the National Minimum Wage Order. These entitlements relate to wage rates, leave entitlements, notice entitlements, loadings, redundancy pay and more.

Underpaying employees – that is, not paying them in accordance with the applicable regulatory instrument – will usually constitute a breach of the Act. Provisions for back-payment of amounts underpaid exist in the Act, together with “civil penalty” provisions imposing what is effectively a fine for established breaches.

Primarily, the entity liable for any breach of this sort is the employer. Often, because a very large number of employers are corporate entities, the liability for back-payments was “quarantined” within the employing company, and not carried through to the individuals who stood behind the employer company. Only civil penalties could be extracted from individuals found to have been accessories to breach by the employer.

In extreme situations – where the back payments amounts were very significant - employing companies were liquidated, with no recourse to those standing behind it available. All that looks to be changing.

The FWO’s publicly stated position is that the Act empowers Federal Courts, (including the Federal Circuit Court) to order that accessories, such as directors, be personally liable to back pay employee underpayments on the strength of the following sections of the Act:

- s 550 which allows a court to make orders that accessories (individuals or corporations) who are ‘involved in’ an employer’s contravention of the Act are liable for the employer’s contraventions; and
- s 545 of the FW Act which provides a broad power to the Federal Court or Federal Circuit Court to make any orders it considers appropriate when it is satisfied that a person has contravened, or proposes to contravene, the Act.

In FWO v Step Ahead Security Services Pty Limited [2016] FCCA 1482, the FWO has recently had some real success in prosecuting directors of defaulting employer entities, validating its position on the potential liability of individuals.

Step Ahead employed security guards in the Gold Coast and Tweed Coast areas. It paid them flat hourly rates which did not meet the minimum required rates of pay, or the casual loadings or penalty rates, the employees were entitled to. In addition, Step Ahead failed to comply with the minimum four-hour shift allowances provided for in the Security Services Industry Award 2010.

The employees were underpaid a total of $22,779.72 over a three month period in 2014.

The FWO commenced proceedings against Step Ahead and its sole director for these contraventions of
the Act. At the time of the hearing, Step Ahead was no longer operating, and there was an application to wind it up pending. There was evidence also that Step Ahead would be unlikely to be able to meet any required back payments.

The Federal Circuit Court held that it had power to ‘make any order it considers appropriate’ including compensation orders against a person ‘involved in’ a contravention under section 550 of the Act. The director was relevantly ‘involved’ and it was appropriate to make an order against him because, amongst other things:

- there was no question that the director was in a position to influence Step Ahead;
- the director was responsible for ensuring that Step Ahead complied with its legal obligations;
- the underpayments arose despite the fact that the director was plainly aware of the company’s statutory obligations;
- Public policy requires the prevention of people retaining a benefit resulting from their misconduct; and
- the director’s previous conduct in respect of non-compliance with workplace laws was a significant factor.

The Court said that awarding compensation would discourage those that control a corporate employer from allowing the corporation to fail only to continue the business via a new corporation - ‘It would encourage them to take steps to ensure the corporation they control meets its statutory obligations as they arise.’

So, what was the outcome? Both the employer and the director were both ordered to pay back the underpayments – and the director was fined $51,400.

For business owners a salutary reminder that short term savings can turn into long term expense.

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WORKERS COMPENSATION ROUNDUP

Dependency – more than just “financial support”

President Judge Keating has confirmed that death benefits are available to a dependent of a deceased worker who relied on support other than financial support as the term “support” in the definition of “dependants” in the context of a workers compensation claim for death benefits is not confined to financial support.

In Richardson v Turfco Australia Pty Ltd [2016] NSWWCCPD 43 Ms Richardson lodged an Application in Respect of a Death of Worker claiming she was dependant on her son at the date of his death. Her son tragically died aged only 19 years when he was run over by a tractor at work, causing fatal injuries.

The employer conceded liability. There was also an unusual miscellaneous application lodged by the deceased’s father contending that Ms Richardson was not a “dependant of the deceased and that the lump sum should be paid to the Estate”.

When the matter was heard in the first instance before Senior Arbitrator McDonald, the only issue in dispute was whether Ms Richardson was wholly or partially dependant upon the deceased for support at the date of death, as required by section 4 of the Workplace Injury Management and Workers Compensation Act 1998.

Senior Arbitrator McDonald found that Ms Richardson was not wholly or partially dependent for support on the deceased and therefore she was not entitled to the death benefit payable under Section 25 of the Workers Compensation Act 1987. The Senior Arbitrator concluded that the words, in the definition of dependency, “for support” meant “financial support”.

The Senior Arbitrator did not accept Ms Richardson’s argument that physical or practical support (such as mowing the lawns or carrying out renovations) was sufficient to create dependency for support.

Ms Richardson appealed the Senior Arbitrator’s decision.

President Keating found the Senior Arbitrator incorrectly conflated support with financial support and remitted the matter to another Arbitrator to determine afresh.

It was pointed out that the amendments to workers compensation legislation back in 1964 meant that claimants were required to prove dependency for “support” which extended to a wider criteria than the previously narrower concept of “earnings”. As Ferrari J said in Cooper v Commissioner for Railways (1972) WCR 47(at 48–49):

“It appears to me that the effect of the substitution of dependency for support in place of dependent upon earnings is to extend the right to compensation so as to encompass dependants of the deceased who drew their support from him but out of sources other than his earnings.”

This case confirms that in death benefit claims, the test is not whether the person is ‘financially dependent’ on the deceased but whether he or she is dependent for ‘support’. Support is an undefined term which encompasses practical physical support and can mean any sort of assistance which is not “trivial”.

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The State Insurance Regulatory Authority ("SIRA"), which is responsible for regulating and administering the workers compensation system in New South Wales, has issued revised guidelines for claiming workers compensation. The Guidelines provide requirements, information and guidance for workers, employers, insurers and other stakeholders. The revised Guidelines came into effect on 1 August 2016. The Guidelines operate by force of law as delegated legislation.

The revised Guidelines replace four separate earlier Guidelines relating to claiming compensation benefits, work capacity decisions and reviews and provision of domestic assistance.

The general requirements for notification of a work related injury for a worker have been reduced to name, phone number and postal address. There is no longer any requirement to provide date of birth or residential address.

Once notification is complete the insurer must take one of three actions:
- start provisional payments;
- delay starting provisional weekly payments due to a reasonable excuse; or
- determine liability.

Whilst a reasonable excuse may apply to provisional weekly payments it no longer applies to provisional medical payments which should be commenced as soon as possible. Where a worker claims medical expenses but these are not paid under provisional payments the insurer must determine liability within 21 calendar days. This change will ensure that injured workers have access to immediate treatment and rehabilitation aimed at facilitating recovery and return to work whilst further investigations are made under the reasonable excuse status for weekly compensation.

The reasons for delaying provisional weekly payments are broadly the same as previously, however some of the requirements have been made more onerous to satisfy the respective categories as follows:
- insufficient medical information can only be relied upon where a worker’s compensation Certificate of Capacity or other medical information certifying an injury has occurred has not been provided;
- where it is asserted the injured person is unlikely to be a worker there is now an onus on the insurer to verify the person’s status rather than the employer being able to verify the worker is not a worker;
- the excuse that the insurer is unable to contact the worker has been made more specific to include two attempts by phone, at least a day apart and one attempt in writing:
  - where the excuse is the injury is not work related, the requirements for acceptable evidence provided by an employer have been made more specific. The Guidelines provide that suspicion, innuendo, anecdotes or unsupported information from any source, including the employer, is no longer acceptable.

An insurer is required to communicate in writing the excuses for not starting provisional weekly payments within seven days of receiving the initial notification. The notice is to include copies of all relevant information considered in the decision and provide a claim form and an explanation as to how the excuse can be resolved and the worker’s remedies and avenues of assistance, much like the requirements in a Section 74 Notice disputing liability.

The Guidelines now provide guidance on calculation of weekly payments and requirements for insurers when conducting work capacity assessments. Work Capacity Assessments are restricted to not more than four appointments per work capacity assessment of which there cannot be more than one appointment with the same type of medical specialist and one appointment with the same type of healthcare professional.

The circumstances in which a worker can access treatment without pre-approval have been expanded to include:
- any treatment within 48 hours of the injury happening;
- nominated treating doctor consultations or case conferences and treatment during consultation for the injury within one month of the date of injury;
- medical specialists referred by the nominated treating doctor within three months of the date of injury;
- diagnostic investigations referred by the nominated treating doctor:
  - plain x-rays within two weeks of the date of injury;
  - ultrasound, CT scans or MRI’s within three months of the date of injury if referred to a medical specialist;
  - any diagnostic investigations on referral from the medical specialist within three months of the date of injury;
  - pharmacy, prescription and over the counter items prescribed and dispensed within one month of the date of injury;
- SIRA approved physical treatment practitioners (physiotherapists, osteopath, chiropractic, accredited exercise physiologist, psychologist or counsellor –
  - up to eight consultations if the injury was not previously treated and treatment starts within three months of the date of injury;
o up to three consultations if the injury was not previously treated and treatment starts over three months after the date of injury;  
o one consultation with the same practitioner after three months and one consultation with a different practitioner if the injury was previously treated.

- initial hearing needs assessment by and approved hearing service provider, referral to ENT specialist. The requirement for a binaural hearing loss of 6% or more has been removed.

It is clear that in issuing the revised Guidelines SIRA is intending a “one stop” shop for decisions affecting injured workers and provided a more easily referenced set of obligations for workers, employers and insurers. There is also an emphasis on reducing need for approval of treatment and disputes in the earlier stages of the claim with a view to providing access to immediate treatment and rehabilitation needs so as to facilitate the speedy recovery and return to work of injured workers even in circumstances where there is an excuse to delay provisional weekly payments.

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Further Claims for Permanent Impairment – When is a Claim a Claim?

The 2012 legislative amendments to the workers compensation legislation specified that a worker could only bring one claim for permanent impairment compensation. The legislation was however amended through Regulations to allow for workers who had lodged a claim for permanent impairment prior to June 2012 to make one further claim for permanent impairment.

In Avni v Visy Industrial Plastics Pty Limited (2016) NSWWCCPD 46, President Keating in the Workers Compensation Commission was required to determine the entitlement of a worker to pursue one further claim in circumstances where the first claim for permanent impairment compensation was resolved by a Complying Agreement and a further claim had been withdrawn following referral to an approved medical specialist.

Ms Avni sustained injury to her left and right upper extremities as a result of the nature and conditions of her employment which was deemed to have occurred on 30 March 2005. On 18 August 2010 a Complying Agreement was entered into for lump sum compensation for payment of 10% whole person impairment for injury to the upper extremities.

On 21 June 2012 Ms Avni made a further claim for compensation pursuant to Section 66 of the Workers Compensation Act 1987 (“WC Act”) wherein she claimed an additional 3% whole person impairment. This claim for compensation was in respect of the injury on 30 March 2005.

On 28 January 2014, Dr Neil Berry, an Approved Medical Specialist (“AMS”), assessed Ms Avni’s whole person impairment in respect of the left upper extremity for 8% whole person impairment which would not have entitled Ms Avni to any additional impairment as it was less than the previous agreed 10% WPI. On 16 May 2014 the Workers Compensation Commission issued a Certificate of Determination – Consent Order and the orders provided, amongst other things, an award for Ms Avni in respect of weekly compensation for a closed period and medical expenses. Importantly, it also provided that the claim for further permanent impairment compensation pursuant to Section 66 was discontinued.

On 23 December 2014 Ms Avni made a further claim for permanent impairment for 15% whole person impairment, less the 10% previously agreed to in the original Complying Agreement.

The arbitrator who originally determined the matter was not persuaded that Ms Avni had an entitlement to bring a further claim for permanent impairment compensation in respect of her injuries.

On appeal a number of different issues were determined however the important consideration was the effect of the Medical Assessment Certificate of Dr Berry issued on 4 February 2014. President Keating determined that the mere issuing of a Medical Assessment Certificate from an AMS, without a subsequent Certificate of Determination, does not bind the parties in subsequent proceedings.

President Keating determined that whilst a properly constituted and issued medical assessment certificate is conclusively determined to be correct in any proceedings with which the certificate is concerned, a medical assessment certificate does not determine the parties’ rights.

A dispute is not determined unless and until the Workers Compensation Commission determines liability and issues a Certificate of Determination. The Workers Compensation Commission is constituted by the President, Deputy President, the Registrar and arbitrators. An AMS is not a member of the Workers Compensation Commission and cannot finally determine disputes before the Commission nor issue the Certificate of Determination.

Furthermore, the Workers Compensation Commission rules provide for a worker to discontinue any proceedings or any part of any proceedings as against any or all other parties to the proceedings at any time. Having elected to discontinue the earlier proceedings with regards to the claim for permanent impairment, Ms Avni was free to recommence her claim for permanent impairment at any time without penalty.

The decision of the President finally provides clarity as to what constitutes the making of a claim for further
permanent impairment. Quite simply a worker will not be considered to have made a claim for further permanent impairment until a Certificate of Determination is issued by the Workers Compensation Commission.

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Do Consent Orders Protect an Employer for Subsequent Claims for Permanent Impairment?

A common method of resolving claims for weekly compensation and medical expenses in the Workers Compensation Commission is for employers to pay a closed period of weekly compensation and an agreed sum of medical expenses. As part of the settlement agreement parties enter into an award in favour of the employer from the date of the settlement. The question then remains is whether subsequent to that settlement, will an employer be protected from a claim for permanent impairment brought by the injured worker.

This situation was examined by the Court of Appeal in Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine (2016) NSWCA 213.

Ms Hine was employed as a teacher in a school conducted by the Trustee for the Roman Catholic Church (the employer). She alleged she suffered a psychological injury in the course of her employment. A Section 74 dispute notice was issued by the Scheme Agent of the employer disputing the claim that the psychological injury was work related and Ms Hine was incapacitated by reason of that injury. Ms Hine referred the dispute to the Workers Compensation Commission and this was subject to a conciliation conference in 2013. The conciliation resulted in a resolution of Ms Hine’s claims for weekly compensation and medical expenses. In particular the consent agreement noted that following the payment of a closed period of weekly compensation up until 14 August 2013, there was an award in favour of the employer in respect of all claims for weekly compensation. Similarly, following the payment of an agreed sum of medical expenses, there was an award in favour of the employer in respect of all claims for medical expenses.

In early 2014 Ms Hine brought a claim for permanent impairment which was disputed by the employer’s Scheme Agent. Amongst the reasons pleaded in that dispute was that there was no entitlement to compensation in respect of permanent impairment as Ms Hine had fully recovered from the effect of the psychological injury sustained with the employer by 14 August 2013.

At first instance Arbitrator Egan of the Workers Compensation Commission upheld the contention of the employer that the Consent Order gave rise to an issue estoppel and this prevented Ms Hine from asserting she was permanently impaired as a result of the work injury. On appeal, the Deputy President of the Workers Compensation Commission overturned Arbitrator Egan’s decision and referred Ms Hine to an Approved Medical Specialist to assess the impairment resulting from the injury.

The employer subsequently appealed to the Court of Appeal. Two issues were raised by the employer in the appeal.

These were:

- whether the employer had the benefit of the claim to issue estoppel;
- whether the Deputy President’s reliance upon the “no contracting out” provisions of the workers compensation legislation pursuant to Section 234 of the Workplace Injury Management and Workers Compensation Act 1998 was correct.

Meagher JA delivered the primary judgment and both Leeming JA and Simpson JA both agreed. Meagher JA noted prior to proceedings in relation to the determination of the dispute for weekly compensation and medical expenses did not include a claim for lump sum compensation. If it had, the only mechanism for the Commission to determine a dispute concerning the degree of permanent impairment would have been a referral to an Approved Medical Specialist and the Commission must determine the claim in accordance with that assessment.

The Commission cannot make or act on its own assessment or finding (including any consent order) in relation to a medical dispute as to permanent impairment. That is, the Workers Compensation Commission did not have any jurisdiction to make an order that was binding on the parties in relation to a dispute as to the degree of permanent impairment resulting from the injury.

In relation to the second point of appeal, Meagher JA stated it was not contended Ms Hine was prevented from pressing her claim. What was contended was that the consent orders created an issue estoppel. Although the employer was successful on that ground of appeal the failure of the employer in relation to the lack of an issue estoppel resulted in the employer’s appeal being dismissed.

This decision is a timely reminder to employers and Scheme Agents that a claim for permanent impairment can only be finalised either by agreement through the execution of a Complying Agreement or as a result of an assessment by an Approved Medical Specialist in the event of a dispute. Agreements made by the parties to a dispute, even if the agreement purports to assert an injured worker has recovered from the effects of an injury, will not protect an employer from a subsequent claim for permanent impairment. The only failsafe method of resolving a claim for an injured
worker’s complete entitlements under the workers compensation legislation is through a commutation settlement or a payment of damages under the worker injury damages regime. Of course both of these types of settlement have their own procedural requirements including a requirement that an injured worker has reached the 15% whole person impairment threshold.  

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CTP ROUNDPUP

A single vehicle – can the accident be blameless?

In our January edition of GD news we discussed the Supreme Court decision of Melenwycz v Whitfield. That decision has now been overturned by the Court of Appeal.

Melenwycz was riding a motorcycle on the Bourke-Hungerford Road on 12 August 2011 when a large kangaroo leapt onto him and knocked him off his motorcycle. Melenwycz commenced proceedings against Whitfield the owner and AAI Limited t/as Suncorp Metway the CTP insurer of the motorcycle which was registered in Queensland. Melenwycz alleged the circumstances of the accident fell within the definition of a blameless accident.

Section 7A of the Motor Accidents Compensation Act 1999 (the “Act”) provides that a blameless motor accident is:

“A motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of a vehicle and not caused by the fault of any other person.”

Section 7B of the Act provides that any claim for damages in respect of death or injury is deemed to have been caused by the fault of the owner or driver of the motor vehicle in the use or operation of the vehicle.

Section 7E(1) of the Act provides a claimant has no entitlement to damages if he or she was a driver and the accident was caused by his or her act or omission.

In the Supreme Court proceedings the defendants denied the accident was blameless and asserted Melenwycz was negligent by failing to keep a proper lookout and riding at an excessive speed. The defendants argued that the blameless accident provisions do not apply to a driver or a driver involved in a single vehicle accident. The defendants also relied on Section 7E of the Act contending that a driver cannot recover damages where the collision was caused by an act or omission of that driver.

The trial judge Justice Hamill found that the accident was a blameless accident as defined by Section 7A. Further, the trial judge examined a variety of evidence, and determined that in the circumstances, the failure of Melenwycz to observe the kangaroo earlier and take evasive action was not an omission which “caused” the accident for the purposes of Section 7E.

An appeal followed.

The Court of Appeal were unanimous in allowing the appeal on the basis that, in the circumstances of Melenwycz’s injury, section 7B did not “deem” fault on Whitfield the motorcycle owner.

The Court of Appeal determined that if the owner of a motor vehicle involved in a single vehicle motor accident has no causal use or operation of the vehicle at the time the accident occurred, Section 7B will not deem the owner to have been at fault. Applying the principles laid out by the High Court of Australia in Allianz Insurance Australia Limited v GSF Australia Pty Ltd the Court of Appeal determined a blameless accident is one in which there must be causative use or operation by the owner or driver (or both) but no fault in that use or operation.

Justice Meagher reasoned:

“Had the respondent owned the motorcycle he could not have had a claim for damages against himself as owner: cf Syed v Crumpton [2016] NSWSC 500 which decides otherwise. I respectfully disagree with the conclusion in that judgment. Section 7B deems fault for the purposes of a claim which depends on the claimant establishing liability under the common law. It does not deem liability. Under the common law a driver cannot have a claim in negligence against him or herself: see in the context of an asserted subrogated claim, Simpson & Co v Thomson (1877) 3 App Cas 279.

The respondent relies on the deeming provision in s 7B in circumstances where there was a motor accident which undoubtedly involved his use or operation of the vehicle but did not involve any use or operation of the vehicle on the part of the owner, either in a causal or temporal sense. In other words, there was nothing done or not done by the owner in relation to use or operation of the motorcycle that was of any causal significance in relation to the collision with the kangaroo; and the occurrence which constituted that incident or accident did not include any driving or other use or operation of the motorcycle by the owner.”

Further, the Court of Appeal determined Section 7E only applies where there are one or more vehicles involved in the motor accident which is said to be blameless.

So what is the effect of the judgment? The findings of the Court of Appeal have a significant effect when determining what is a “blameless accident”. Firstly, in order for a motor accident to be considered a
“blameless” accident it must be caused by the use or operation of the vehicle. Simple ownership of a vehicle will not be enough. Secondly, a driver who also owns the vehicle will not be entitled to claim damages against himself as the owner of the vehicle. Thirdly, if an accident involves a single vehicle an accident may be classified as a blameless accident, but only if there is causal conduct by the owner in the use or operation of the vehicle.

Given the significance of the judgment it is possible a special leave application to the High Court will follow. Time will tell.

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Section 62 – IAL v Asaner and the Impact of Jubb v IAL

In Insurance Australia Limited t/as NRMA Insurance v Asaner [No2] [2016] NSWSC 1078, Justice Campbell has considered whether a surveillance DVD and medical opinion based on the DVD constituted “additional relevant information” within the meaning of the Motor Accidents Compensation Act 1999 (“MACA”).

Under Section 62 (1)(a) of MACA an application for a further medical assessment of a claimant can be made on the ground there is “additional relevant information” available regarding the injury. Under MACA Section 62 (1A) a referral for a further assessment can only be made if in the opinion of the officer dealing with the application the information is capable of having a material effect on the previous assessment.

The circumstances of the claim are quite straightforward. Mr Asaner was assessed by Dr Harvey-Sutton for the insurer, who reported she could not find any ongoing signs of injury or disability. Mr Asaner was then assessed at MAS by Assessor Johnson, who assessed whole person impairment at 14%. This included 4% for an impairment of the left shoulder as a result of neck pain. The assessor had Dr Harvey-Sutton’s report before him when he made his assessment.

Following the MAS assessment the insurer obtained some surveillance of Mr Asaner, showing free use of the left shoulder, which it sent to Dr Harvey-Sutton for her review. Dr Harvey-Sutton then wrote a second report in which she stated that she had watched the surveillance film and it confirmed her opinion set out in her first report that she could not find any ongoing signs or injury or disability.

The insurer applied for a further medical assessment of the plaintiff under MACA Section 62 (1)(a) on the basis the surveillance DVD, the report of the surveillance operative and Dr Harvey-Sutton’s second report was additional relevant information.

The insurer’s application was unsuccessful. The MAS officer determining the application was not satisfied the three pieces of information submitted were additional relevant information about the injury. The officer’s reasoning was that Dr Harvey-Sutton’s second report dealt with the same issues as her first report:

“In this case, Dr Harvey-Sutton has commented… the evidence (being the surveillance material) supported her original assessment of the claimant’s whole person impairment in relation the left shoulder. This is clearly recorded on page 3 of her report in which she states “my opinion has not changed”.

I note that Dr Harvey-Sutton’s previous opinion was before the Assessor and was considered. As her opinion has not changed, I do not consider it to be additional relevant information”

The insurer sought judicial review of the MAS officer’s determination on a number of bases arguing the officer was wrong to assume that new evidence supporting previously expressed conclusion could never be additional relevant information.

The insurer also argued that the officer had fallen into error because he had not personally viewed the DVD, based on the decision in IAL v Clewley [2015] NSWSC 1805 that an opinion formed without viewing the DVD was not one properly formed according to law.

Justice Campbell disagreed with this submission. Whether “additional” information can have a material effect on the outcome of the previous assessment usually raises medical issues and an application to MAS for a further assessment is usually supported by medical opinion as to how the additional information will change the outcome of the previous assessment. There will be only a handful of cases where the surveillance will speak for itself because the activity shown on the surveillance is so clearly inconsistent, such that it would be an error on the part of the MAS officer not to view the surveillance film.

However, the insurer did ultimately succeed on the judicial review application because His Honour was satisfied the MAS officer had fallen into jurisdictional error. The officer had thought, wrongly, that “additional relevant information”, as far as medical reports were concerned, could only be opinions dealing with issues not previously considered.

This was contrary to the recent decision of the NSW Court of Appeal in Jubb v Insurance Australia Limited [2016] NSWCA 153. In Jubb, the Court of Appeal determined that “additional relevant information” did not exclude information concerning issues which have already been considered by the previous medical assessor.

Jubb also puts in doubt the validity of the decision in Singh v Motor Accidents Authority of New South Wales (No 2) [2010] NSWSC 1443, a decision which the Court of Appeal said has to now be approached with
caution. The MAS officer had specifically referred to Singh in his determination.

Justice Campbell was careful to point out that revised medical opinion from an expert by itself can still satisfy the test of being additional relevant information. His Honour gave the example of a “different but cogent” medical view not available at the time of the previous assessment as one such report that would satisfy the test.

At the conclusion of the judgment His Honour uses the opportunity to reinforce the Court of Appeal’s views expressed in Jubb regarding MACA Section 62(1) and the discretion to be exercised when determining whether to refer the matter for a further assessment:

“... a third question arises which is “whether or not to refer the matter for a further assessment” in the exercise of the “residual discretion” conferred by s 62(1) by use of the word “may”: Jubb at [32] – [36]. Of the “residual discretion” Gleeson JA said (at [36]):

“... the discretion is not entirely unconstrained. The power conferred on the proper officer must be exercised in accordance with the subject matter, scope and purpose of the statute...[T]he existence of that discretion has been recognised in the authorities on s 62.” [Citations omitted].

Questions like whether a party has “held back” information, or whether the additional relevant information is new, or whether like information is shown to have been considered and rejected in the previous assessment, or whether by the exercise of reasonable forensic diligence the information could have been obtained in a timely way for the purposes of the previous assessment are matters which may inform the exercise of the residual discretion: Jubb at [77] – [80]. The examples I have provided cannot, and are not intended to, be exhaustive.”.

This has always been a contentious area of the MAS assessment process, as the ability of a party to trigger a further assessment when faced with an excessive assessment to reduce can be the factor determining entitlement or other wise to substantial damages for non economic loss. The decision in Jubb has widened the gateway to a further assessment under MACA Section 62(1)(a) as evidenced by this decision of Justice Campbell. The Court of Appeal will no doubt be keen to re-visit this section of the MACA at the earliest opportunity.

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In September 2004, two year old Layton Smith suffered catastrophic injuries in a motor vehicle accident. Layton was a passenger in his father’s vehicle when a van travelling in the opposite direction along the Great Western Highway jumped the median strip into its path. The driver of the van, Mr Messruther, was pronounced dead at the scene of the accident as a result of a heart attack.

Layton’s father Troy Smith brought proceedings as tutor under the Motor Accidents Compensation Act 1999 (NSW) (the “MACA”) on behalf of Layton against Mr Messruther’s CTP insurer NRMA Insurance. The accident occurred before the start of the current MACA blameless accident provisions, which were introduced by the Motor Accident Compensation Amendment Act 2006 (NSW), meaning liability had to be established against Mr Messruther if Layton was to receive any compensation.

The issue was whether Mr Messruther had the heart attack before the collision, or as a result of the collision. Witness evidence was conflicting. The driver a little distance behind the Smiths’ sedan gave evidence he had a clear recollection of seeing the driver of the van sitting up, with his hands on the wheel in the position expected of a person driving a vehicle. However, a driver in the lane next to Mr Messruther’s van gave evidence the van was slowly swerving back and forth across the lane and that she could see through the passenger window that the driver appeared unconscious but with his hands on the steering wheel. She flashed her headlights, sounded her horn, and yelled in an attempt to “wake up” the driver, but he remained slumped and limp.

A joint expert report of two consultant cardiologists agreed that Mr Messruther may not have had any symptoms before losing consciousness.

Justice Button rejected Smith’s case that at the time of the collision Mr Messruther was conscious and driving. The evidence of the witness in the adjacent vehicle was preferred to the evidence of the witness driving behind the Smiths’ vehicle.

An appeal was filed by Troy Smith as tutor on behalf of Layton challenging the credibility of witness evidence and the Justice Button’s approach to the medical evidence of the cardiologists.

For reasons not explained, but presumably due to the potential liability for costs, Troy Smith later made a successful application to be removed as tutor for his appellant son before Justice Ward in the NSW Court of Appeal in March 2016. However, there was no tutor proposed in the alternative.
Under Uniform Civil Procedure Rules 2005 (NSW) (UCPR) Rule 7.14(1), a person under legal incapacity cannot may not commence or carry on proceedings except by his or her tutor: A “person under legal incapacity” is defined in s 3 of the Civil Procedure Act 2005 (NSW) as any person who is under a legal incapacity in relation to the conduct of civil proceedings and includes a child under the age of 18 years.

UCPR Rule 7.18(1)(b) provides that in any proceedings in which a party is or becomes a person under legal incapacity:

(a) if the person does not have a tutor, the court may appoint a tutor, or 
(b) if the person has a tutor, the court may remove the party’s tutor and appoint another tutor.

However, one of the difficulties with the imposition of the role of tutor is that it carries with it a responsibility for adverse cost orders made against an incapacitated plaintiff. In this particular case, Layton Smith’s solicitor sought to relieve the potential tutor from that liability.

In view of there being no alternative tutor proposed, Justice Ward made orders including the following:

1. Pursuant to r 7.18(1)(b) UCPR order that Mr Troy Smith be removed as tutor for the appellant in these proceedings.
2. Proceedings be stayed until such time as an appropriate tutor consents, and is appointed, to act as tutor for the appellant in the proceedings.
3. Direct that the appellant’s solicitors submit a request to the President of the Law Society of New South Wales to nominate within 14 days a solicitor who is prepared to act as the tutor for the appellant in these proceedings and has appropriate expertise to do so being a tutor who has no interest in the proceedings and is not connected with any of the parties or the parties’ legal representatives.
4. If the President of the Law Society of New South Wales is unable to nominate a tutor within the time allocated under the orders, order the respondent’s solicitor to re-list the matter for further directions before the Registrar.’

Pursuant to Justice Ward’s orders, on 1 April 2016, the President of the Law Society of New South Wales nominated accredited personal injury specialist solicitor Geraldine Daley as an appropriate person to be appointed as tutor in these proceedings. Ms Daley agreed to the appointment but only if orders were made protecting her from liability for costs and for her reasonable costs of being the tutor to be met.

NRMA Insurance did not agree to Ms Daly’s proposed conditions. As a result Carroll & O’Dea solicitors filed a Notice of Motion in the NSW Court of Appeal seeking orders for the appointment of Geraldine Daley as tutor on the terms required by Ms Daly.

On 15 August 2016, the motion came before Justice Gleeson. The judgment is set out in Smith v NRMA Insurance Limited [2016] NSWCA 250 (9 September 2016). In addition to considering the application for the orders sought by Carroll & O’Dea, his Honour called for written submissions on two further questions posed by his Honour:

- whether the Court should make a maximum costs order to limit the liability of the tutor to costs to a specified amount, such as $10,000.
- whether the Court should make Ms Daley’s appointment as tutor conditional upon her filing an affidavit stating that she has received written advice from independent senior counsel that the appeal has real prospects of success.

While orders for the appointment of Ms Daley as tutor were sought pursuant to UCPR Rule 7.18(1)(b), in the alternative, the plaintiff’s counsel sought to rely on the Court’s power to appoint a tutor for the purposes of particular litigation under its parens patriae jurisdiction. It was submitted that it was in the interests of justice that Geraldine Daley be appointed as tutor with the costs protection she sought. Otherwise, there would be no replacement tutor and Layton Smith’s appeal could not progress.

NRMA Insurance opposed the application for Ms Daley to be protected from liability for costs on the basis that one of the main objects of the appointment of a tutor is to have a person on the record that is personally liable for costs.

Justice Gleeson agreed with the plaintiff’s counsel. His Honour determined that the Court could make an order protecting a tutor from personal liability for costs under its parens patriae jurisdiction or alternatively under UCPR Rule 7.18(1)(b), in reliance on the power conferred by UCPR Rule 2.1. Rule 2.1 (the “catch all” provision that gives the Court the power to give such directions and make such orders for the conduct of any proceedings as appear convenient for the just, quick and cheap disposal of the proceedings.

His Honour ordered:

- The appointment of Ms Daley as tutor should be on terms including a protective costs order.
- The respondent is precluded from seeking any recourse to Ms Geraldine Daley for the payment of any costs order made in its favour in these proceedings and Ms Daley is not personally liable in respect of any such costs order.

His Honour acknowledged the difficulty in trying to balance the interests of an appellant, trying to litigate his appeal, and an insurer, who had succeeded at trial and sought to protect its position on costs if the appeal did not succeed. The rationale of the decision was that the protection of a person under a disability and the protection of the processes of the Court must take priority over the insurer’s costs considerations, as otherwise the appellant could not proceed with his litigation.
Moreover, no-one else other than Ms Daley was prepared to step into the role of tutor. His Honour rejected the suggestion by the insurer that the NSW Trustee and Guardian might accept an appointment. The suggestion was regarded as speculative only, as there is no evidence of any assets of the appellant (except if he were to succeed on his appeal) from which the NSW Trustee and Guardian’s fees and any adverse costs orders would be paid in the event the appeal failed.

However, what was perhaps surprising was that Justice Gleeson did not think it was necessary to require the tutor to obtain independent advice that the appeal has real prospects of success as a condition of appointment of the tutor. This is particularly so in light of His Honour’s concession that this might be appropriate if an appeal were either not bona fide or had no real prospects of success. We would have thought given the factual issues agitated before Justice Button that the insurer would have made this argument, but Justice Gleeson noted “the insurer expressly disavowed making any such submission along those lines in the present case” and that it was significant that the insurer had not made any suggestion that the case was weak and/or unarguable.

The other factor his Honour took into account was the plaintiff would not have funds to commission an advice from counsel on prospects and noted the insurer had not offered to fund this advice for Layton Smith. In the end, it may have been simply the problem with funding that caused his Honour not to require the advice on prospects to be obtained. However with the benefit of hindsight, there may have been some utility in the insurer funding an independent advice on prospects to put before the court in opposition of the motion.

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