GD News

Gillis Delaney Lawyers

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

The Chip Falls against Big W

Exactly what the effect is of various provisions of the *Civil Liability Act 2002* ('the CL Act') in NSW continues to bedevil insurers, lawyers and the Courts. The recent High Court decision in *Strong v Woolworths Limited t/as Big W & Anor [2012] HCA 5* is a prime example.

The facts of the case are typical of "slip and fall" public liability claims. The claimant suffered serious spinal injury when she slipped and fell at around 12:30pm at a shopping centre. At the time of her fall, the claimant had an amputated right leg and needed crutches to walk. Her fall occurred when the tip of one of her crutches came into contact with a "greasy chip" that was lying on the floor of a sidewalk sales area.

The area where the incident occurred was under the care and control of Big W ('Woolworths'). The claimant brought proceedings in the District Court of New South Wales and was successful in a claim for damages in negligence against Woolworths. Woolworths appealed.

There was no issue that Woolworths owed the claimant a duty to take reasonable care, or that on the day of the incident Woolworths did not have in place any system for the periodic inspection and cleaning of the area. The area in question had last been inspected at 8:00am on the morning of the incident.

In the Court of Appeal, the primary issue was whether the claimant had proved that Woolworths' negligence was the cause of her injury.

For claims such as these, the principles governing the determination of causation for liability set out in Section 5D of the CL Act apply. Section 5D relevantly requires that the negligence was a necessary condition of the occurrence of the harm (called "factual causation") and that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (called "scope of liability").

In the Court of Appeal, an application of the statutory test found that the claimant had failed to prove on the balance of probabilities that Woolworths' negligence caused her fall. The Court of Appeal found that there was no basis for concluding that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system. In the absence of evidence supporting an inference that the chip had been there for some time, such as that the chip was dirty or cold to touch, the Court of Appeal said that there was no basis for concluding that it was more likely than not that it had not been dropped shortly before the appellant slipped.

The Court of Appeal approached the causation question on the basis that reasonable care in the circumstances required periodic inspection and necessary cleaning of the sidewalk area at 15 minute intervals throughout the day. The Court of Appeal found it likely that the chip had been deposited at lunchtime and, on that basis, held that it could not be concluded that, had there been a dedicated cleaning of the area every 15 minutes, it was more likely than not that the appellant would not have fallen. In those circumstances, the Court of Appeal found no negligence on the part of Woolworths.

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The High Court has overturned this finding. By majority (4-1), the High Court held that, in the circumstances, it was an error to hold that it could not be concluded that the chip had been on the ground for long enough to be detected and removed by the operation of a reasonable cleaning system. The evidence did not permit a finding, the High Court held, of when between 8:00am and 12:30pm the chip was deposited. Given this, the probability was that it had been on the ground for more than 20 minutes prior to the appellant's fall. On the balance of probabilities, therefore, the appellant would not have fallen but for Woolworths' negligence – therefore, in terms of the CL Act, the claimant had established factual causation.

The compelling inference in this case was that the chip had been there long enough and a reasonable cleaning system would have removed the chip.

In the past defendants in slip and fall cases have argued that a plaintiff's claim should fail if the plaintiff did not establish that a substance had been on the ground for a length of time and that the substance would have removed by a reasonable cleaning system. As can be seen from the following finding of the High Court an inference to aid the plaintiff's case can be drawn. The majority of the High Court concluded:

> *"The inference was open that the chip was not present on the floor of the sidewalk sales area at the time the area was set up for the day's trading. However, the conclusion that the chip had been deposited at a particular time rather than any other time on the day of the incident was speculation.*
>
> *Reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was adjacent to the food court. The evidence did not permit a finding of when, in the interval between 8.00am and 12.30pm, the chip came to be deposited in that area. In these circumstances, it was an error for the Court of Appeal to hold that it could not be concluded that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system. The probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm and not the shorter period between 12.10pm and the time of the fall."*

In the circumstances also, there was no real issue about scope of liability. The parties agreed that it was appropriate that the scope of Woolworths' liability extend to the harm that the claimant had suffered.

The case really turns on what was an appropriate finding on the evidence presented. Its usefulness, however, also lies in the High Court's discussion of section 5D of the CL Act. From that examination, it is tolerably clear that these principles are not really very different from the established principles which have always governed the imposition of liability for negligence at common law.

Factual causation required under section 5D(1)(a) is, according to the High Court, really no more than a statutory restatement of the classic "but for" test of causation – that is, the plaintiff would not have suffered the particular harm but for the defendant's negligence. The statutory principles include a provision (in section 5D(2)) for exceptional cases which would fail a "but for" test – such as those where the defendant's negligence is a material contribution to harm, but not necessarily a sole necessary condition.

Whilst there were arguments that the "but for test" should incorporate concepts like " material contribution to harm, or material increase in risk of harm" the High Court shied away from rephrasing the concept.

As to the scope of liability test in Section 5D(1)(b), the High Court acknowledges that this is a statutory expression of the policy considerations to be considered in determining whether legal responsibility should attach to the defendant's conduct. That sounds very much like the classic limiting principle of reasonable foreseeability of particular harm at common law. For now there is the "but for" test for causation as well as a permissible finding that factual causation is established in exceptional cases where the plaintiff cannot establish the negligence was a necessary condition of the occurrence of harm provided established common law principles are applied.

So the more things change, the more they stay the same. In a slip and fall case, a claimant is required to prove that, had a system of periodic inspection and cleaning been employed, it is likely that "the chip" would have been detected and removed before the incident.

Defendant's need to watch out for the adverse inference that can be drawn from the facts in each case. If defendants simply assert that the plaintiff case must fail as there is insufficient evidence to establish the length of time that a substance was left on the ground the defence may well slip and fall.

Homeowner's Duty to Visiting Contractors

Carrying out repairs on a home can be a risky business. Contractors may be confronted by defects that they need to repair and in some situations there are hidden defects. If a contractor is injured on the homeowners premises a question will often arise as to whether or not the homeowner owes the contractor a duty of care and if so, what is the extent of that duty?

Guidance on this issue can be found in the recent NSW Court of Appeal decision in *Gaskin v Ollerenshaw*.

Gaskin provided a quotation to paint a roof at premises that Ollerenshaw and his wife were purchasing. The quotation was ultimately accepted and Gaskin attended to carry out the work and whilst performing the work the veranda roof collapsed under his weight. The fascia boards to which the veranda roof had been attached were rotten. Gaskin was seriously injured.

Gaskin brought proceedings against Ollerenshaw alleging that the homeowners were negligent as they had obtained reports from a building consultant and pest inspector before the purchase which had indicated there was wood decay in the fascia and a high risk of concealed timber pest workings to roof timbers and Ollerenshaw did not disclose those details and rather assured Gaskin that it was safe for him to stand on the roof and that Ollerenshaw had climbed onto the roof previously when he had not actually done so. The trial judge rejected the evidence that Gaskin gave in relation to the assurances as to the condition of the roof. Gaskin appealed.

The issues for determination of the appeal were whether:

- Ollerenshaw was subject to an extended duty of care flowing from the special knowledge that aspects of the roof might be unsafe;
- whether Ollerenshaw assured Gaskin that the roof was safe; and
- whether the assurance caused Gaskin's loss.

The Court of Appeal confirmed that:

> *"There is no rule of law to the effect that householders who do not know of the existence of a defect in their property that might cause danger to lawful visitors – but who are aware of circumstances which would alert a reasonable person to the danger from the defect may, without negligence on their part, ignore the existence of the defect."*

The measure of the discharge of the duty of care owed by occupiers to visitors remains what a reasonable person would, in the circumstances, do by way of response to the foreseeable risk. The circumstances may well require, by way of reasonable response, an inspection of the property or part of it; and removal or repair of the defect.

The Court of Appeal noted:

> *"An independent contractor coming onto premises in order to undertake a task within his or her professional competence will usually be expected to exercise reasonable care for his or her own safety, having regard to the possibility of risks which are known."*

The Court of Appeal noted that the cause of the collapse was not termite damage but a combination of the failure to affix the veranda roof to the truss rafters of the main roof, rather than, as had been done, nailing the veranda roof to the fascia boards and secondly, the absence of flashing that had allowed water to seep through into the fascia boards causing dry rot.

The Court of Appeal noted the building inspection report and the pest inspection report did not disclose any relevant matter of concern.

The Court of Appeal noted there was no indication of termite damage to the veranda and that was not known to either Gaskin or Ollerenshaw in part because the building report had not revealed the condition of the boards nor the method of affixing the veranda roof to the house.

The Court of Appeal concluded that the content of the reports did not provide any basis for an obligation to investigate further with respect to the veranda roof. Once it was accepted that the owners neither were nor should in the exercise of reasonable care have been aware of the defective construction of the veranda roof, liability could not arise on that basis.

It was then necessary to turn to the assurances which were allegedly made by Ollerenshaw.

The homeowner allegedly made representations in respect to the safety of the veranda roof as a platform from which to work without supporting planking, which statements were made without any reasonable basis and therefore demonstrated a lack of reasonable care for the safety of Gaskin.

The Court of Appeal noted that if Ollerenshaw had merely said: "The roof looks stable to me" or "I have a building inspection report which doesn't suggest any weakness in the roof" there could be no complaint. However, Gaskin said the assurances went further involving an affirmative claim as to the safety of the structure as a working platform.

The Court of Appeal noted that in order for Gaskin to succeed Section 5D of the Civil Liability Act 2002 provides that the negligence of Ollerenshaw must be a necessary condition of the occurrence of the harm.

To determine whether or not a negligent act is a necessary condition of the harm it is necessary to determine whether or not the harm would not have occurred but for the negligent conduct.

The Court of Appeal noted this gives rise to a number of difficult issues particularly where there are sequential or concurrent elements or conditions that cause an accident. The Court of Appeal also noted that there is an exception in Section 5D of the Civil Liability Act 2002 which permits a finding of causation in an exceptional case where the "but for" test is not satisfied. Basten JA and Meagher JA, in a joint judgment, noted that when it came to causation:

> *"It is also common place to analyse causal factors as being necessary or sufficient or both. "The straw that broke the camel's back" is a necessary, but not sufficient causal factor. Each grain of sand put in the balance against a one gram weight is necessary to tip the balance of a particular point: none alone is sufficient. For a factor not to be a necessary one, the event must have occurred absent of the factor."*
>
> *The foregoing analysis is, of course, inaccurate in terms of civil litigation. To be a necessary condition, it is sufficient that the Court is satisfied that the factor was probably necessary. Once satisfied that the particular factor was operative (in the presence case on the mind of Gaskin) it may be but a small step to conclude that it was also necessary. Inferences derived from the course of negotiation may be sufficient in that respect. In the example of physical causation noted above, each grain of sand may constitute a material contribution to the tipping of the balance and each will satisfy the "but for" test.*

In this case it was accepted that a Court could possibly conclude that the assurances were in a sense a necessary condition of the conduct which led to the accident, if the assurances were made.

The Court of Appeal noted that the trial judge had reached conclusions rejecting Gaskin's evidence on the assurances on the basis of flawed reasoning and those findings should therefore be set aside. It did not follow that setting aside those findings would result in a different outcome, however the Court of Appeal concluded that it was necessary for a retrial to occur to allow a determination of whether the assurances were made as it was possible for the Court to infer the assurances were causative of the risk of harm.

The duty of care owed by occupiers to visitors remains what a reasonable person would, in the circumstances, do by way of response to the foreseeable risk. If an occupier has been negligent and that negligence was probably necessary as a condition of the occurrence of the harm then the injured person will succeed in their claim.

Indicative Terms Can Mean a Contract of Insurance is in Place

The supply of indicative terms despite the absence of a policy, a tax invoice and the payment of premium, can still result in a binding contract of insurance as was seen in a recent decision of the Victorian Supreme Court in *Leading Synthetics v Adroit Insurance Group and Atradius Credit Insurance NV.* The case demonstrates that negotiations between brokers and insurers can result in a binding contract of insurance even where an insurer contends that it will not be on risk until it issues written confirmation that it is on risk and issues a policy.

Leading Synthetics is a supplier of synthetic resins. Signum Specialties was one of its customers. In 2007 and 2008 Signum purchased product from Leading Synthetics on 60 day payment terms.

In late 2007 Leading Synthetics instructed its insurance broker to seek a policy against the risk that Signum might fail to pay

money due under its trading account. The broker negotiated with Atradius Credit Insurance NV("Atradius") ,a credit risk insurer, to place cover for that risk up to an amount of $800,000.

It was common ground that by 28 April 2008 when the broker agreed on behalf of Leading Synthetics that the policy should commence from 1 April that all of the essential terms of the contract of insurance had been agreed. Nevertheless, a few days earlier Atradius had sent Leading Synthetics a document entitled "Indication of Terms" which stated:

"These terms are provided without comment on the part of Atradius until such time we provide you with written confirmation that we are on risk for your transaction and agree to issue a policy."

Atradius asserted that it never provided such written confirmation nor did it agree to issue a policy and on that basis it denied any contract of insurance was in force.

In May 2008 the broker had corresponded with Atradius setting out its understanding of the status of six different credit risk covers which were in the process of being negotiated and requested Atradius to confirm its understanding of the negotiations. In relation to the Signum credit risk, the broker wrote:

> *"Cover placed awaiting outcome on others prior to processing."*

Although Atradius engaged in further email communication with the broker concerning the other risks, it did not address the Signum cover again. Neither did the broker follow it up.

Atradius did not issue a policy. It did not send a tax invoice. No premium was paid. Nothing further occurred until November when warnings of Signum's impending failure arose and an $800,000 claim was made as a consequence of the default of Signum.

Leading Synthetics commenced proceedings seeking indemnity under a contract of insurance with Atradius and claiming damages from the brokers in the event that there was no contract of insurance. The issue for the Court was whether or not there was an intention to form legal relations. The parties had conceded that the essential terms of a credit risk contract of insurance had been agreed and the only issue was whether or not the agreement had commenced.

The Court accepted that the Atradius letter conveyed to Leading Synthetics and a reasonable person in that position would have understood, that Atradius did not wish to be bound by contract until it confirmed in writing it agreed to go on risk. However, the Court did not believe that a reasonable person would have necessarily understood that Atradius must employ some particular form of words in the subsequent document to convey that message.

The Court formed a view that the communications between the broker and Atradius were such that the only issue left to be agreed was the commencement date for the policy.

The various emails exchanged by the parties which made reference to "non binding indications" did not prevent the completion of a contract. The only incomplete term was the policy start date. The Court noted that an email sent by the broker in relation to the Signum risk requested confirmation that the insurance commence from 1 April 2008 and a response from Atradius that "1 April 2008 is OK" was sufficient to establish that the insurer agreed to enter into a contract of insurance on that date.

Whilst the trial judge accepted that the "indication of terms" conveyed an intention that the insurer would not come on risk until it agreed to do so, the agreement had been concluded by the exchange of emails.

The Court also found that Atradius were estopped from denying that a contract of insurance was in existence as their silence on the issue following the broker's communication on the six other risks induced an assumption on the part of Leading Synthetics that cover had been effected. The absence of any comment on the Signum risk meant that Atradius could not assert a contrary position.

In this case Atradius had indicated that it was prepared to offer terms and it had agreed to come on risk. Its initial "indication of terms" which required the issue of a formal policy for a contract to come in place did not preclude the establishment of a contract of insurance where all terms of the contract of insurance were agreed including the commencement date for the cover even though no policy document was issued.

You Must Plead the Civil Liability Act Defences

The NSW Court of Appeal in Bellingen Shire Council v Colavon Pty Limited has delivered a clear message to the legal profession that it is necessary to specifically plead certain provisions of the Civil Liability Act 2002 that give rise to defences in civil liability claims.

This case has been a long running saga, with the claim originally proceeding to trial before a District Court judge with the Council succeeding in the claim with a subsequent appeal to the Court of Appeal being successful and the claim being remitted to hearing once again.

Colavon Pty Limited were the owners of a prime mover and tanker that rolled down an embankment adjacent to a narrow section of Billings Road, Dorigo. The tanker was carrying milk collected from a number of properties in the area. The road was wet due to recent heavy rain and the accident occurred when the edge of the road gave way. The edge was not part of the formed roadway and was a soft built up section of soil and loose material.

The second trial resulted in a judgment in favour of Colavon and this time the Council appealed. The second trial judge held that the accident was due to the negligence of the Council in failing to install guide posts along the road so as to delineate the edge of the formed surface of the roadway from the soft edge.

The Council argued that Section 43A of the Civil Liability Act 2002 provides that any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

The Council argued that it was entitled to rely upon this defence.

Colavon challenged this assertion, contending that the trial judge should not have been permitted to allow the Council to rely on the defence as it had not been included in the formal pleadings in the case.

The defence filed by the Council provided:

> *"(a) the provisions of Part 5 of the Civil Liability Act 2002 apply to the determination of the Council's liability, if any:*
>
> *(b) the provisions of Section 45 of the Civil Liability Act 2002 apply to the allegations made in the Statement of Claim."*

There was no further particularisation of these paragraphs.

In the first trial the Council had relied on Section 45 of the Civil Liability Act 2002 that provides:

> *"A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out roadwork, or to consider carrying out roadwork, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm."*

Section 43A played no role in that first trial and was not relied on by the Council. When the Court of Appeal considered the first appeal it concluded that it was incumbent on Colovan to plead that the Council had actual knowledge as this was a material fact within the meaning of the Uniform Civil Procedure Rules which required pleading when section 45 was a potential defence.

When the second trial occurred Colavon objected to the Council relying upon Section 43A, pointing out that Section 43A was not pleaded in the Council's defence. Up until this point the Council had conducted its case on the basis that the edge of the road formed part of a classified road under the Roads Act 1993. The Council withdrew its concession that the edge was a classified road and that was the basis for submitting that Section 43A then applied. Colavon argued that it was taken by surprise during the trial when Section 43A was raised as a defence however the trial judge allowed the Council to rely on the defence, noting:

> *"As to the defence raised by the Council of Section 43A of the Civil Liability Act 2002, this was raised late. It was raised in further written submissions and Section 43A itself was not specifically pleaded. However, Part 5 of the Civil Liability Act 2002 was and no particulars of it were sought. When objection was taken during the course of the trial I accepted*

that the Council was entitled to rely on it as a defence. Having said so I propose to maintain that ruling. However, I must say that this case was conducted in a manner that had not been relied upon earlier and was only introduced well after the completion of evidence, and one would have thought as an afterthought. Be that as it may, the Council's argument is that the power to undertake traffic control on or near a road is a special statutory power for the purpose of Section 43A of the Civil Liability Act 2002."

The Court of Appeal then closely examined the Uniform Civil Procedure Rules.

The Court of Appeal noted that a failure to comply with the Rules of the Court, including the Pleading Rules, is not necessarily fatal to a party's right to rely upon unpleaded matters. A Court has a wide power to dispense with its Rules.

However, the Court of Appeal noted that whilst Section 43A is found in Part 5 of the Civil Liability Act, there are four separate protections or defences available to a public authority which include Section 43, 43A, 44 and 45.

The Court of Appeal concluded that the trial judge erred in concluding that a reference to Part 5 of the Civil Liability Act 2002 was an adequate reference to the separate defences found in Part 5.

The Court of Appeal noted that the failure to plead Section 43A deprived Colavon of the opportunity, at any stage of the proceedings, to consider its position in relation to any such defence. Nor was it in a position to test evidence relevant to the existence of the alleged "special statutory power".

The Court of Appeal noted that the unfairness to Colavon in allowing the defence pursuant to Section 43A to be raised by the Council was such that the defence should not and ought not to have been allowed. It therefore followed that the Council could not rely upon that defence and the Council's appeal was ultimately dismissed.

A long winding journey has revealed that the provisions which have been codified in the Civil Liability Act 2002, and in particular, the various defences that are available to parties, must be formally pleaded or a defendant will not be able to rely on the defences. The actual material facts which need to be established in the defences must also be pleaded.

As this case illustrates, a failure to plead a defence will result in a party being unable to rely upon that defence. In this case if from the outset the pleadings had raised defences under both Section 43A and Section 45 in the alternative those defences could have been raised by the Council to attempt to resist the claim.

Discrimination in Employment – Criminal Records

Declining to employ an applicant on the grounds of a previous criminal record can amount to discrimination as was seen in the recently published report of the Australian Human Rights Commission ("AHRC"). The AHRC has published a report into discrimination in employment on the basis of criminal records following investigations of the actions taken by Rail Corporation NSW concerning an application for employment, The applicants identity has been protected in accordance with the *Australian Human Rights Commission Act 1996* ("AHRC Act").

The AHRC Act confers functions on the Australian Human Rights Commission in relation to equal opportunity in employment pursuant to Australia's international obligations under the Discrimination (Employment & Occupation) Convention 1958 (the "Convention").

The Convention prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin or other grounds specified by ratifying states).

Section 3 of the Act defines discrimination as:

"(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:

i. has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

ii. has been declared by the Regulations to constitute discrimination for the purposes of the AHRC Act."

However, Section 3 also provides for situations which are excluded from the definition of discrimination.

A distinction, exclusion or preference is not discriminatory if it is:

- *"in respect of a particular job based on the inherent requirements of the job; or*
- *in connection with the employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenants, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities inherent of that religion or that creed. "*

Australia has declared a criminal record as a ground of discrimination for the purpose of the AHRC Act.

The AHRC Act confers on the AHRC the function of enquiring into any act or practice that may constitute discrimination. The AHRC has the power to make findings and make compensation recommendations.

Mr CG made a complaint to the AHRC concerning the actions of Railcorp. Mr CG was employed by Railcorp from 1999 to 2007 in various roles. From September 2003 to April 2005 he worked as a market analyst.

In or about June 2009 Mr CG applied for a job as a market analyst with Railcorp. He met all the essential selection criteria and was the selection panel's recommended candidate for the job.

During the recruitment process Mr CG was asked by Railcorp to provide comments about his criminal record and he disclosed convictions for a mid range drink driving offence in 2001 and a low range drink driving offence in 2008.

Railcorp ultimately communicated with Mr CG advising that he had not been selected for employment because of his criminal record.

Mr CG alleged that the failure to offer him employment as a market analyst because of his criminal record constituted discrimination in employment on the basis of his criminal record. Railcorp accepted that he was not offered employment because of his criminal record but argued that the failure to employ him did not amount to discrimination because Mr CG could not meet the inherent requirements of the job which included:

- compliance with its drug and alcohol policy;
- upholding its safety first values; and
- performing the duties faithfully, diligently, carefully, honestly and with the exercise of skill and good judgement.

A conciliation conference failed to resolve the claim.

The ARHC ultimately concluded that there had been discrimination.

The AHRC noted that the High Court decision in Qantas Airways v Christie provides guidance on what are the inherent requirements of the particular position and Brennan CJ in that case noted:

> *"The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertakings and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employer, by reference to that organisation."*

In the Qantas Airways case various comments were proffered by the High Court to describe an "inherent requirement" and those comments included:

- *"something that is essential to the position;*
- *an essential element of that spoken of rather than something incidental or accidental".*

An employer cannot stipulate something that is not essential or stipulate qualifications or skills which are disproportionately high to attempt to overcome the tenants of discrimination in employment.

The ARHC noted the Courts have held that the burden is on the employer to identify the inherent requirements of the

particular position and consider the application to the specific employee before the inherent requirements exception may be invoked. It has been said there must be a tight correlation between the inherent requirements of a particular job and an individual's criminal records to invoke the relief provided by the exception.

The Commissioner noted that he needed to be satisfied that there is a sufficiently tight connection between the inherent requirements of the job and the exclusion of Mr CG.

The Commissioner accepted that Railcorp had safety as a key priority and attempted to implement a safety first culture and accepted that a Railcorp employee being willing and able to take personal responsibility for their safe behaviour and their work was an inherent requirement of all jobs at Railcorp.

The Commission also accepted that it was an inherent requirement of a market analyst job that the job holder comply with the drug and alcohol policy of Railcorp and Railcorp was a drug and alcohol free workplace.

The Commission also accepted that the inherent requirements included obligations to perform the duties of the job faithfully, diligently, carefully, honestly and with the exercise of good skill and judgment.

The Commissioner however was not satisfied that there was a tight or close connection between the inherent requirements of the job of a market analyst and the exclusion of Mr CG from employment.

The Commissioner noted it is inconsistent with the declaration of a criminal record as a ground for discrimination for the purposes of the AHRC Act for employers generally to be able to demonstrate that they lack requisite trust and confidence in potential employees simply because they have criminal records.

The Commission noted that the absence of a criminal record might be an inherent requirement of some positions with a limited class of employers but Railcorp did not fall into that class of employers.

The Commissioner concluded that:

> *"The mere fact of having two convictions within the preceding period of eight years is not necessarily inconsistent with these inherent requirements".*

By way of passing the Commissioner noted that driving was not part of the proposed employment.

The Commissioner recommended that Railcorp pay Mr CG $7,500.00 in compensation for humiliation and distress. The ARHC only has power to recommend the payment of compensation and not order compensation be paid. Railcorp has advised the AHRC that it maintains its view that its decision was not discriminatory, that Railcorp declines to pay compensation having regard to Mr CG's lack of candour during his employment application process and notwithstanding Railcorp's ongoing and demonstrated commitment to non discrimination and equal opportunity, Railcorp will be undertaking a review of its recruitment processes with a view to ensuring that persons are not inappropriately excluded from employment with Railcorp on the basis of criminal records.

The Commission's report has now tabled to the Minister as is required so that the results of the investigation are available to the public at large.

Complaints of Bullying & Harassment Against Supervisor & A Dismissal

The Federal Magistrate's Court of Australia was recently called upon to determine a claim by an employee who was terminated after he had made complaints to his direct supervisor about a manager that was allegedly bullying and harassing him.

Stephenson was employed by Air Services Australia("ASA"). He made a complaint about alleged bullying by Richards, a manager. ASA appointed an external mediator to resolve the issues between Stephenson and Richards but the mediation did not take place before Stephenson was advised by ASA's' CEO that his employment was terminated.

Stephenson alleged he had a workplace right by complaining about the alleged bullying and harassment and ASA took adverse action against him by terminating his employment for reasons related to his complaint.

Section 340 of the *Fair Work Act* (““FWA”) provides that a person must not take adverse action against another person because the other person has a workplace right or had not exercised a workplace right.

Section 341 of FWA defines workplace rights to include a situation where a person is able to make a complaint or enquiry in relation to his or her employment or to seek compliance with a workplace law or workplace instrument.

Section 351 of FWA places the onus on the employer to establish that there was not a breach of a workplace right as the section provides that it is presumed in proceedings arising from an adverse action claim that the reason alleged for the adverse action occurred unless the proven otherwise.

During the hearing the Federal Magistrate heard evidence about Stephenson’s interaction with persons in the air traffic control team. Evidence was adduced of the perceptions of employees of how Stephenson discharged his duties.

The Magistrate accepted that the evidence demonstrated that Stephenson exercised a workplace right for making a complaint about the conduct of an employee to another and that ASA took adverse action against Stephenson by dismissing him from employment. As those two elements were made out it was then necessary to turn to the remaining element, whether the adverse action was taken because, or in part because, Stephenson had exercised a workplace right. The Court noted ASA had the burden of disproving that reason for the dismissal.

Courts have noted that the enquiry in this type of claim is

> *“The search for what actuated the conduct of the decision maker, not what the person thinks actuated him or her.”*
>
> *It is not open to a decision maker to choose to ignore the objective connection between the decision he or she makes and the attribute or activity in question.”*

However the Court noted that the reason for the decision is not determined by reference to the motivations of persons providing information to the decision maker. The relevant issue is the decision maker’s motivation and whether it included a prohibitive reason, not whether the information on which the decision to take adverse action was based was flawed or the reasoning why that information might have been flawed.

The Court noted that even if Mr Russell, who made the decision to terminate Stephenson, was supplied with information by people whose actions were motivated by the fact that Stephenson had made complaints, and even if some of that information was inaccurate because the persons who generated it were pursuing a campaign against Stephenson because of his complaints, if Russell did not make his decision for a reason which included the fact that those complaints had been made then there was no breach of Section 340 of FWA.

Russell had given evidence that he had terminated Stephenson as Stephenson failed to establish proper working relationships with important individuals both in ASA and externally and that a need for a cohesive team was the reason for the dismissal and not the complaints made by Stephenson. That evidence was accepted and the Court was satisfied that Stephenson’s complaint did not play any part of the CEO’s reasons for dismissing him.

Whilst in this case the employer escaped a claim for compensation for the termination of an employee who had made a complaint, employers need to be mindful of the fact that the adverse action provisions in FWA provide employees with a significant weapon.

The case serves as a reminder that the dismissal of an employee is an adverse action and the reasons for dismissal must be viewed objectively when determining whether or not the reason for dismissal was in part that the employee had or exercised a workplace right.

Issues In Tax Recovery Actions Against Company Directors

Our firm was recently involved in a case against the Deputy Commissioner of Taxation (“DCT”) which although settled, raised issues which Company Directors and their professional advisers should be aware of when facing proceedings for recovery of unpaid taxation, particularly where the transitional provisions (the “*Tax Laws Amendment (Transfer of Provisions) Act 2010*”) are concerned.
In this case the Company entered into an instalment agreement under the former Section 222ALA of the Income Tax

Assessment Act 1936 ("the 1936 Act") to pay arrears of PAYG Withholding Tax. The defendant was the Sole Director of the Company and in its Statement of Claim, the DCT contended that the defendant breached the Section 222ALA Agreement from 5 May 2010 by failing to meet an instalment payment. The DCT contended that such breaches enlivened the operation of former Section 222 AQA(2) of the 1936 Act with the effect that the Director is personally liable for the payment of the unpaid tax owed by the Company.

The DCT had served a Director's Penalty Notice in the form required before the transitional provisions came into effect on July 2010. The DCT however conceded because the proceedings were commenced after 1 July 2010 that it was required by operation of the Tax Laws Amendment (Transfer of Provisions) Act 2010 ("the Repealing Act") and Section 269-25 of Schedule 1 of the Tax Administration Act 1953 to give formal statutory notice by Section 269-25.

The document which the DCT sought to advance as its Section 269-25 Notice was a letter to the defendant's solicitor simply advising him that if the outstanding tax was not paid proceedings would be commenced against him. We contended that the letter did not comply with the section which provides, relevantly:

> *"Content of notice*
>
> *(2) The notice must:*
>
> *(a) set out what the Commissioner thinks is the unpaid amount of the company's liability under its obligation; and*
>
> *(b) state that you are liable to pay to the Commissioner, by way of penalty, an amount equal to that unpaid amount because of an obligation you have or had under this Division; and*
>
> *(c) explain the main circumstances in which the penalty will be remitted."*

Company directors faced with proceedings for recovery of amounts due under a 222ALA Agreement should carefully consider what notice the DCT was required to serve (and the form of that notice) having particular regard to when the breach of the Agreement occurred and when proceedings were commence.

Another issue in the proceedings was whether tax credits which may be obtained under the Fuel Tax Act 2009 may be treated as actual payments made by the company into the running balance account maintained by DCT for the Company. Of course the above issues may be raised in addition to the substantive defences that the Company took all reasonable steps to comply with the 222ALA Agreement.

Stamp Duty Chargees Beware

The Federal Court of Australia, per Katzmann J recently delivered a judgment in *Arnautovic and Sutherland t/as Jirsh Sutherland & Co v Cvitanovic* (as Trustee for the Bankrupt Estate of Adrian Lawrence Rosee) which serves as a useful reminder to equitable chargees to ensure that stamp duty is paid on instruments they seek to enforce.

The second appellant, a member of the firm Jirsh Sutherland was appointed as Liquidator of two companies of which Mr Rosee was director. Under Deeds, Mr Rossee guaranteed the payment of the Liquidator's fees and expenses and indemnified him for all costs incurred while acting as Liquidator of the companies. The Deeds required payment by a specified date or within seven days upon receiving demand from the Liquidator. The Deeds also contained a charging clause by which Mr Rosee agreed to charge any property to which he had title in favour of the Liquidator in respect of any liabilities Mr Rosee had under the Deeds, an acknowledgment by Mr Rosee that the Liquidator had a caveatable interest in any real property owned by Mr Rosee and an undertaking by Mr Rosee to grant an unregistered Mortgage to the Liquidator within 7 days of receiving a request.

The Deeds were not stamped with duty. Mr Rosee and his wife jointly owned a property which was sold three months after the Deeds were exchanged. On settlement a sum of $35,000 representing work done in connection with the liquidation of the two companies were drawn in favour of the appellant. At the time of sale, Mr Rosee was bankrupt and the respondent had been named as his Trustee.

In an application filed in the Federal Magistrates Court, the respondent alleged payment of the bank cheque to the appellants was void as a transfer of property in preference, contrary to Section 122 of the Bankruptcy Act. The Defence filed by the appellant was that the bank cheque was paid at the direction of the bankrupt in lieu of enforcement of an equitable charge over the property created by the Deeds and had the payment not been made, the proceeds would have vested in the Trustee, subject to the equitable charge. The respondent also contended that any charge created by the Deeds was unenforceable

because the Deeds had not been stamped. Section 211 of the Duties Act 1997 (NSW) providing that a mortgage on which duty must be paid under Chapter 7 is "unenforceable to the extent of any amounts secured by the Mortgage on which duty has not been paid".

The Deeds were tendered at first instance without stamp duty being paid. When the non payment of duty was raised, the solicitor for the appellants represented to the Federal Magistrate that he would arrange for his clients to pay the duty on the deeds. Section 304 of the Duties Act permits undertakings to be given to permit an un-stamped instrument into evidence. No record was made of this representation in the transcript.

At first instance the matter was not decided on the stamp duty question. On appeal it fell to be decided what was the effect of stamping the Deeds and in particular, whether the failure to pay stamp duty meant that it was merely inadmissible in evidence until duty was paid. By the time of appeal the Deeds had been stamped.

Katzmann J referring to various authorities ultimately reached the conclusion that the change in statutory language of the current Duties Act was not intended to have the effect that the Mortgage was only enforceable from the time of stamping and not retrospectively from the time of execution.

Another relevant factor was whether the issue of stamping having been raised at first instance, there was an undertaking to pay that stamp duty since if the undertaking had been given then it would be arguable that the evidence of the stamped documents should be received on appeal. The Court found that the exchange at first instance between the appellant's solicitor and the Federal Magistrate did not amount to an undertaking. Factors which led to that decision was that there was no record of it in the first instance transcript and no documents provided by the appellant in answer to a notice to produce calling for documents recording the undertaking.

Ultimately, The Court did not accept that it would be fair and just to receive as new evidence the stamped Deeds, and therefore refused to do so. Accordingly the Deeds were taken to be admitted into evidence bearing no stamp duty and were therefore unenforceable.

The case serves as a useful reminder that lenders need to ensure that duty is paid before equitable charges are enforced and if not, should carefully both consider and record the terms of any undertaking given to the Court to pay duty.

Workers Compensation Roundup

Deemed Employment

The New South Wales Court of Appeal and the NSW Workers Compensation Commission recently reviewed two interesting factual scenarios with regards to the concept of employment and deemed employment within the auspices of workers compensation claims. Under the legislation, if a claimant does not fall within the general definition of a "worker", the extended definition contained in Clause 2(1) of Schedule 1 of the Workplace Injury Management and Workers Compensation Act 1998 ("WIM Act") may deem a claimant to be a worker for the purposes of obtaining workers compensation.

The definition of "worker" in Section 4 of the WIM Act is as follows:

> *"Worker means a person who has entered into or works under a contract of service or a training contract with an employer … and whether the contract is express or implied and whether the contract is oral or in writing".*

Clause 2 of Schedule 1 deems an employment relationship in the following situation:

> *"(2)(i) Where a contract:*
>
> *(a) to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name), or*
>
> *(b) is made with a contractor who neither sublets the contract nor employs any worker, the contractor is for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor".*

In *Sekuloska v Sekuloski (2012)* which was heard in the Workers Compensation Commision the purported worker (Mr Sekuloski) and the purported employer (Mrs Sekuloska) were husband and wife. They lived together in a home they owned as joint tenants which was subject to a mortgage. In approximately 2003 they began planning to extend and renovate their

home. To fund this work they decided to extend their mortgage.

Whilst it was the intention that tradesmen would do most of the work, Mr Sekuloski and other family members would undertake some of the work. Mr Sekuloski intended to undertake carpentry, brickwork, wall panelling and the finishing work. As the holder of the owner/builder permit, Mrs Sekuloska obtained a worker's compensation policy to cover family members working on the property.

There was no direct payment ever made to Mr Sekuloski, and the evidence was such that Mr Sekuloski would receive "payment" by a redraw from the mortgage at the conclusion of the building works.

The Arbitrator who initially heard the matter was of the opinion there was an intention to create a legally binding employment contract. In the alternative, Mr Sekuloski was a "deemed worker" as he performed work exceeding $10 in value, was a truck driver by trade and did not sublet the contract nor employ any worker. The Arbitrator dismissed the argument that Mr Sekuloski was "paying himself" through the mortgage redraw and that the employment contract was void for lack of consideration. An appeal followed.

The Deputy President who determined the appeal focussed on the long standing principles enunciated in *Teen Ranch Pty Limited v Brown (1995)*. Quite simply, family or domestic arrangements do not normally give rise to binding contracts. There is a presumption of fact that such parties did not intend to form legal relations, especially in an employment context.

The Deputy President considered that Mr Sekuloski and Mrs Sekuloska lacked the necessary intention to create legal relations. Mr Sekuloski bore the onus of establishing that a legally binding contract existed and he failed to discharge that onus.

Mr Sekuloski did not come close to rebutting the presumption that in a family or a domestic setting, parties do not intend to create legal relations. Mr Sekuloski performed vaguely defined work on his home, on irregular occasions when he had time. Mr Sekuloski clearly did not do that work in expectation of receiving payment from his wife and did not receive any "payment" until about one year after the completion of his work. The source of Mr Sekuloski's payment was not his wife but a joint account which he financed from his work as a truck driver and through the extended mortgage.

Importantly, the Deputy President noted there was no obligation on Mr Sekuloski to perform any work on the property and he was simply engaged in a joint building project with his wife for a mutual benefit. The agreement concerned a family home owned jointly. The husband and wife could not be considered to be worker and employer. The Deputy President also commented that, although not determinative, it was difficult to imagine Mrs Sekuloska trying to sue her husband for the cost of redoing work defectively carried out by him!

Finally the Deputy President commented that there was no intention to enter legal relations and given that there was no payment over $10.00, the purported worker did not fit within the deeming provision.

The Court of Appeal in *Workers Compensation Nominal Insurer v Adnan Al Othmani (2012)* examined another unique factual scenario involving a tenant and landlord. This matter was subject to a Presidential appeal in early 2011 and we previously commented on the Deputy President's decision in our March 2011 Newsletter. The tenant had sustained severe injuries resulting in paraplegia when he fell through sheeting on a pergola roof of a house he had rented from the landlord one week earlier. There was conflicting evidence from the tenant and the landlord but the tenant alleged that he had been employed by the landlord to undertake some repair work. He claimed there was an agreement that the landlord would pay him $1,000.00 for that work.

Deputy President Lorna McFee originally determined that despite the landlord/tenant relationship, the factual circumstances satisfied the indicia for deemed employment.

The Court of Appeal examined a number of other procedural issues but with regards to the employment question, the majority supported the Deputy President's analysis. On the accepted factual circumstances both Bathurst CJ and McColl J accepted that there was an agreement to pay $1,000.00 for fixing all defects. Accordingly, it could then be readily inferred that the work was in excess of $10 in value and was not incidental to a trade carried on by the tenant. It was also the situation that the tenant neither sublet nor employed workers in the performance of that oral contract. The majority commented that the expression "sublet" involved some form of subcontracting and it did not include any voluntary assistance provided by a friend of the worker in performing the task.

The Court of Appeal also rejected the argument that the tenant may have been bound to carry out that work pursuant to his obligations as a tenant of the property. Whilst the Court of Appeal accepted it may be correct that some work may have been the responsibility of the tenant by reason of Section 26 of the Residential Tenancies Act, this was not the case in respect of all the existing defects including repairing the seriously leaking roof. The Court of Appeal confirmed the Presidential decision that the tenant was a deemed worker for the purposes of the Act and would be entitled to compensation for his ultimate paraplegia.

One wonders in the sweeping changes to the Workers Compensation system promised by the current government whether the antiquated deeming provisions will also be amended. The concept of "work exceeding $10 in value" is hardly relevant in modern society when that amount is less than the price of a couple of takeaway coffees!

Independent Medical Examinations Back In Action

Independent Medical Examinations (IME) have a vital role in the management of compensable injuries in the New South Wales Workers Compensation Scheme. Although Section 119(4) of the Workplace Injury Management and Workers Compensation ("WIM Act") Act, 1998 has always provided the basis of IME referrals by scheme agents, including sanctions for the worker if they did not attend same, WorkCover in recent years had modified the right to an IME through an operational instruction.

The purpose of an IME is to obtain an impartial assessment based on the best available evidence. It could be requested by a worker, a worker's solicitors or employer/scheme agent and was undertaken by an appropriately qualified and experienced medical practitioner who was not the injured worker's treating doctor. The purpose of the IME was to provide information to assist in the determination of workers compensation injuries and assist with claims management. Subsequent (or refresher) IME's must be with the same medical practitioner unless they have ceased to practice in the speciality concerned, they no longer practice in the location convenient to the worker or both parties agree to a different practitioner being appointed.

Prior to the Government Gazette issued by the New South Wales Government on 23 March 2012, the operational instruction provided that if an injured worker produced an IME report assessing whole person impairment or the like, the employer/scheme agent did not automatically have a right to secure their own IME evidence in reply. The scheme agent would first need to approach the nominating treating doctor or the doctor who provided the report and pose questions to them in relation to any "issues" they had with the report. If a reasonable response was received within 10 ten days, then the employer/scheme agent lost the right under section 119 (4) to have the injured worker independently examined.

The recent government gazette has modified the operational instruction restrictions to now allow IME's in the following circumstances:

- Where the diagnosis of an injury reported is to be clarified/determined;
- To clarify a diagnosis of ongoing conditions and whether it still results from the injury;
- Recommendations and needs in relation to treatment;
- Determination of fitness for pre-injury duties and hours;
- Determination in relation to fitness for other jobs/duties;
- What past or future ongoing capacity results from the injury;
- An assessment of whole person impairment resulting from the injury including any proportion to be deducted for pre-existing change;
- When the injured worker submits a report which is less than 10% whole person impairment and questions regarding that assessment arise and those questions are posed to the author of the report in the first instance but no response is received in 10 days;
- In all circumstances where the injured worker provides a report from an IME assessing a greater than or equal to 10% whole person impairment;
- Where there is any claim for an additional permanent loss or whole person impairment when one or more previous claims for permanent impairment or permanent loss have already been determined and paid.

In recent times the NSW workers compensation scheme has experienced a surge in deterioration claims and claims to aggregate or top up impairments and Scheme Agents can now seek additional evidence from an IME to assist in the evaluation and determination of claims.

Scheme Agents will also have the right to arrange an IME to comment on "top up" claims for consequential injuries to the digestive system and consequential loss injuries to other parts of the body which seem to be proliferating as workers attempt to chase a 15% WPI assessment so that work injury damage claims can be made.

Secondary Injuries Revisited

In *Kumar v Royal Comfort Bedding Pty Limited [2012] NSWWCCPD 8* Deputy President Roche gave consideration to the principles applicable to determining whether a secondary injury is compensable, affirming that a worker does not need to satisfy the requirements of the definition of "injury" in Section 4 nor the "substantial contributing factor" requirements of Section 9A in secondary injury claims.

The worker injured his back in March 2009 while bending over to place packing under a machine. The insurer accepted liability and paid compensation including the cost of surgery which was undertaken in May 2010. The worker gave evidence that after the back surgery whilst trying to lift himself in bed using his arms, he felt a lot of pain in his right shoulder. He first complained to his doctor of shoulder pain six weeks after the surgery. His doctor took no history in relation to the cause of the shoulder pain. When the worker returned to see his doctor one week later, the doctor's notes recorded ongoing right shoulder pain "only after surgery". One week later the doctor's notes recorded ongoing right shoulder complaints and noted a query as to whether this was WorkCover related.

In November 2010 the worker was seen by an orthopaedic surgeon who reported that the worker had long standing back and right shoulder injury from work. He recorded a history that the worker had been lifting a heavy roll at work on 9 March 2009 when he experienced sharp pain in his back and shoulder. Surgery was recommended.

In a subsequent report dated 24 May 2011 the surgeon repeated the incorrect history of injury to the shoulder at work on 19 March 2009. It also referred to the back surgery in May 2010 and commented that the applicant's shoulder had deteriorated as he was pulling himself around in bed to help with mobilisation.

The worker's general practitioner reported to the insurer in March 2011 that the applicant injured his right shoulder whilst working for the employer and the pain had been aggravated during recuperation following the surgery.

The orthopaedic surgeon who was retained on the insurer's behalf commented that activities post-operation and mobilisation would not be consistent with the cause of significant right shoulder pathology. He related the worker's right shoulder pain to age related degenerative rotator cuff lesion which was constitutional in origin and certainly not work related.

Based on this report the insurer disputed liability for the cost of proposed surgery to the worker's right shoulder in a Section 74 Notice on the grounds the worker had not suffered an injury to his right shoulder arising out of or in the course of his employment and his employment was not a substantial contributing factor to the shoulder condition.

The arbitrator preferred the opinion of the insurer's doctor and based on similar pathology in the applicant's left shoulder accepted there was some substance in the insurer's doctor's opinion that the right shoulder condition was due to age related degenerative rotator cuff tendinosis that was constitutional in nature. An award was entered in favour of the employer. An appeal followed.

On appeal Deputy President Roche commented that it was not necessary for the worker to prove that he suffered a Section 4 injury to his right shoulder, noting that the employer had conceded on appeal that the right shoulder condition and the need for surgery resulted from the accepted back injury. The question the arbitrator had to determine was whether as a result of the worker's accepted back injury he developed symptoms in the right shoulder for which it was reasonably necessary that he have the surgery recommended by his treating orthopaedic surgeon. The incorrect history recorded by the worker's doctors that the injury to the right shoulder occurred at work was not a valid ground for discounting their evidence as they also recorded that the right shoulder symptoms started after the back surgery. This was consistent with a conclusion that the worker suffered an aggravation of his shoulder condition as a result of the back surgery.

All it was necessary for the worker to establish was that the proposed surgery was reasonably necessary as a result of the injury on 19 March 2009. It was not necessary to determine if the worker had suffered "significant right shoulder pathology" as a result of the activities when the worker tried to mobilise himself after the back surgery. It was only necessary to determine if the right shoulder condition resulted from the accepted back injury and that question was a straightforward causation issue.

On an objective view of the whole of the evidence Arbitrator Roche held that the compelling conclusion was the worker's right shoulder condition resulted from stress placed on it due to mobilising and transferring during his recuperative period following his back surgery.

The claim for hospital and medical expenses relating to the surgery was referred to an Approved Medical Specialist for assessment of whether the surgery was reasonably necessary treatment as a result of the back injury on 19 March 2009.

The decision highlights the relative ease with which workers can succeed in claims for consequential injuries. While it is necessary for a worker to establish a primary injury arose out of or in the course of his employment and that employment was a substantial contributing factor to the injury, there is no similar requirement for consequential injuries. All the worker needs to establish is that the consequential injury results from the primary injury. Consequently, so long as the worker's medical evidence supports some connection between the onset of symptoms of the consequential injury with treatment or impairment consequent to the primary injury, the secondary injury will almost invariably be found to result from the primary injury.

CTP Roundup

Vehicles on Tracks- Is an Excavator a Motor Vehicle?

In NSW the *Motor Accidents Compensation Act* ("MACA") governs damages for injuries sustained in an incident or accident involving the use or operation of a motor vehicle. The damages awarded in motor accident claims significantly outstrip the damages awarded in work injury damages claims where a person is significantly injured. This has led to claims by injured workers that bulldozers, tractors, portainers and other moving equipment are vehicles for the purpose of the MACA and that damages should be assessed under MACA

So are vehicles on tracks vehicles for the purpose of MACA claims?

The answer turns on the timing of the accident.

A change in legislation has answered this question in the affirmative for injuries that occur after 3 March 2011.

The definition of vehicle is found in the *Road Transport (General) Act 2005* and includes any vehicles prescribed by the Regulations.

The Road Transport (General) Amendment (Track Vehicles) Regulation 2011 which was made under the Road Transport (General) Act 2005, effectively added the following vehicles to the definition of vehicles:

> *"Any description of tracked vehicle (such as a bulldozer) or any description of a vehicle that moves on revolving runners inside endless tracks that is not exclusively on a railway or tramway".*

The Regulation commenced on 3 March 2011 however was not given retrospective operation.

But what about those older accidents?

In a recent NSW Court of Appeal decision of Andy's Earthworks Pty Limited v Verey [2012} NSWCA 32, the Court of Appeal had to consider whether an excavator was a motor vehicle within the meaning of that Act prior to the legislative amendment, noting the subject accident occurred on 1 November 2006.

Verey commenced proceedings in the District Court claiming damages alleging he was injured at a worksite when he was a passenger in a bucket, attached to the arm of an excavator, which was dropped to the ground. Verey brought his action under the MACA.

Puckeridge ADCJ at first instance concluded the excavator was a motor vehicle as defined in MACA and Andy's Earthworks appealed this decision to the NSW Court of Appeal. The matter came before Beazley JA, Macfarlan JA and Whealy JA, who disagreed with Puckeridge ADCJ, setting aside his findings that the excavator was a motor vehicle.

Macfarlan JA wrote the leading judgment with which Whealy JA and Beazley JA agreed, however Beazley JA did add commentary, which confirms the Court of Appeal's position simply as follows:

> *"It seems to me that to give effect to the words of the statute a "vehicle on wheels" does not refer to the means by which locomotion is provided to the vehicle. The structure of the vehicle must be "on wheels". The excavator was not on wheels. It was on tracks. There was no suggestion that the tracks were the outer cladding of a wheel or wheels."*

Macfarlan JA stated:

> *"The front and rear wheels of the excavator are readily described as wheels but in my view the excavator was not on them, as the evidence did not demonstrate that any significant part of the weight of the vehicle rested on those wheels. Further, as I have noted, the parts of the vehicle that were in contact with the ground (the tracks) could not because of their length and shape, be regarded as effectively part of the wheels."*

The Court of Appeal determined that Puckeridge ADJC was in error in focusing upon the means by which the excavator was propelled as the relevant question was not this, but whether the excavator was "on" its wheels.

So the answer is that a vehicle on tracks can be a vehicle for a MACA claim but only where the accident occurs after 3 March 2011.

Personal Responsibility – Crossing The Road

Failing to keep a proper lookout when crossing the road can have serious consequences and injuries sustained in a motor vehicle collision may prove to be non compensable when the driver has no opportunity to avoid a collision as was seen in the recent case of Yoo v Poulos heard by Judge Elkaim.

Mrs Yoo was a 53 year old woman who was struck by Poulos' vehicle. She had parked her motor vehicle and walked along the road in a westerly direction to where she wished to cross the road. She said there was a vehicle parked to her left but not to her right. She alleged that she moved forward apparently to about the driver's side line of the parked vehicles and then leaned forward so that her back was at an angle about 40° from the vertical when she was struck by a vehicle that was travelling in a westerly direction. She claimed that she had allowed the traffic to pass and that she did not see the vehicle before the collision, and that she was struck by the vehicle's wing mirror. She alleged that she would not have been struck if she had not leaned forward.

Poulos gave evidence that he was driving with a friend and noticed Yoo about 10 to 15 metres ahead and noticed that she was then looking to her left. Poulos gave evidence that as he passed Yoo he noticed out of the corner of his eye that she stepped out into the side of his vehicle. Poulos assessed that the left hand side of his vehicle was about half a metre from the line of parked cars and the right hand side was a shorter distance from the centre of the road.

The passenger in the vehicle also gave evidence. He said that he saw Yoo walking up the footpath and next saw her on the road between two parked cars, at which time Poulos was driving at about 40 to 45 kph. He only noticed Yoo standing between the cars when the vehicle was about 2 metres from her. He stated that he then saw Yoor step out toward the car and collide with it above the left front tyre. He said that Yoo came back and then struck the side mirror and he thought her head had hit the windscreen. He did not recall Yoo leaning forward.

His Honour noted that the ambulance report commented that the plaintiff "stepped onto the road and was hit by a vehicle from her right on her right side of her body, collided with car's left mirror – knocked her to the ground."

Ultimately the Trial Judge rejected the possibility that the collision occurred because the plaintiff had leaned forward and that she would not have been struck but for doing so. Elkaim J considered there was no opportunity for Poulos to effectively sound his horn and that he was both driving at a safe speed and at a safe distance from the parked cars. He also rejected Yoo's allegation that Poulos ought to have driven to the other side of the road after he noticed Yoo standing between the cars.

Elkaim J noted that when Poulos saw Yoo she was stationary and concluded that it would not be reasonable for Poulos to assume that Yoo was other than checking to see if it was safe to cross the road. Ultimately Elkaim J determined that the matter fell squarely within the parameters of the judgment in *Knight v Maclean* where Justice Heydon stated:

> *"It is not the law that a driver complying with the minimum requirements of the law of negligence must drive in such a way as to anticipate everything that a pedestrian might do at all stages of every journey, or to be in a position to reduce speed to levels which will avoid any risk of a collision at all stages of any journey."*

In those circumstances Elkheim J determined that Yoo's claim failed.

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