GD News

Gillis Delaney Lawyers

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Limitation Periods And Building Claims

The NSW Court of Appeal in *Cyril Smith & Associates Pty Limited v The Owners – Strata Plan No 64970* has recently provided guidance on the way that the Courts will approach limitation periods in claims arising out of defective building works.

In 2001, an eight storey residential building was completed. Soon thereafter, it became apparent that there were problems with the building including water penetration in a number of units. The water penetration caused damage to the contents of those units, and rusting of the steel structure supporting the roof. In 2005, The Owners Corporation for the Strata Plan commenced proceedings claiming damages from the builder. In February 2008, The Owners Corporation was granted leave to file an Amended Summons joining the architect, Cyril Smith & Associates Pty Limited. The Owners Corporation succeeded in the claim against the builder in an amount of approximately $1.5 million and the builder obtained judgment for contribution from the architect in an amount of $297,791.

An appeal followed and the primary issue was whether the six year limitation period specified by the *Limitation Act* in NSW had expired before proceedings were commenced against the architect.

Section 14 of the *Limitation Act* provides that a cause of action founded on contract or tort is not maintainable if brought after the expiration of the limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to the person through whom the plaintiff claims. The question for the Court was "*When did the cause of action accrue?*"
The Court of Appeal noted:

> *"Where there has been negligent construction of a building, it has been held that the relevant loss accrues 'when the defects becomes manifest or are otherwise discovered'."*

The Court of Appeal noted that a structural defect may reveal itself over time progressively. The first indication may be minor cracking requiring superficial repair whereas the underlying problems require far greater expenditure, assuming it to be capable of correction.

The question is whether the cause of action accrues when the damage is first detected? What if the damage detected appears to be trivial and later proves to be substantial?

In the case of *Southern Shire Council v Heyman* the High Court of Australia confirmed that for a cause of action to accrue what needed to become manifest was not any legal responsibility for the cause of the defect but the actual physical defect in the structure. In that case, the loss of value of the premises was triggered by knowledge of the inadequacy of the foundations being a physical defect, not by knowledge of who, as between the architect, engineer, builder or inspector may arguably have been responsible for the defective work. That case was concerned with the nature of the damage that occurred rather than the time that it actually occurred.
In a building case, the cause of action first accrues when the plaintiff first suffers damage. The Court of Appeal noted this leaves open a critical question where a structural defect may reveal itself over time progressively. The Court of Appeal noted that in many cases the conundrum that

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arises is that:

> *"The first indications may be minor cracking requiring superficial repair, whereas the underlying problem requires far greater expenditure, assuming it to be capable of correction. If the superficial cracking should put the owner on notice of inquiry as to its cause and if reasonable inquiry would have revealed the cause, the underlying defect has become manifest, even though it did not in fact become known to the owner at that time."*

In Pullen v Gutteridge Haskins & Davey Pty Limited, the Victorian Court of Appeal considered a claim brought against an engineer some nine years after work began and seven/eight years after practical completion. The limitation period in Victoria for a cause of action in negligence was six years. The Court of Appeal in that case concluded:

> *"The cause of action being for negligence, it is not complete until damage not negligible is sustained by the plaintiff. The question is when in contemplation of law damage is first sustained in a case like the present. The respondent says that damage is sustained as soon as physical damage is done to the structure .... The appellant contends that in a case like the present damage is not sustained, and so time does not begin to run, until either the latent defect in the building is actually discovered or it becomes manifest in the sense of becoming discoverable by reasonable diligence. The judge accepted the appellant's submission here but found that the appellant had in fact discovered 'the defects and damages flowing therefrom' more than six years before the commencement of the first action."*

The NSW Court of Appeal concluded that Pullen's case is:

> *"i authority for the proposition that even where actual damage caused by the latent defect in the building has been suffered more than six years before the commencement of the litigation, the cause of action does not accrue until the link between the physical manifestation and the underlying defect is known or ought to be known. Such a principle would constitute an exception to the rule that a cause of action in negligence accrues when material damage is first suffered."*

The Court of Appeal noted that this principle has significant consequences and provided a useful example of how the principle can lead to difficulties. Referring to the consequences the Court of Appeal posed the following question:

> *"For example, it is quite possible that damage to the fabric of a building might be repaired by the builder, at its cost, because the cause (inadequate design) was not then identified, and was not then reasonably capable of identification. In such circumstances, the builder would not have joined the architect or engineer responsible for the design. When, more than six years later, the real problem becomes manifest and the architect or engineer is sued by the owner, would the builder be allowed in to recover from the architect the cost of the earlier repairs, even though that cost did not constitute damage for which the owner later sued?"*

However the Court of Appeal accepted it was necessary to follow the decision in Pullen's case and it is the identification of the damage that is relevant and not the cause of the defect and the Court of Appeal concluded to identify the date the cause of action accrues:

> *" it is the physical defect which must be known or manifest, not that the cause of the defect must be identifiable."*

In this case the Court of Appeal concluded that:

> *"The relevant defect in the building was not the design, installation or inspection of the windows, but the windows themselves. Once it was appreciated that the windows themselves were defective (in that they were not adequately watertight) the defect was known. The physical consequence of the defect, namely the ingress of water, was not itself the defect, although it might well have been sufficient to lead a reasonable person to make inquiry and thus discover the defect. In this respect, there is an important distinction between a case of water penetration into a room, where the point ingress can readily be investigated, and the adequacy of footings or foundations to a building, which can often only be inspected with difficulty: cf Strata Plan 50946 v Multiplex"*

The Court of Appeal determined that knowledge that the windows were defective did not mean that The Owners Corporation knew who was responsible for the defect, but the time within which it needed to ascertain who was responsible, and if necessary, commence proceedings had commenced to run. The cause of action accrued when the defect in the windows was detected. The Owners Corporation failed to act within six years of the accrual of the cause of action and proceedings brought in respect of the defect against the architect were accordingly statute barred.

Finally the builders claim against the architect was also dismissed. The claim for contribution was made pursuant to s 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) which provides:

" 5 Proceedings against and contribution between joint and several tort-feasors

(1) Where damage is suffered by any person as a result of a tort ...:

...

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise ....

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage ...."

The Court of Appeal determined that as a judgment was delivered that provided that there was no liability to the Owners Corporation on the part of the architect because the cause of action was statute barred then the claim for contribution by the builder must fall away as:

"there is now no right on the part of the builder to claim contribution against the appellant(architect). Accordingly, the judgment for contribution must also be set aside"

This has significant consequences where one party is sued within the limitation period but the other party is not as rights of contribution that once existed fall away as a result of expiration of the limitation period for the cause of action against the party that was sued too late.

Determining the date that a cause of action accrues can be difficult particularly where latent defects are concerned. Sometimes there will be a latent defect which cannot be seen however what is noticed may lead a reasonable person to make inquiries to which would lead to the identification of the defect. That has relevance to the determination of when the cause of action accrues. In those cases a balancing act will be necessary as the Court tend to the view that " there is no additional requirement that in order for a defect to be latent it must not be visible, or must be concealed or hidden, although, of course, a defect which is visible and not hidden may be manifest in the sense of being discoverable with reasonable diligence." If a defect is detectable by reasonable diligence after damage has been identified the cause of action in those circumstances is likely to found to have accrued for the purpose of determining when the cause of action accrues and the relevant limitation period.

So, when did you first notice damage and what would reasonable inquiries reveal? Is the time ticking on your cause of action?

Double Insurance & The Construction Industry -Other Insurance Clauses in Insurance Policies Have a Significant Impact

Contracts between contractors and subcontractors in the construction industry routinely contain clauses which regulate risk and obligations to arrange insurance. Sometimes a subcontractor is required to arrange insurance in the name of a contractor. No doubt the contractor has its own insurance and this can give rise to issues of double insurance where two policies are liable to respond to the claim.

Further problems arise where construction risk policies arranged by a contractor provide coverage for subcontractors as "insureds" where those subcontractors already have their own insurance. Once again, issues of double insurance may arise.

Section 45 of the *Insurance Contracts Act* provides that an "other insurance clause" in an insurance policy which seeks to limit an insurer's liability under one insurance policy where cover is provided by another insurance policy arranged by the insured is void. Other insurance clauses are void to the extent that they limit an insured from recouping benefits under two insurance policies.

However, last year the High Court had cause to consider the application of "other insurance clauses" where one policy is arranged by a party and that party is a beneficiary under a different policy of insurance but not a party to that policy. The High Court concluded that Section 45 of the Insurance Contract Act had no application to a policy taken out by an insured where the other insurance has an insured as a beneficiary but not a party to the insurance.

The decision of the High Court in *Speno Rail's* case considered facts that reflect situations that commonly occur in the construction industry. A principal had engaged a contractor to provide services. That contractor's employee was injured and claimed damages for his injuries from the principal. The contract between the principal and the contractor required the

contractor to effect insurance in the name of the principal. It did so and arranged insurance with Zurich Insurance. The principal, Hamersley Mines, made a claim on the Zurich policy and Zurich indemnified Hamersley in relation to the claim. Hamersley did not make a claim on its own insurance and that insurance contained an "other insurance clause". Zurich sought to apply the principles of double insurance and sought contribution from Hamersley's insurer. Hamersley's insurer disputed that double insurance applied invoking the "other insurance clause " as the reason for that stance. The High Court upheld the application of the "other insurance clause" and determined that Section 45 of the Insurance Contract Act did not apply to an "other insurance" clause in the policy effected by Hamersley as the Speno policy was not effected by Hamersley, Hamersley were simply beneficiaries under the policy.

As can be seen, this decision will have significant consequences in the construction industry where there are multiple policies available to respond to a claim, some of which contain "other insurance" clauses.

A recent example of the issues which arise is seen in the Supreme Court decision in *Vero Insurance Limited v QBE Insurance (Australia) Limited*.

In that case Vero issued a policy of contracts works and public liability insurance to the NSW Department of Commerce for all works contracts awarded by it during the policy period. The "Named Insured" under the Vero policy was described as follows:

> *"Clients that the NSW Department of Commerce represents as well as: the State of NSW, the Minister for Commerce, the NSW Department of Commerce, other State and/or Local Government Authorities, instrumentalities and/or agencies and contractors, subcontractors, workmen, architects, engineers, project directors, project managers, construction managers and practitioners of all disciplines associated with the insured projects."*

"Insured projects" were defined as:

> *"All works including temporary works under construction contracts awarded by Commerce or the Minister for Commerce or their agents or any construction commenced by Commerce itself or works awarded that Commerce undertake to insure as their role as project manager or construction manager during the duration of the policy unless excluded by notification from Commerce."*

Barclay Mowlem Construction Pty Limited were the head contractors for the Liverpool Hospital, which was a project which fell within the definition of "insured project".

Barclay Mowlem had arranged its own policy of insurance with QBE Insurance (Australia) Limited which indemnified Barclay Mowlem against legal liability to pay damages for compensation in respect of injury to any person and damage to property as a result of an occurrence happening as a result of the insured's construction operations.

Mr Selia was an employee of a subcontractor to Barclay Mowlem's. Selia was injured at the Liverpool Hospital site and commenced proceedings claiming damages against Barclay Mowlem and Barclay Mowlem. Barclay Mowlem were indemnified by Vero pursuant to the terms of the insurance arranged by the NSW Department of Commerce, as Barclay Mowlem were an insured, being a contractor for an insured project. Barclay Mowlem was also insured under the QBE policy and Vero sought to apply the principles of double insurance.

QBE argued that double insurance did not apply as the policy wording contained a clause that contained an "other insurance clause" that provided:

> *"The liability of the insurer to indemnify the insurer pursuant to the insured … shall not extend to any of the following:*
>
> *….*
>
> *More Specific Insurance*
>
> *Liability for which separate insurance protection has been effected by the named insured … except as provided by Memorandum 6.1 hereunder."*
>
> *Memorandum 6.1 provided:*
>
> *"Notwithstanding anything contained in this policy to the contrary, insurers hereby agree that this policy shall, in respect of construction operations where the principal, owner, head contractor or another (including the Named Insured) has effected more specific contractor's liability / public liability insurance (hereafter referred to as Primary Insurance), provide the following indemnity:*

a) *pay all losses not otherwise recoverable under those policy(ies);*

b) *pay all amounts in excess of that recoverable under those policy(ies);*

c) *pay the difference (if any) between the excess (deductible) under the primary insurance and the excess (deductible) that would have been applicable under the policy if the contractor had been insured under; provided such losses and/or amounts would but for the existence of the specified policy(ies) be recoverable under this policy and subject to the limit of liability stated in the schedule and provided that such recovery is for the sole benefit of insureds' designated in paragraphs (a), (b), (c) and (d) of the definition of "Insured" and is not for the benefit of subcontractors or other contractors, principals or owners."*

The Court was called on to consider Section 45 of the *Insurance Contracts Act* and the operation of this "other insurance" clause. QBE argued that Barclay Mowlem was not a party to the Vero policy but the policy was effected by Barclay Mowlem and accordingly, Section 45 of the Insurance Contracts Act did not prohibit the "other insurance" clause from applying.

Vero argued that Clause 5.21 of the QBE policy did not apply as the insurance was not effected by the named insured as specified in the "other insurance" clause. Vero argued the insurance was placed on its behalf by the Department of Commerce's insurance broker. Vero also argued that Barclay Mowlem fell within the category of persons who were contractors, subcontractors or workmen as referred to in Memorandum 6.1 of the QBE policy and the final proviso of the policy and therefore the proviso applied and excepted the "other insurance" clause from applying as it was a policy for a contractor.

The Supreme Court, in this case was required to determine whether or not it should adopt a referee's findings on these issues rather than make its own determination. The referee had concluded that the "other insurance" provision applied because Vero's policy was effected by the contractor, acting through the agency of the Department of Commerce and the broker who placed the insurance. The referee had also concluded that the contractor was not a party to the policy but was a beneficiary and in those circumstances the "other insurance clause" would apply.

Justice Einstein determined that the Court was only permitted to reject a referee's findings where the referee can be shown to have adopted an incorrect approach and failed to consider the evidence or the referee has not given the parties opportunity to present their argument. Vero did not demonstrate error by the referee and as the findings on facts made were reasonably supported by the reasons given in the report, there was no justification for rejecting them. As there was no dispute before the referee about the operation of Section 45, Vero's disagreement with the referee's findings based on its own interpretation of the evidence was inappropriate.

The end result was that QBE was not liable to contribute to the claim as the "other insurance" clause ensured that the policy did not respond.

It is clear that "other insurance" clauses have a real role to play in claims for double insurance where construction insurance is involved. The term of an "other insurance" clause will always be important to consider.

As can be seen in this case the proviso in Memorandum 6.1 in the QBE policy and its references to contractors and subcontractors may have put at risk the application of the "other insurance" clause as may have the reference to "insurance effected" in the other insurance clause. However, Vero's argument that the contract was not effected by Barclay Mowlem did not find favour with the Court.

No doubt insurers are sharpening their pencils and crafting "other insurance" clauses which will seek to effectively deal with the conundrum which arises where there is more than one insurance policy which will respond to the claim and an insurer's client as part of its risk management processes requires sub-contractors to take out their own insurance and insurance in the name of the contractor. After all, the claims experience will impact on premiums and moving that risk to subcontractors and the subcontractor's insurance will go a long way to reducing claims costs.

Labour Hire- Liability for Unsafe Equipment Supplied by a Host

Using labour hire creates its own problems. An employer has a non-delegable duty to exercise reasonable care to provide employees with a safe system of work and safe plant and equipment. However, when an employer entrusts its employees to another and places that employee on hire to work for another business, the employer will not escape liability for injury to the employee however the host may well pick up the lion's share of liability for that accident.

The New South Wales Court of Appeal in *Galea v Bagtrans and Adecco* confirmed that "*where an employer trusts another with tasks of providing the employee with the place and/or system of work, and/or with plant and equipment, the employer will generally be vicariously liable for failure by that other person to exercise reasonable care in those matters.*"

Significantly, the Court of Appeal in Galea's case held that the non-delegability of an employer's duty means the employer is liable for any breach of duty of the host effectively imposing a strict liability on the employer. If the host breaches its duty owed to the labour hire employee, the employer will be vicariously liable for the failure by that other person to exercise reasonable care. Unsafe equipment supplied by a host will create a liability for the host as well as the employer.

Traditionally, following decisions such as *TNT v Christie* the liability for injury to an employee lent on hire has been apportioned between the host and labour hirer with the labour hirer picking up 20% to 25% of the liability. The Courts have accepted each case turns on its own facts as does any apportionment of liability between the host and the labour hirer. However, in Galea's case the Court apportioned liability 85% to the host and 15% to the labour hirer.

The problem for a host is that the host will generally supply equipment used by the employee whilst on hire. So what happens where that equipment is defective?

In June 2011, the New South Wales Court of Appeal in *Roche Mining Pty Limited v Jeffs* was called on to determine a host's liability for defective equipment when a labour hire employee was injured whilst performing duties at the Wambo Coal Mine.

Jeffs was a casual employee of Damstra Mining Services Pty Limited. Damstra was a labour hire company, which provided skilled employees to Roche Mining Pty Limited. Roche was in charge of the running of the Wambo Coal Mine and owned the plant and equipment used at the mine including a Caterpillar Truck. Jeffs was injured when he fell 2.5 metres whilst climbing into the truck. Jeffs alleged that Roche owed a duty of care and that it had breached that duty of care in failing to supply equipment that permitted safe access to the truck.

The Trial Judge found that Roche had breached its duty of care owed to Jeffs and determined that the labour hire company was 20% to blame for the accident, 80% of the blame rested with Roche.

Roche appealed however there was no challenge to the apportionment of responsibility to the labour hirer rather Roche challenged the finding that it had been negligent.

Jeffs was qualified to drive heavy equipment. Roche had given Jeffs induction training and passed him as qualified to operate various vehicles at the mine including the caterpillar truck. Jeffs' work at the mine was controlled on a day to day basis by a Site Supervisor employed by Roche who gave directions as to what work was to be carried out. Roche employed the Safety Officer who gave directions to Jeffs and other Damstra employees as to matters relating to occupational health and safety.

The Court of Appeal confirmed that Roche's duty of care was a duty "*to take reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury*." The Court of Appeal noted this is a less stringent duty than that owed by an employer to employees but the duty recognised Roche's role in operating Wambo and its responsibilities under the Civil Liability Act 2002 and its control of the system of work and its ownership of the plant that Jeffs was required to operate.

The Court of Appeal confirmed that Roche's duty of care was a duty to provide Jeffs with a safe system of work and safe plant with which to carry out his work.

The Trial Judge had concluded that the mechanism of the accident was the absence of continuous handrails on the ladder used to gain access to the truck which resulted in inadequate support points on either side of the ladder and led to Jeffs' losing his grip. Roche argued that it should not be held liable for a defect in the original design of the truck.

Roche relied on the case of *Davie v New Merton Board Mills*, which involved a claim by an employee who suffered an injury to his eye as a result of a latent defect in a tool provided by his employer. The latent defect was excessive hardness of the steel due to negligent treatment of the tool during manufacture. The negligent manufacturer of the tool was undertaken by reputable makers who had sold it to a reputable firm of suppliers who in turn sold it to the employer. The employer's system of maintenance and inspection was not at fault. The House of Lords in that case held that the employer's duty was to take reasonable care to provide a reasonably safe tool and that such duty had been discharged by buying from a reputable source a tool whose latent defect it had no means of discovering.

The Court of Appeal rejected Roche's argument that the lack of handrails was effectively a defect that Roche could not detect. The negligence of Roche was seen to lay in the failure to devise a safe system of work having regard to the knowledge that those who accessed the truck were exposed to a real risk of injury and this was not a case of latent defect.

In this case, the Court of Appeal concluded that a reasonable response to the risk would have been the retrofitting of a transverse stair access system and this was a reasonable precaution and was not one advocated with the benefit of hindsight. The ladder on the truck did not comply with Australian Standards for vertical ladders. Whilst Roche argued that the evidence demonstrated the access configuration to the truck conformed to industry practice, the Court of Appeal held there was cogent evidence that those regulating the mining industry were of the view prior to the accident that the means of access to equipment such as the caterpillar truck exposed workers to a risk of injury from falling which could and where practicable should, be avoided by the fitting of a stairway. The Court of Appeal noted, "*in other words, common practice was not necessarily a prudent practice*".

Whilst Roche argued that there had been no previous falls from the ladder the Court of Appeal noted that this issue was not irrelevant but it was not determinative of the question of whether there was a duty of care let alone whether that duty had been breached.

At the end of the day Roche were found to be liable for injuries flowing from a fall from an access ladder, which was unsafe even though the vehicle was in the same configuration as when it was purchased.

As can be seen those who use labour hire assume responsibility for the safety of employees lent on hire and are liable to ensure the equipment used is safe.

Whilst the Court of Appeal did not need to reconsider the apportionment of liability between the employer and the host, the case serves as a reminder that a labour hirer cannot escape responsibility for injuries to its employees by blaming a host for the defective equipment supplied by the host. Where the labour hire employee are exposed to risks from unsafe plant and equipment owned by the host and operated by the employee both the host and labour hirer are in the gun but the lion's share of liability will be likely to rest with the host.

Should You Really Ask For A Hand?

From time to time repairers and tow truck drivers receive calls about broken down vehicles and advice is provided over the telephone. Offering an opinion or asking someone to ready a vehicle for towing can however have unintended consequences and create a liability as was seen in the recent decision of the NSW Court of Appeal in O'Toole v Wagga Towing.

In early October 2002 O'Toole commenced employment as a courier with a company run by Mr Russell. Russell raced a V8 Holden. Before O'Toole commenced employment with Russell's company he had accompanied Russell to a race meeting and after he commenced employment he attended other race meetings with Russell. At these meetings O'Toole helped Russell in various ways, for example, changing stickers on the car, washing the car and unloading spare wheels and other things. However attending the race meetings was not part of O'Toole's employment.

In October 2002 O'Toole and Russell attended a race meeting and after the meeting Russell was driving his truck, towing a trailer carrying a V8 Holden and O'Toole was a passenger in the truck. The truck developed engine problems and Russell pulled into an emergency lane on the side of the road. Russell put the truck into second gear and applied the handbrake. The truck was parked on an incline. Russell called Wagga Towing, and asked that a tow truck come and tow the truck to Wagga Wagga. Cool, an employee of Wagga Towing asked Russell to remove the front bumper bar and tail shaft of the truck before he arrived with the tow truck to avoid delays. Russell went about taking off the front bumper bar and O'Toole went under the truck to remove the tail shaft. O'Toole asked Russell if the vehicle was safe and Russell advised that the handbrake was on. O'Toole undid the nuts and bolts on the tail shaft which came away from the vehicle. The vehicle then commenced to roll forward and O'Toole was run over by the truck and dragged along under it for a time and was severely injured.

O'Toole brought a claim for damages against Russell and Wagga Towing.

In 2002 the Motor Accidents Compensation Act 1999 (NSW) defined "motor accident" as an accident or incident caused by the fault of the owner or driver of the motor vehicle in the use or operation of the vehicle which causes the death of or injury to a person. Use or operation of a motor vehicle included the "*maintenance or parking of the vehicle*".

The Trial Judge found that O'Toole was not a mechanic and had little knowledge of the mechanical side of vehicles. The Trial Judge also found that at the time of the accident Russell was the driver of the vehicle and that Russell owed O'Toole a duty of care and was at fault in directing O'Toole to get under the vehicle to remove the tail shaft without choking the wheels when the vehicle was parked on a slope. The fault was seen to be in the use or operation of the vehicle in the parking and maintenance of the vehicle.

The Trial Judge also found that Cool was an expert in towing and Wagga Towing breached its duty of care by providing advice to Russell to remove the tail shaft without warning Russell of the dangers of doing so. Liability was apportioned 70% to Russell and 30% to Wagga Towing. An appeal followed.

The NSW Court of Appeal agreed that both Russell and Wagga Towing had been negligent however determined that blame should be apportioned equally between Russell and Wagga Towing. The Court of Appeal concluded that a reasonable person in Russell's position would have appreciated that disconnecting the tail shaft would remove any braking effect from the engagement of the gears and even without any actual knowledge that disconnecting the tail shaft would disable the parking brake would have appreciated that to undo bolts under the truck on an incline without choking the wheels was a risky undertaking.

The Court of Appeal noted:

> *"Russell should have appreciated that there was some risk even without understanding precisely how that risk might eventuate and the likelihood of the risk eventuating may have been quite small to Russell's understanding. If it eventuated could be horrendous so the risk was not insignificant and that a reasonable person in Russell's position would not have directed O'Toole to undertake the task at least without first taking the simple precaution of choking the wheels."*

The Court of Appeal noted that Russell did owe a duty of care to O'Toole, which obliged him not to direct O'Toole to undertake the task of disconnecting the tail shaft, without first taking the simple precaution of choking the wheels. The majority of the Court of Appeal determined that the fault of Russell occurred in the parking and maintenance of the vehicle and the preparation of the vehicle for towing was seen to be part of the process affecting the maintenance of the vehicle.

In relation to Wagga Towing's liability the Court determined that Cool should have known of a risk that removal of the tail shaft of the truck might disable the parking brake and gears and thereby permit the truck to move out of control and a reasonable person in Cool's position would have alerted Russell to the risk having regard to the extent of the risk and minimal burden of the relevant precaution. Cool was not entitled to assume that Russell was aware that removing the tail shaft would also disable the parking brake and therefore was under an obligation to warn about the risk.

The Court of Appeal also determined that Russell and O'Toole were not in a class of persons who might reasonably be expected to be aware of the risk that the parking brake would be disabled when the tail shaft was removed. Therefore Wagga Towing could not escape liability based on the contention that O'Toole and Russell were aware of the risk and a warning about the risk was not necessary.

The request by Wagga Towing to ready the vehicle for towing resulted in a substantial liability for Wagga Towing due to its failure to warn about the risks of undertaking preparatory work to ready the vehicle for towing. Cool in all likelihood did not turn his mind to providing a warning.

The next time Wagga Towing receives a call they are unlikely to request that the owner ready the vehicle for towing without first warning the owner about any preparatory work to be undertaken.

Repairers will also need to be mindful of the risks involved in providing advice over the telephone as a helpful hand may well expose repairers to a liability. So next time when you call someone for advice don't be surprised if you don't get a hand.

Late CTP Claims, Section 81, CARS and the Motor Accidents Compensation Act, 1999.

On 24 June 2011, the Court of Appeal, in *Gudelj v. Motor Accidents Authority [2011] NSWCA 158*, determined the issue of the status of claims (and relevant obligations) made outside the time prescribed by Section 72 of the *Motor Accident Compensation Act 1999*.

The Facts

- Accident occurred on 21 May 2006;
- Notice provided to NRMA on or about 27 October 2008, outside the 6 month period prescribed by Section 72of the Act and provided an explanation for delay;
- NRMA rejected the Claimant's explanation for delay;
- CARS Assessor Boyle, on 2 July 2009, determined that Gudelj had not provided a "full and satisfactory" explanation for lodging the claim outside the time prescribed by Section 72;
- On 11 June 2009, the Claimant lodged an application for discretionary exemption under s.92(1)(b), on the grounds that because NRMA had not issued a s.81 Notice, this amounted to "deemed denial" under s.81(3);
- CARS Principal Claims Assessor Cassidy, on 14 August 2009, denied that the matter should be referred for assessment, nor could it be exempted under Section 92(1)(a). She concluded that where the insurer had not lost the right to reject the claim, and a late claim dispute was determined in the insurer's favour, the only avenue open to a claimant is to seek mandatory exemption of the claim under s.92(1)(a).

The effect of the decisions of Ms Boyle and Ms Cassidy was to frustrate the claim so it could not be pursued. As the Claimant could not obtain a certificate under s.92 or s.94, he was prevented from commencing court proceedings by s.108.

The Appeal to the Supreme Court

On Appeal to McDougall J, he held that:

- A claimant who loses a late claim dispute can apply for mandatory or discretionary exemption of the claim;
- NRMA was not required to issue a s.81 Notice in respect of the late claim, and there was no "deemed denial" of the claim under s.81(3);
- There being no grounds for mandatory or discretionary exemption of the claim, the claim was at an end.

The Claimant appealed to the Court of Appeal.

The Decision of the Court of Appeal

The main area of significance for the CTP scheme was whether the PCA Cassidy was correct in her reasons dismissing the application for exemption, the Section 81 status of a late claim dispute and insurer obligations in relation to "late claims".

The Court of Appeal determined that PCA Cassidy was in error. Hodgson JA (Giles JA and Handley AJA agreeing) relevantly found:

- *"...where an insurer has not lost the right to reject a late claim, and there has been a S96(1)(a) determination adverse to a claimant, the matter does not proceed to assessment under s94." (para 57);*
- *"....It must still, of course, be identifiable as a "notice"....of a "claim" (para 62);*
- *"...the words "under s72" in s 81(1)...are not apt to limit the duty to cases where six month limit in s 72(1) has been complied with: this would draw an illogical distinction between defects arising from s 72(1) and those arising from s 70 and s 74; and in any event, the words in question are apt to refer to s 72(2) rather than to the time limit in s 72(1). (para 63);*
- *"...I do not think s 81(1) discloses any intention that an insurer should have no duty in circumstances where there is a late claim and the requirements of s 73(1) are satisfied." (para 64);*
- *"...cl 8.11.1 of the Guidelines refers to denial by an insurer of "the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle ... in its written notice issued in accordance with s 81". However, that cannot govern the interpretation of s 81(1); and in any event, plainly a written notice denying liability may do so for other reasons, such as that there was no "injury" within the definition of injury in the Act (cf Allianz Australia Insurance Limited v GSF Australia Pty Limited [2005] HCA 26; (2005) 221 CLR 568, Zotti v Australian Associated Motor Insurers Limited [2009] NSWCA 323). Denial of liability on that ground would not deny fault, yet would plainly satisfy s 81(1). I see no reason why denial of liability on the basis of a defect in the claim should not also satisfy s 81(1). (para 69);*
- *A denial pursuant to Section 73 satisfies the requirements of a denial for the purpose of Section 81 and is the "preferable" construction (para 70);*

- *Alternatively, an insurer which declines to issue a s.81 Notice for a late claim, is deemed to have denied liability for the claim under s.81(3), and may be in breach of its licence [s.81(5)], albeit that such a breach would be considered de minimus*.

The matter was therefore the subject of an order that the Motor Accidents Authority was to exercise its power according to law and PCA Cassidy is now be required to issue a Certificate of Exemption.

As was referred to in paragraph 69, PCA Cassidy should also issue a Certificate of Exemption in all matters where liability, even though not fault, is denied. As the Court of Appeal identified, "...cl 8.11.1 of the Guidelines...cannot govern the interpretation of s81(1)". This will therefore apply to denials on the basis of no "injury" or other claims that are considered, for example, to not fall within the statutory policy. Whilst many such denials may not currently fall within Clause 8.11.1 of the Guidelines, they are clearly circumstances intended and contemplated by the interplay of Sections 81, 91(2)(a) and 92(1).

Hodgson JA made clear his view that, in circumstances such as those confronting Mr Gudelj, and considering the Objects of the Act, a claimant should not be shut out by refusal of an exemption.

Independent Contractor or Employee – There Are Financial Consequences If You Get It Wrong And Sham Contracting can Lead to Fines for Employees Involved in the Contracting Practices.

There are significant ramifications for companies and businesses that seek to classify employees as independent contractors when they get it wrong. When determining whether an individual is an employee or an independent contractor it is important to consider the nature of the relationship as an employment relationship creates obligations in relation to annual leave, long service leave, sick pay and superannuation. In addition, obligations to pay payroll tax and workers compensation premiums impact on a business' decision to engage independent contractors instead of employees.

So how does a dispute arise?

Generally a person classified as an independent contractor who contends they are an employee will claim employment related benefits, seek workers compensation benefits or allege a breach of the *Fair Work Act* and underpayment of statutory entitlements such as wages, sick pay and annual leave. Further a charge may be issued by the ATO for payment of a superannuation charge for non-payment of compulsory superannuation benefits. Alternatively a Union or the Workplace Ombudsman may prosecute a business and its directors and employees that participate in arranging the contracting practices for breaches of the Fair Work Act stemming from the failure to pay statutory entitlements.

There have been two recent decisions that provide guidance on what may occur when a person treated as an independent contractor claims to be an employee.

The recent Federal Court decision in *On Call Interpreters & Translators Agency Pty Limited v Commissioner of Taxation (No. 3),* provides useful guidance on the way that the Court will approach the examination of the relationship between a business and the persons it engages to provide services. On Call provided interpretation and translation services. It received requests from clients and then matched jobs with interpreters or translators on its panels. The interpreters were free to accept or reject jobs and undertake work provided by rival companies. The interpreters wore name badges provided by On Call and were not permitted to swap jobs amongst themselves. In 1989 On Call had asked the ATO whether it considered these interpreters to be employees or independent contractors and the ATO had accepted they were independent contractors. The ATO however changed its mind and a superannuation guarantee charge was issued upon On Call for failure to pay prescribed superannuation contributions for the benefit of the translators.

The Federal Court was then called on to determine whether or not the translators were independent contractors. It was necessary for the Court to examine the nature of the relationship between the parties and Justice Bomberg noted that a number of factors needed to be taken into account. Justice Bomberg noted that the Court uses what he called "*the "smell test" or a level of intuition*". The issue was whether the person performing the work was an entrepreneur who owns and operates a business and in performing the work, was the person working in and for that person's business as a representative of that business and not of the business receiving the work.

Whilst the interpreters regarded themselves as independent contractors, they did not generally use business names, advertise their services, subcontract or hold their own insurance. On Call had in excess of 2,000 people on its books and no

employees.

Applying the smell test and considering the relevant factors, Justice Bomberg concluded that the translators were employees. Even though the translator could accept or reject assignments, this was only one consideration to determine whether or not On Call had the level of control of an employer engaging casual employees.

Accordingly, there was an obligation to pay compulsory superannuation payments for the translators.

On another level in a case before the Federal Magistrates Court, The Fair Work Ombudsman sought to prosecute Centennial Financial Services a director of the company and its HR manager for his role in sham contracting practices of the company.

Centennial Financial Services engaged a number of employees as "corporate associates". The employees were terminated and re-engaged as independent contractors. A sham contract occurs when an employer tries to disguise an employment relationship as an independent contracting relationship.

The Workplace Ombudsman sought to prosecute the company and its HR manager for a sham contracting arrangement resulting in breaches of the Fair Work Act and non payment of entitlements including wages and annual leave. That prosecution was successful as the corporate associates were employees and the contracting practice was implement to create savings for the business.

The Court noted the workers were engaged to sell and distribute the company's financial products and the new consultancy agreement did not reflect the nature of the relationship.

In the Centennial Financial Services case, whilst the director was the controlling mind of the company, the HR manager was essentially involved in the arrangements. The HR manager was responsible for ensuring the company complied with relevant Workplace Relations Laws and was therefore centrally involved in the unlawful activities.

Federal Magistrate Cameron determined that both the director and the HR manager had breached the *Fair Work Act* and imposed fines totalling $3,750.00 on the HR manager and $13,200 on the director and ordered the proceeds be paid to the employees whose underpaid benefits were in the order of $50,000. In this case a company, its director and its HR manager were liable for their involvement in sham contracting arrangements.

The Centennial Financial Services case sounds a clear warning to employees that they may be liable for breaches of workplace relations law when they participate in an employer's attempt to disguise an employment relationship as an independent contracting relationship arrangements Its not as simple as arguing that the HR manager simply did what they were told as that argument failed in the case.

Employers who breach the *Fair Work Act* can be fined up to $33,000. Actions can be brought by a worker, a union or the Fair Work Ombudsman. The ATO can issue a charge to recover unpaid superannuation benefits.

As can be seen, not only can a company but its directors and HR managers may be held liable for breaches of the *Fair Work Act* when it comes to non payment of statutory benefits to employees. Sham contracting has serious consequences.

The risk is there for businesses, directors and HR managers who get the classification of employees wrong. Will you be looking at a claim for unpaid wages, sick leave , holiday pay, long service leave or compulsory superannuation benefits.

Employer Ordered To Reinstate Dismissed Employee And Faces Pecuniary Penalty Orders

Australia Post face a further hearing to determine whether they are liable and the amount of any liability for pecuniary penalties following an order that they reinstate a dismissed employee. Pecuniary penalties can be imposed by the Federal Court, the Federal Magistrates Court or an eligible State or Territory Court where an employer has contravened a civil remedy provision. The civil remedy provisions include the general protection against adverse actions and unfair dismissals.

The fines on a corporation are up to a maximum of $33,000. The penalty can be imposed by a Court in addition to orders for reinstatement and compensation.

Stephens was first employed by Australia Post as a part-time driver/sorter on a fixed term contract from May 2009 until

October 2009. A second term contract was offered to Stephens shortly before the expiration of his first contract. A letter from Australia Post dated 21 October 2009 offered Stephens "*continuing fixed term employment with Australia Post for the period listed below…*". The letter noted Stephens' employment under this contract would terminate on 20 January 2010 unless an offer is made in writing to Stephens to extend the period of his employment.

The letter noted the grounds for termination may include:

- The position is no longer required.
- Unsatisfactory performance.
- Misconduct.

Stephens sustained a lumbar strain injury at work on 3 December 2009. He made a worker's compensation claim for his injury.

Stephens gave evidence that on 4 January 2010, he approached a supervisor and asked him about his worker's compensation claim as he had lodged it over a month ago and his doctors' bills were overdue. The supervisor advised Stevens to contact Jim Crumm ('Crumm') which Stephens did the next day. Crumm explained that he had been too busy to process Stephens' claim but would take care of it soon.

As a result of the conversation with Crumm, Stephens was late for a customer pick-up.

At the end of his run, Stephens tore his trousers in the crotch. As a result of the location of the tear, he advised another supervisor, Ashley Zieden ('Zieden'), that he wanted to go home to change his trousers. Zieden told him that if went home he would not be paid. There was a disagreement between Zieden and Stephens as to whether or not Stephens had sworn at the supervisor.

The following day, the Stephens was called into a meeting with the Hub Manager and was asked to explain the allegation of swearing and his failure to complete one of his pick-ups. Stevens gave his version of events. However, he was not believed by the Hub Manager. The Zieden's version was accepted by the hub Supervisor.

On 7 January 2010, Stevens received a letter of termination. The letter of termination relied upon:

- His failure to collect mail from a business customer on 5 January 2010; and
- Using inappropriate language in a discussion with a manager.

His employment was terminated with one week's pay in lieu of notice.

Stephens made an application to the Federal Magistrate's Court alleging:

- Australia Post was in breach of Section 340(1) of the Fair Work Act, 2009 as he claimed he was exercising his workplace right to make a claim under Safety, Rehabilitation & Compensation Act, 1988. He claimed his termination was in response to his worker's compensation claim and not due to the incidents on 6 January 2010.
- His termination was because of a physical disability and the consequential reduction in his working ability as a result of his workplace injury.

Federal Magistrate Smith determined Stephens did have workplace rights conferred by the Safety, Rehabilitation & Compensation Act, 1988.

The Federal Magistrate preferred Stephens' evidence over that of the supervisors of Australia Post. The Federal Magistrate noted there were no contemporaneous notes or other such evidence relating to the alleged incidents or the disciplinary process that Australia Post had undertaken in making the determination to terminate Stephens' employment.

If an employee is able to establish he had a workplace right, the onus falls on the employer to establish that the termination of the employee did not occur because of the existence or possible existence of a workplace right. Federal Magistrate Smith did not believe the reasons given by the employees of Australia Post were genuine reasons for terminating Stephen's employment. As a result Stephens' claims relating to workplace rights and disability discrimination succeeded.

He found the Australia Post supervisors in their evidence overstated the seriousness of the alleged misconduct to hide the real purpose of the dismissal. He did not consider either the swearing at a supervisor or his failure to make a pick-up were serious enough incidents for Stephens' to be dismissed. He also noted Stephens had an unblemished employment record and that

the dismissal process followed by Australia Post was undocumented.

The employee was reinstated notwithstanding there was only nine days left on the fixed term contract. The Federal Magistrate was satisfied, had the termination not occurred, that Stevens would have been offered a further six months fixed term contract. The Federal Magistrate has adjourned the hearing on whether to impose pecuniary penalties on Australia Post for their breach of the civil remedies provisions.

Employers should be aware of the civil remedy provisions and the risk that they may face more than just compensation or reinstatement claims from dismissed employees. The fines for breach of the civil remedy provisions are up to $33,000 for corporations.

OH&S Roundup

Fall & Fatality & $190,000 in Fines

The NSW Industrial Court has recently handed down fines totalling $190,000 following the prosecution of a company involved in a breach of the *Occupational Health and Safety Act*,*2000* in connection with the death of an employee from a fall at work.

Strata Build Pty Limited and its director were both prosecuted for breaches of the OH&S Act, Strata Build for failing to ensure the health and safety at work of an employee and the director pursuant to the deeming provisions that render a person concerned in the management of a corporation liable to prosecution for the same offence.

Strata Build Pty Limited operates a painting business. An employee of the company was undertaking painting work at an apartment complex. He was working on an extension ladder without harnesses or fall protection painting the external surfaces of apartment. The extension ladder was used to access the balcony of the second floor and as the employee got close to the top of the ladder, the ladder started to move and became unsteady and the employee fell and his injuries proved to be fatal.

There was no risk assessment carried out in relation to the use of an extension ladder.

The Court noted that the primary consideration in sentencing requires a determination of the objective seriousness of the offence. The Court noted that the evidence indicated that the employee was using a ladder that was six metres long to climb up to the second floor balcony of an apartment block and due to the height of the second floor balcony, the length of the ladder was not sufficient for it to reach above the top of the balustrade and it rested on the outside of the concrete wall of the balcony. The Court noted there was a failure to complete a risk assessment of the hazards associated with the use of the ladder to access work areas in excess of six metres in height. The Court also noted there was a failure on the part of the company to provide training in the use of scaffolding, elevated work platforms or harnesses or lanyard systems for accessing work areas. The Court was also critical of the level of supervision. There was scaffolding available on site to undertake work at height.

The Court noted:

> *"It is of little relevance to an assessment of the objective seriousness of the offence that Mr Vega unilaterally adopted a procedure that was patently unsafe. This was in circumstances where the defendant conceded that in relation to this particular site, there was no documented safety system. The obligation upon the defendants is to ensure the safety of its employees, which extends not just to the careful and observant, but to the hasty, careless, inadvertent, inattentive and even foolish…."*

The Court also noted:

> *"Although damage or injury to employees does not, of itself, dictate the seriousness of the offence or penalty, a breach where there was every prospect of serious consequences, may be assessed on a different basis to a breach unlikely to have such consequences. In such a case, the occurrence of death or serious injury, may manifest the degree of seriousness of the relevant risk."*

In this case the Court held that both the company and its director had the same degree of culpability. The director managed the business and performed painting and other related tasks for it, including erection of scaffolding.

The Court noted that there had been a late plea of guilty in the proceedings and accordingly no substantial discount on penalty was available.

When determining the penalty the Court also noted it was important to have regard to the maximum penalties which were available, in this case, $550,000 for a company and $55,000 for an individual.

As the Court commented:

> *"It is important to note that in determining the appropriate penalty the Court must take into account the maximum penalty for an offence. "*

The Court also referred to the well known decision in *Morrison v Powercoal* which commented on the consideration of the maximum penalty when it comes to determining the the appropriate penalty. In that case it was said:

> *"Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance. In their book Sentencing , Stockdale and Devlin observe that:*
>
> *'A maximum sentence fixed by Parliament may have little relevance in a given case, either because it was fixed at a very high level in the last century ... or because it has more recently been set at a high catch-all level ... At other times the maximum may be highly relevant and sometimes may create real difficulties ... A change in a maximum sentence by Parliament will sometimes be helpful [where it is thought that the Parliament regarded the previous penalties as inadequate].'*
>
> *It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. "*

No doubt send shivers go down the spines of all businesses as they face greatly enhanced maximum penalties under the harmonised Occupational Health and Safety Regime due to commence from 1 January 2011 when the maximum penalty for Category I offences under the new legislation will be $3 million.

In this case the corporate defendant was fined $175,000 against a maximum penalty of $550,000 and its director $15,000 against a maximum penalty of $55,000.

The case sounds a warning to all that with increased maximum penalties on their way, bigger fines will become a fact of life for breaches of the *Occupational Health and Safety Act.*

Workers Compensation Roundup

Reinstatement Of Injured Workers

In NSW injured workers are entitled to seek reinstatement in the event that they are dismissed from employment because they are not fit for their employment because of a work injury. The *Workers Compensation Act 1987("WCA")* contains the legislation provisions that regulate this entitlement.

The NSW Industrial Relations Commission (IRC) which deals with applications for reinstatement under the Workers Compensation Act recently examined the operation of these provisions in *Richard Plunkett v Silverbrook Research Pty Limited (2011)*. Mr Plunkett claimed an entitlement to reinstatement after he was terminated from his employment with Silverbrook Research Pty Limited. He had suffered a workers compensation injury to his forearm and had been receiving workers compensation for periods of incapacity and medical treatment. Contemporaneous to his physical injuries he had suffered a psychological injury due to interpersonal and other difficulties within his employment environment. A key consideration in the final determination was that this psychological injury was not the subject of a worker's compensation claim.

In August 2008 Mr Plunkett was terminated. His letter of termination contained a number of reasons for his termination including his failure to attend a psychiatric examination that was arranged by the employer, concerns by a number of other employees about Mr Plunkett's erratic behaviour and the incapacity restrictions due to his forearm injuries the subject of a compensation claim.

Mr Plunkett made an Application under the protection from dismissal provisions contained within the WCA. Section 241 of the

WCA which relevantly provides that:

> *"(1) If an injured employee was dismissed because he or she is not fit for employment as a result of the injury received, the employee may apply to the employer for reinstatement to employment of a kind specified in the application.*
>
> *(2) The kind of employment for which the employee applies for reinstatement cannot be more advantageous to the employee than that in which the employee was engaged when he or she first became unfit for employment because of the injury.*
>
> *(3) The employee must produce to the employer a certificate given by a medical practitioner to the effect that the employee is fit for employment of the kind for which the employee applies for reinstatement."*

Mr Plunkett applied for reinstatement after producing a Pre Injury Duties Certificate. Commissioner Connor ultimately dismissed the Application for Reinstatement as the workers compensation injury was not a substantial consideration in the termination. This was despite the onus of proof resting with the employer to satisfy the Commission that the dismissal did not flow either in whole, or substantial part, from the injury. Specifically Section 244 of the WCA states:

> *"(1) In proceedings for reinstatement order under this Part it is to be presumed that the injured employee was dismissed because he or she was not fit for employment as a result of the injury received.*
>
> *(2) That presumption is rebutted if the employee satisfies the Commission that the injury was not a substantial and operative cause of the dismissal of the employee."*

Commissioner Connor commented the evidence clearly indicated that the dismissal did not actually flow from the workers compensation injury Mr Plunkett received but essentially due to his relationship with other Silverbrook staff members and other issues raised in the termination letter. If he had been dismissed because solely or substantially he was not fit for employment as a result of his workers compensation injury to his forearm he would have been entitled to the remedy of reinstatement. Whilst the injury to the forearm may have been a factor in the termination of Mr Plunkett, it was not a substantial consideration in the termination.

The operation of these reinstatement provisions are rarely tested in the IRC. Whilst each reinstatement application will turn on its own facts, the multitude of reasons contained in the termination letter in this case was sufficient to defeat the reinstatement application. Nevertheless the judgment makes it clear that the reinstatement entitlement is only triggered when the sole or substantial cause of the termination is the worker's compensation injury and the worker was now fit to return to pre-injury employment. An application for reinstatement can be brought within two years from the date of termination. One wonders whether this published judgment will remind injured worker's solicitors of the rights for reinstatement where a terminated worker is certified fit for pre-injury employment after he has been terminated.

Pre and Post 2002 Psychological Injuries

The amendments introduced into the workers compensation legislation at the end of 2001 included special provisions for psychological and psychiatric injuries. In particular, the amended legislation granted rights to injured workers to claim lump sum compensation for permanent impairment that involved a primary psychological/psychiatric injury, provided a worker was assessed with permanent impairment of at least 15% whole person impairment (WPI).

The transitional provisions provided that there would to be a reduction in the compensation payable for the 2002 onwards injury for any proportion of the WPI due to a pre 2002 injury. A question then remained. Was the reduction to be in percentage or in monetary terms?

Recently President Judge Keating examined the operation of these transitional provisions in Fleming v NSW Police Force (2011) NSW WCC PD 33. Mr Fleming was an operational police officer from 1995 to August 2007 and had been exposed to a series of traumatic events which ultimately resulted in a post traumatic stress disorder. Whilst it was agreed Mr Fleming suffered WPI of greater than 15%, the employer argued that the injuries suffered prior to 2002 would reduce the percentage of whole person impairment to be less than 15%. Accordingly, Mr Fleming would not be entitled to lump sum compensation as he did not reach the 15% threshold. The worker had argued he should only face a deduction in monetary terms for the proportion of the WPI prior to 2002 events.

President Keating reviewed the various authorities that dealt with such factual scenarios and noted it was evenly balanced between a reduction in the monetary amount of lump sum compensation due to the pre 2002 injury and reductions in

percentage terms. The President considered the definition of "compensation" and "permanent impairment compensation" in the Workers Compensation Act 1987. The President concluded the reduction for any proportion of the WPI found to be due to a pre 2002 injury was to be effected by a reduction in the compensation payable (ie, the dollar amount) and not by a reduction in the percentage degree of WPI. Interestingly, the President also determined it was for an Arbitrator to carry out these proportional reductions and not an Approved Medical Specialist (AMS).

What this decision means is that a worker who has a psychological injury due to injuries both before and after 2002 that reach 15% WPI in total will not suffer a percentage deduction for the injuries suffered pre 2002. Quite simply, the total level of compensation in dollar terms will be assessed and a deduction applied in dollar terms for the pre 2002 proportion of the injury.

This decision also has important ramifications for work injury damages as by preserving the 15% WPI assessment workers will satisfy the threshold for such claims which is also 15% WPI.

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