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.

Unfair Terms in Insurance Contracts – Legislative Change

The introduction of legislation to govern unfair terms in insurance contracts is squarely on the agenda following the release of a consultation paper in late December inviting comment on proposed legislative reform to deal with unfair terms in insurance contracts.

The Government recognises that legislation which would permit the Courts to declare terms in an insurance contract unfair could result in an increase in insurance premiums and will affect an insurer's reinsurance arrangements.

So why change the existing law?

According to the Government:

> *"The problem sought to be addressed is the current imbalance between protections offered under the existing regulation of insurance contracts and that which currently applies to other financial products and services, which may result in actual or potential disadvantage or loss to consumers due to insurance contracts containing terms that are harsh and/or unfair."*

There are existing rules that are directed at offering protection to policyholders from being negatively impacted by policy terms in certain circumstances, for example:

- pre-contract disclosure rules directed at informing policyholders about the terms of the policy before it is entered into;
- utmost good faith rules preventing parties from relying on terms if to do so would be inconsistent with the doctrine of utmost good faith; and
- rules on reliance on specific terms: rules directed at preventing reliance by insurers on specific types of policy terms for specified types of policies unless the terms have been brought to the attention of the consumer.

The Consultation paper comments that the key points to note about the problem are that:

- *"there is a risk of unfair terms in standard form insurance contracts causing loss or damage to policyholders and third party beneficiaries which, in some situations, could be significant;*
- *there are existing laws that might help to prevent loss or damage to policyholders due to reliance on unfair contract terms; and*
- *the extent to which those laws are effective, or potentially effective, to address situations of unfair contract terms is debateable, but the existing laws:*
  - *do not cover the same breadth of circumstances as unfair contract term laws;*
  - *are directed at providing remedies in individual cases where an objectionable term is sought to be relied upon, whereas unfair contract term laws are directed at eliminating objectionable terms from standard form contracts; and*

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Renee Sadler rms@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
Nicholas Dale nda@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
John Renshaw jbr@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
Michelle Landers mml@gdlaw.com.au
Belinda Brown bjb@gdlaw.com.au

February 2012 Issue

Inside

Gillis Delaney Lawyers
Level 11,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

- *have been identified by the Senate Economics Legislation Committee and the Natural Disaster Insurance Review as not providing adequate protection to consumers. "*

However the Government recognises that the most significant consideration, in terms of possibly justifying an exemption from unfair contract term laws for insurance contracts, is the potential impact of having an exclusion declared void. As noted in the Consultation paper "*Declaring void an exclusion that was important in the context of an event of widespread loss and damage (such as a natural disaster) means insurers would be required to pay for losses arising from a risk for which they have not collected any premiums. Depending on the number and size of the claims, this could have major ramifications for an insurer's balance sheet and capital requirements."* It is also recognised that there would be a potential impact on the price and availability of reinsurance.

Thus the need for consultation.

Submissions have been invited from stakeholders and are due by 17 February 2012. The Government intends to determine whether unfair contract terms should apply in some form to insurance contracts and whether the regulator should only have standing to challenge the terms in the contract.

Comments from stakeholders are sought on 5 options:

- The Status Quo is maintained.
- Enhance existing Insurance Contract Act remedies: Existing remedies in the Insurance Contract Act, including section 14, would be modified to improve their effectiveness to prevent the use of unfair contract terms in standard insurance contracts with consumers. Section 15 would continue in operation so that the unfair contract term provisions of the ASIC Act would not apply.
- Permit the unfair contract terms provisions of the ASIC Act to apply to insurance contracts: Unfair Contract Term provisions in the ASIC Act would operate in addition to, and alongside, the Insurance Contract Act remedies.
- Extend the Insurance Contract Act remedies to include unfair contract terms provisions.
- Encourage industry self-regulation to better prevent use of unfair terms by insurers.

At this stage no concluded view has been reached but support for the introduction of unfair contract term laws to insurance contracts is building.

The Consumer Action Law Centre (CALC) strongly believes that unfair terms exist in Australian insurance contracts and that they are causing Australian consumers harm.

National Legal Aid has stated that there is overwhelming evidence which documents in clear and unambiguous terms the detriment that consumers have suffered due to harsh or unfair terms in insurance policies.

The Senate Economics Legislation Committee and the 2011 Natural Disaster Insurance Review have concluded that unfair contract terms should apply to insurance contracts.

If unfair contract term provisions do apply to insurance contracts insurers will need to focus on plain language drafting of exclusions. When determining whether a term of a consumer contract is unfair a court may take into account such matters as it thinks relevant, but must take into account the extent to which the term is transparent and the contract as a whole.

Transparency is determined by reference to the term and whether it is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term.

The insurance industry looks set for some radical changes in 2012. Whilst in 2010 the Government's consideration of the introduction of legislation that would impose unfair contract term regulation on insurance contracts faded away before the election. However the drive for change has been reinvigorated.

Recovering Losses When Vendors Cover Up Termite Damage

Is covering up termite damage before you sell a property a problem? If you have termite damage in your home and you are selling your property can you attempt to hide that termite damage from prospective purchasers. If you do will you be liable for a damages claim by the purchaser based on deceit or fraudulent representations once the termite damage is detected?

The NSW Court of Appeal in *Wood v Balfour* has recently considered a claim by a purchaser of a property against a vendor after termite damage was detected after the purchasers moved in.

Mr and Mrs Balfour were the owners of a property and in 1999 identified termite activity and damage to timbers at the home and arranged for a pest control company to treat the damage.

In the period from 1999 to 2000 three further separate areas of termite damage were detected and the Balfours took steps to repair and cover the damage in relation to each. The Balfours were not contemplating selling the home at that time.

In early 2004 the Balfours placed their property on the market for sale. The Woods ultimately purchased the property in August 2004. Soon after settlement the Woods discovered termite damage and found there was extensive structural damage from termites. The Woods commenced proceedings against a pest inspection company that had provided a report to them prior to their purchase and settled the claim for a sum of $106,250.

The Woods then commenced proceedings against the Balfours alleging that the work that Mr Balfour did in concealing termite damage and the Balfour's non-disclosure of that work amounted to a representation by the Balfours to the Woods that, in effect, there was no serious termite damage to the property.

The Woods alleged that the representation was fraudulent because the Balfours knew that it was false and intended to deceive the Woods. The Woods also alleged the Balfours had committed an act of deceit and were liable in damages.

The Trial Judge noted the parties agreed that the cost of demolition and rectification was $225,000 and the Woods were seeking the difference between what they recovered from the pest inspector and the actual demolition and rectification costs.

The Trial Judge ultimately found that the termite damage amounted to genuine repairs to deal with the damage for aesthetic reasons not related to the sale of the property. The Trial Judge found that the Balfours did not act dishonestly. An appeal followed.

The Contract of Sale contained a provision that

> *"3. The property together with the appurtenances thereto is sold in its present state of repair and the purchaser acknowledges that he buys the property relying on his own inspection, knowledge and enquiries and that he does not rely on any warranties or representation made to him by or on behalf of the vendor. The purchaser shall not call upon the vendor to carry out any repairs whatsoever in relation to the property hereby sold."*

In the Court of Appeal MacFarlan J A noted:

> *"the making available of a property for inspection, coupled with silence as to the existence of any latent defects, gives rise to a representation that the vendor has not knowingly concealed any significant defects in quality of the property that would otherwise be patent (patent defects being those defects that are "either ... visible to the eye, or arise by necessary implication from something visible to the eye": ... If it is proved that a vendor fraudulently concealed defects in quality, an action in deceit is available (subject of course to questions of causation and damage). The primary judge's reasons do not indicate that his Honour appreciated that the principles so stated contemplate that there may be deceit where the vendor has engaged in "conduct calculated to deceive a purchaser" and that such conduct may be constituted by works of concealment undertaken with the purpose of preventing a prospective purchaser observing on an inspection of the property defects in quality that, but for the concealment work, would have been patent."*

MacFarlan J A noted:

> *"In my view the conclusion to be drawn in the present case is therefore that, by presenting the property for inspection by prospective purchasers and their advisers, the Balfours represented that they had not knowingly concealed any major termite damage which was not patent and which compromised the structural integrity of the property. "*

Such a finding should raise concerns for all vendors of properties. In this case MacFarlan J A held that a representation had been made to the Woods and the representation was false but whether or not Balfours knew it to be false and acted for the purpose of concealing the defective state of the property was a different question.

To establish a tort of deceit it is necessary to establish that:

- there was a false representation;
- the representation was made with the knowledge that it was false or that it was made recklessly or carelessly as to whether the representation was false or not;
- that the representation was made with the intention that it be relied on;
- that the plaintiff relied on the false representation;
- the plaintiff suffered damage which was caused by reliance on the false representation.

MacFarlan J A noted it was not enough for the Woods to prove the Balfours were aware of the termite damage, it was necessary for the Woods to further prove the Balfours were aware that the property had substantial termite damage that compromised the properties structural integrity.

The claims made by the Woods in the Court papers alleged that the Balfours were dishonest rather than recklessness. The Court of Appeal found that the Balfours were not put on notice of an alleged case of recklessness and the Woods were therefore not entitled to argue recklessness. Consequently the Court of Appeal could only consider the question of dishonesty and determined that there had not been dishonesty by making a knowingly false representation. An argument based on recklessness may have been more problematic for the Balfours.

The case on fraudulent representation was rejected by the Court of Appeal based on the facts of the case.

Giles JA in his judgment noted that the purchasers would have an action available to them in deceit and did not need to rely on the alleged false representation. Giles J A noted:

> *"The direct route to a remedy is that there is fraudulent conduct by the vendor in not disclosing the defect and the purchaser would not have bought, or would have bought for less, had the defect been disclosed. The fraudulent conduct may be an original concealment with intent to prevent discovery and subsequent non-disclosure, or it may be non-disclosure with intent to prevent discovery where the original concealment was for aesthetic or other reasons unconnected with deception. Concealment is an element in the deceit, since the vendor's intervention has deprived the purchaser of the ability to discover the defect. It may be that there is fraudulent conduct where the vendor knows of a non-visible defect, although one which the vendor did not conceal, but more than mere knowledge and non-disclosure will be necessary. "*

Giles JA did not consider the conduct of the Balfours amounted to deceit.

The Court of Appeal concluded that the Balfours did not act dishonestly and they did no more than repair cosmetic damage and it was not established that Mr Balfour was conscious of the substantial termite damage. The Balfours did not withhold information about the termite damage in order to deceive the Woods. The Balfours conduct was not fraudulent.

Whilst this case failed it is clear that vendors who are aware of substantial structural damage caused by termites who seek to cover up that damage and conceal the damage from prospective purchasers can be held liable for losses suffered by purchasers. The claims which can be made by purchasers are an action in deceit and/or an action for false representations. The terms of a Contract of Sale will not save a vendor from claims based on fraudulent of dishonest conduct.

So the next time you plaster up termite damage what is your intention. Are you trying to conceal the damage with the intent to secure a better price when you sell the property? Should you tell the purchaser about what you know as if you do not that may amount to a false representation? If you do try to conceal termite damage you may face an action for damages once the termite damage is detected by the purchaser notwithstanding the terms in your Contract of Sale.

You Can't Give Evidence About What You Would Have Done

Before the *Civil Liability Act 2002* commenced in New South Wales persons that suffered a loss as a consequence of an alleged failure to warn would seek to call evidence on what they would have done had a warning been provided. This evidence

was seen as potentially self serving and its probative value was questionable and infected by hindsight bias. If the evidence was admitted it was very difficult to challenge on appeal.

However the *Civil Liability Act 2002* has changed things as noted by Walmsley AJ in the decision of *Warragamba Winery Pty Limited v State of New South Wales*.

Section 5D (3) of the Civil Liability Act provides:

> *"If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:*
>
> *(a) the matter is to be determined subjectively in light of all relevant circumstances subject to paragraph (b); and*
>
> *(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.."*

Warragamba Winery was one of fifteen owners of homes or businesses damaged or destroyed by bushfire at one or other of Warragamba, Silverdale and Mulgoa. The owners sued the State Government for alleged wrongful acts by the National Parks and Wildlife Service and the New South Wales Rural Fire Service. The Sydney Catchment Authority was also sued.

The claims were based on negligence, breach of statutory duty and nuisance on the part of two defendants. The National Parks and Wildlife Service and Sydney Catchment Authority were said to owe duties of care as occupiers and the Rural Fire Service owed a general duty of care because of the functions it was performing.

Negligence was alleged on the basis of the three entities failing to assess the risk posed by a fire which started in the Blue Mountains and the failure of the National Parks and Wildlife Service and Rural Fire Service to take proper steps to control it so it would not spread.

It was alleged that greater resources should have been deployed in fighting the fire and also that there ought to have been a warning to the plaintiffs so that they could take timely action to preserve their properties.

During the course of the trial, Counsel for the owners sought to adduce evidence about what the owners would have done if they had been warned. The hypothetical scenario of what would you have done if you had a warning about the fire was posed. Counsel for the State of New South Wales objected to the admission of any evidence in response to that question on the grounds that Section 5D(3) of the *Civil Liability Act* prohibited the giving of that evidence unless it was against the interest of the owner. Counsel for the owner argued the evidence was admissible under the Evidence Act

Walmsley AJ noted that in medical negligence cases evidence about what a person would have done if warned may carry little weight.

Walmsley AJ concluded that, "the fact that the legislation specifically excluded the operation of Section 5D (3), only to statements against interest, emphasises the breadth of the reach of Section 5D (3)."

Walmsley AJ ruled that evidence of what a person would have done if a warning had been provided was not admissible and should not be allowed.

Self serving statements of claimants addressing what they would have done if they had been warned are not admissible in Court proceedings in NSW.

Utilising Labour Hire Comes With Its Own Risks

Businesses that use labour hire are exposed to substantial claims when the equipment used in the business is not up to scratch and causes an injury to the hired worker as seen in the recent decision of the NSW Court of Appeal in Clarence Valley Council v McPherson.

McPherson was an employee of a labour hire company who was lent on hire to Clarence Valley Council and was injured whilst using equipment supplied by the Council. McPherson sustained a severe twisting injury to his right wrist when he was using an auger drill bit powered by a chainsaw to drill holes in camphaloral trees to enable them to be poisoned. The Clarence Valley

Council had engaged APS Pacific Pty Limited ("APS") to supply McPherson's services. McPherson had worked for APS for seven to eight years. He was placed with the Council by APS and had worked with the Council for seven days when he was injured.

A conventional chainsaw can be converted into a drilling machine by the attachment of an auger and a chainsaw and auger was provided by the Council. McPherson was injured whilst using this chainsaw. This particular chainsaw did not have a torque limiting clutch arrangement and the entire torque and inertia reaction was borne by McPherson when the auger bit hit a hard section of the tree. The expert evidence was that the auger should have a clutch arrangement to limit the torque.

The Trial Judge found that both the employer and the Council had been negligent and apportioned 85% of the liability to the Council. The Council appealed.

The Council argued that prior to the incident more than 1,000 holes in camphaloral trees had been drilled without incident and the magnitude of the risk was very low and there was no law against the use of a chainsaw with an auger that did not have a torque limiting clutch fitted. It was also argued that it would be unreasonable to require the Council in circumstances to fit an attachment which was not required either by any law, regulation or Australian Standard. However, the Council did have chainsaws to which were fitted augers with torque limiting clutches.

The Court of Appeal noted that McPherson had been supplied to the Council to undertake spraying operations and the Trial Judge noted that the Council had chosen, in a spur of the moment fashion, to provide the chainsaw with auger to carry out drilling rather than the process used previously by McPherson where he used an axe to create the hole for the poison.

The Trial Judge noted that APS neither knew of nor could have prevented the provision by the Council of an inappropriate chainsaw and auger. The labour hirer effectively had nothing to do with the job once McPherson commenced employment and did not attend the site where McPherson was working nor did it require McPherson to report to him about what he did each day. APS did not provide any training or instruction to McPherson in the use of the chainsaw and auger.

The Court of Appeal commented:

> *"There was a high degree of departure from the standard of care of the reasonable employer by the appellant (Clarence Valley Council) and a low degree of departure from that standing by APS. This was because as Her Honour found, it was the appellant (Council), without any notice to APS, that at the last minute had changed the method of work from the use of an axe to the use of a chainsaw and auger. Of greater significance, in my view, is the fact that the evidence established that as far as APS was concerned they were hiring the services of the respondent (McPherson) to the appellant (Council) for the purpose of carrying out spray operations. At no time did the appellant (Council) inform APS that the respondent (McPherson) would be required to operate any plant or machinery other than that required to carry out the task of a spray operator.*
>
> *The alleged lack of interest of APS in the wellbeing of the respondent therefore assumes the relatively unimportant failure compared to the failure of the appellant (Council) to provide the respondent with a chainsaw and auger fitted with a torque limiting clutch arrangement. The immediate and major cause of the respondent's (McPherson's) injuries lay with the appellant (Council) rather than APS."*

In the circumstances the Court of Appeal determined that a reasonable apportionment of liability was 85% to the Council.

Apportionment of liability between a labour hirer and the host will always turn on the facts of each case. Whilst in this case the Council referred to a number of decisions attributing liability in the range of 75% - 80% to businesses that use labour hire, the Court of Appeal made findings on apportionment which resulted in a larger share of responsibility for the host employer. The Court confirmed that such legal authorities are not of any real assistance in determining apportionment as they depend on the facts and circumstances of the case.

Once again the Court of Appeal has confirmed that a business engaged in with a commercial enterprise that uses labour hire is exposed to substantial claims when labour hire employees are injured whilst equipment supplied by the host. In McPherson's case the host was 85% responsible for the injuries and liable to compensate McPherson and pay more than $400,000 in damages.

Ceiling Collapse and Personal Injury Claims -Causation Is The Issue

Surprising results can occur when personal injury claims are heard by the Courts. To recover damages for a personal injury an injured person must establish that the injuries were the result of a negligent act. Courts are called on to consider whether a person is owed a duty of care and whether there is a breach of the duty that duty. In addition it is not enough that there is negligence, the negligence must have caused the injury. In NSW the Civil Liability Act 2002 provides that a determination that negligence caused particular harm comprises the following elements:

- that the negligence was a necessary condition of the occurrence of the harm (factual causation), and
- that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).
- In determining liability for negligence, the injured person always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

If an injured person fails to adduce sufficient evidence to establish that the negligence of a party was a necessary condition of the occurrence of harm then the claim will fail.

Lawyers need to carefully consider the extent of expert evidence required to establish causation. This is particularly the case where acts or omissions of professionals play a role in an accident which leads to an injury. It is even more important where there are multiple parties including a professional that plays a role in certification of the structural soundness of a building in which a ceiling ultimately collapsed, as was seen in the recent decision of the NSW Court of Appeal in Turjman v Stonewall Hotel.

The NSW Court of Appeal was recently called on to determine a number of personal injury claims arising as a consequence of the collapse of the first floor ceiling at the Stonewall Hotel in Oxford Street Darlinghurst.

The Stonewall Hotel was originally a bank building which was substantially renovated in 1993. In mid 1997 approval was given to use the building as a hotel and place for public entertainment ("POPE licenced premises") with a maximum capacity of 200 persons for the ground floor and 150 persons for the first and second floors. An application for renewal of the licence was lodged in 2002 and an engineer's report concerning the structural integrity of the building was submitted with the application.

Early one morning the ceiling of the first level of the hotel collapsed. At the time there were 40 persons on that level, 150 persons on the ground level and 50 persons on the second level. A number of patrons on the first level were injured. Eight damages claims were brought by those injured in the collapse of the ceiling.

Proceedings were brought against the owner of the building, the lessee (which conducted the hotel) and the engineer whose report had been submitted in support of the renewal of the licence, as well as a town planning consultant that had applied for the licence. At trial, claims against all defendants failed, however an appeal was brought but only against Stonewall, the lessee of the premises.

The ceiling collapsed as it had not been properly installed. The ceiling comprised of two parts, one directly fixed to the floor above and one suspended approximately half a metre below that floor. The screws attaching that part fixed to the floor failed as the screws were of insufficient length and otherwise unsuitable. The suspended part failed either because of the transfer of additional load on to the directly fixed part or because of pull out failure as unsuitable screws were used to attach that part.

The case was based on arguments concerning the responsibilities which flowed from the change in the use of the premises in 1997 when it commenced operation as a hotel and the renewal of the POPE licence in September 2002.

Stonewall did not advise the structural engineer about the full activities carried out on the second level of the hotel, including dancing on the floor.

Stonewall accepted that it had breached its duty of care in failing to adequately brief the consultant in relation to the activities carried on in the hotel however argued that breach was not causative of the injuries sustained by the patrons when the ceiling collapsed.

Central to the plaintiffs' case at trial was the attention given or not given to the soundness of the ceiling when the POPE licence was renewed in September 2002.

The Council required a certificate submitted from a structural engineer who stated that the premises were structurally sound

and capable of withstanding the loadings which arise from the use (particularly reference is directed to the floor loading/deterioration from dancing-jumping over the years).

Mr Byatt an engineer attended at the hotel for inspections on five occasions. Under his direction openings were made in the ceilings of the ground level and the first level and in the floors of the first and second levels, in order to view the structural beams and their support and to identify the timber of the floor joists in order to check its stress grading. Based on these and other investigations Mr Byatt provided a report, addressed to Stonewall. The report was to the effect that the floor structures of the first and second levels were adequate to support the maximum anticipated loading, and that the results of the investigation confirm the original structural appraisal which certified the use of the building as a hotel and that the floor framing generally is structurally adequate to support the anticipated loading. The report did not purport to comment on the ceilings of the ground and first levels.

The trial judge held that Byatt's retainer with Stonewall was limited to examining the structural integrity of the floors and did not require any investigation of the ceilings. The duty of care owed by Byatt did not go beyond a duty to exercise reasonable care in the investigation and assessment of the structural integrity of the floors. His Honour held also that no breach of that duty of care had been established, and further that the case against Byatt failed on the issue of causation.

The plaintiffs argued that Stonewall breached its duty of care because, having received e-mails from the Mayor of the Council expressing concerns about the bounce in the floor when people were dancing and the need for a structural certificate, Stonewall should have conducted a full safety audit of the hotel which would have revealed the defective installation of the ceiling of the first level; alternatively, having received the e-mail it should have advised Byatt of the contents of that e-mail and provided full information about the activities being carried out on the second level of the hotel, whereby Byatt would have recommended the retaining of a vibration expert, and if such an expert had been retained the defective installation of the ceiling would have been discovered.

Justice Giles noted:

> *"It was not suggested that Stonewall breached its duty of care in failing to engage a competent structural engineer. Accordingly, in the enquiry into factual causation it should be asked what Mr Byatt would have done had he been provided with the relevant information, not what the hypothetical structural engineer would have done."*

The Court of Appeal noted the causal relationship between the negligent failure to provide Mr Byatt with all relevant documentation and the collapse of the ceiling must be analysed by reference to the Civil Liability Act 2002 (NSW), section 5D.

Bathurst CJ and Allsop P noted:

> "*The factual causation here must start with Mr Byatt. It is he who should have been given the documentation and information. The primary judge found that Mr Byatt would have retained a vibration expert ... If that were the determinative causal framework of analysis, the plaintiff failed to establish factual causation because it was not shown that any such vibration advice would have put a structural engineer on notice, either of the problem of the inadequate affixation of the ceiling, or of the risk of deterioration of any affixation of the ceiling."*
>
> *"If, however, the approach that Mr Byatt would have taken would not conform to proper engineering practice, that causal analysis based on Mr Byatt's approach may not be determinative. A clear basis would exist for the operation of s 5D (2) to impose liability on Stonewall if a reasonable engineer in Mr Byatt's position would have necessarily engaged in investigation of the integrity of the ceiling. There is also much to be said for the proposition that the common law also would not permit the negligence of a third party to determine the outcome of the causal analysis in such circumstances."*
>
> *"... the steps that Mr Byatt, or the hypothetical engineer acting in accordance with proper engineering practice was required to take, must be considered in light of the retainer given to the engineer, namely, to certify the structural soundness and capacity to withstand likely loadings. It was not suggested by the appellant(the injured persons) that the retainer was inadequate as distinct from the claim that the engineer was not supplied with all the information necessary to properly perform that retainer. Further, as the experts agreed ...an independent investigation of the ceiling was not within the scope of the requirements of South Sydney Council. "*
>
> *"… the plaintiff and the appellants did now show and have not shown a relevant causal connection between the negligent omission of Stonewall in failing to supply the Harper email to Mr Byatt and the failure of the ceiling for the purposes of s 5D(1)(a). There is no basis, in our view, to conclude under s 5D (2) that factual causation was*

established and that responsibility for the harm should be imposed on the respondent."

The trial judge implicitly found that if a vibration expert was engaged they would have advised that there was no problem with the floor of the second level, it followed from the expert evidence that the competent structural engineer would not have been caused to investigate the adequacy of the fastening of the ceiling.

There was insufficient evidence to establish that the disclosure of the emails to the structural engineer would have prevented the collapse of the ceiling and the injury to the patrons.

The plaintiffs have failed in their claim and we will have to wait and see whether the claim bubbles up to the High Court. There is an evidentiary onus placed on injured persons to establish that a negligent act is a necessary condition of the occurrence of the harm and without adequate expert evidence claims can and will fail.

Damages For Using A Former Employer's Client List

The NSW Supreme Court in *Commercial & Accounting Services (Camden) Pty Limited v Cummins* has sounded a warning that former employees cannot use the client lists of their past employer to solicit business after they have left employment and if they do they may be liable for loss of goodwill suffered by the employer.

Cummins was an accountant. He sold his practice to Commercial & Accounting Services (Camden) Pty Limited ("C&A"). C&A also traded under the name "Best Practice". In the Agreement for Sale Cummins undertook to refrain from conducting a business of accounting services or tax preparation for a period of at least three years within a radius of ten kilometres of the business address of C&A. Cummins also became an employee of C&A and was to create a minimum level of billings each week (17 hours). After the sale Cummins obtained a franchise to operate as a licenced financial planner under the name ReInvest, rented premises and worked in his new business from the premises he rented as well as for C&A. C&A provided some referrals to ReInvest and referred client details of some C&A clients to Reinvest to facilitate invites to seminars run by ReInvest.

Cummins was employed by C&A for three years when he terminated his employment and then sought to operate an accounting practice from the premises where ReInvest conducted its operations. Cummins dispatched letters to clients of C&A which included the following comments:

"Latest News

After working part time at Best Practice for the past several years, my contract there has ended June 2009. Many people have expressed their wish to continue having their accounting and tax needs met by myself, for which I am grateful. This has necessitated my return to my own accounting and tax practice as Dennis Cummins Public Accountant and Tax Agent …

The new contact details are as follows …"

A draft letter was enclosed with that correspondence. The draft letter was addressed to C&A which if executed by the recipient would direct C&A to deliver the tax file papers of the client to Dennis Cummins.

The letter was allegedly sent out in dribs and drabs on the basis of lists prepared by Cummins and members of his family compiled from Cummin's recollection and information ReInvest had. The number of C&A clients that received the letter could not be established. The evidence in this respect was unsatisfactory.

The witnesses for Cummins gave evidence that lists were prepared on excel spreadsheets consolidating previous Re-Invest mail out lists, seminar survey responses, emails and telephoning people at their place of work.

In the first half of 2009 ReInvest had about 250 clients and by August 2010 it had 1,093 clients. Reinvest had grown its client base by 876 clients who were former clients of Best Practice and 550 of them were clients of the business purchased by Best Practice from Mr Cummins.

The fact that C&A's business was decimated and Cummins' business apparently grew by the approximate number of clients that left C&A led to the conclusion that Cummins must have solicited many more clients of C&A than he contended.

The volume of clients that left C&A also led to the inference that Cummins could not have recalled the details of all of the clients that were solicited and that the client list of C&A was the source of information used in the mail out campaign.

The Court noted that to obtain over 1,000 clients the letter must have gone to a lot more people who were not ReInvest clients for they were only about 250 people.

Cummins accepted that the details of the clientele of Best Practice were confidential information. He also admitted that he owed C&A an equitable obligation not to breach its confidence.

Gzell J noted that the details of the clients of C&A was not information that an employee was free to use after his termination of employment. It was not information "*that once learnt necessarily remains in the servant's head and becomes part of his own personal knowledge."*

Gzell J also noted that even if Cummins was free to use this information after the termination of his employment:

> *"A former employee's entitlement to use knowledge which the former employee remembers, and the absence of an entitlement to make notes and lists while in the employment and take them and use them, are very long established and are not open to doubt or debate."*

Gzell J noted the use of the client list of Best Practice offended these principles.

Gzell J noted that:

> *"The employee cannot remove, whether by using paper or using memory, a material part of the former employer's business records; but the employee can approach a particular customer or client whom that employee can recall without a list or deliberate memorisation."*

In this case, Cumming had grown his client base by 876 clients. Gzell noted that 876 clients left Best Practice and the Court assumed that they were solicited by Cummins using Best Practice's confidential information. Gzell J speculated that of the 876 former clients of Best Practice more than 100 former clients were friends and relatives of Cummins and her daughter leaving 775 clients who were in all probability contacted by Cummins using the client list. 775 clients represented a 75% of the number of client in Best Practice.

In a robust approach to damages, the Court awarded 75% of the loss of goodwill of C&A based upon a loss of 75% of its clients and this resulted in an award of $117,995 plus costs.

A terminated employee cannot use the client lists of a former employer to assist in the soliciting of business in ventures they pursue after the termination of their employment. Whilst a former employee is entitled to use knowledge which the former employee remembers, the employee is precluded from taking documents and notes about confidential information including details contained in client lists and using that information otherwise they will be in breach of their duty of confidentiality. However provided there is no breach of confidentiality a terminated employee is not prohibited from soliciting business from clients of their former employer unless there is a valid restraint trade in the contract of employment.

Confidentiality clauses and restraint of trade clauses in employment contracts play a vital role in protecting the legitimate interests of a business when an employee departs that business.

The Rise And Rise Of Adverse Action Claims

Under Work Choices, employees were protected from being terminated in circumstances that were harsh, unjust or unreasonable by the unfair dismissal regime. Employees were also protected from unlawful terminations where a termination was based on a proscribed reason such as Union membership, race, sex, age, disability or marital status or where terminations were without the minimum notice period.

General Protection provisions against Adverse Actions

The Fair Work Act 2009 ('FWA') introduced provisions to protect employees who have workplace rights.
Section 340 of FWA provides that an employer must not take an adverse action against an employee because an employee has a workplace right or may exercise a workplace right. An employer cannot take adverse action against an employee to

prevent the employee exercising a workplace right.

Under Section 341 of FWA:

"(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment."

Under Section 342 of FWA adverse action include the following actions by an employer:

- the dismissal of an employee; or
- injuring the employee in his or her employment; or
- changing the position of the employee to the employee's prejudice; or
- discriminating between the employee and other employees of the employer.

Prospective employees are also taken to have workplace rights if they are ultimately employed in the prospective employment by the employer.

Examples where FWA have determined that an employee has workplace rights include where:

- an injured worker who has a right to bring a worker's compensation claim; or
- an employee returning from parental leave and exercising the right under Section 84 of FWA to return to the employee's pre-parental leave position or if that position no longer exists an available position for which the employee is qualified and suited nearest in status and pay to the employee's pre-parental leave position.
- the right of an employee to complain to WorkCover in relation to an unsafe work practice of his or her employer
- where an employee has raised a complaint against another employee or the complaining employee's employment conditions.

There are procedural difficulties for employers in defending adverse action where an employee has made an allegation that an employer has taken an adverse action against them. Section 361 of FWA provides where an employee has made an application before FWA alleging an adverse action has been taken against him or her, it is presumed in the proceedings arising from the application, the adverse action that was or is being taken by the employer has been taken by the employer for that reason or with that intent unless the employer can prove otherwise.

Section 361 of FWA reverses the onus of proof applicable to civil proceedings where an adverse action application is brought before FWA. Generally in civil actions, the onus of proof is on the complainant to establish on the balance of probabilities the action complained of was carried out for a particular reason or with a particular intent. However Section 361 of FWA provides that once a complainant has alleged that person's actual or threatened action is motivated by a reason or intent that would contravene the general protections provisions in FWA, the employer has to establish, on the balance of probabilities, that the real reason or reasons for taking of the action was not motivated to adversely affect a person's workplace right.

To prove this, an employer would normally need to call evidence from a decision maker to explain what motivated that person (and ultimately the employer) to take the action which is complained of by the employee.

Managers and supervisors who would be called to give this type of evidence should also be aware of Section 362 of FWA which provides that where a person who advises, encourages or incites a person or takes any action with the intent to coerce another person (being the employer) to take adverse action against an employee, the manager or supervisor is taken to have contravened the same provision as the employer provision.

Employers, managers and supervisors should also be aware that taking an adverse action against a person who has workplace rights is a civil remedy provision. The maximum pecuniary penalty that can be imposed (in addition to any compensation payable to the employee) on an individual for breach of a civil remedy provision is $6,600. The maximum pecuniary penalty for a Corporation is $33,000.

Adverse Actions and Temporary Absence from Work

Section 352 of FWA provides an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury. The Fair Work Regulations 2009 provides that the kind of illness or injury causing a temporary absence from work within the meaning of Section 352 of FWA will exist if an employee:

- provides a medical certificate within 24 hours after the commencement of the absence or a longer period as is reasonable in the circumstances; and
- the employee is required under the terms of a contract or industrial instrument or workplace instrument, to notify the employer of their absence from work and to substantiate the reasons for absence.
- An illness or injury is not "temporary" if:
- the employee's absence extends for more than three months; or
- the total absences of the employee within a 12 month period, have been more than three months and the employee is not on paid personal/carer's leave.

However if the employee is receiving workers compensation payments under a law of the Commonwealth or State, the period for which the employee receives workers compensation is not to be counted as part of the three month period for temporary absence.

This is consistent with the decision of Federal Magistrate Raphael in *Lee v Hills Before and After School Care Pty Limited (2007) 160 IR440*.

As a result an employer, to avoid a breach of the Section 352 of FWA that prohibits the dismissal of the employee if the employee is temporarily absent from work because of illness or injury must prove that the termination was unrelated to the employee's temporary absence because of illness or injury.

An example would be a decision to make the employee's position redundant because of genuine operational reasons. However, the onus remains on the employer to prove the reason for termination was unrelated to the employee's absence because of injury or illness.

In a matter of *Iannello v Motor Solutions Australia Pty Ltd (2010)* FWA, Ms Iannello went on maternity leave on 7 December 2008. She was scheduled to return from maternity leave on 1 April 2009. However, prior to her return, there were work shortages in the company and Ms Iannello was advised that there was insufficient work for her to return full time.

In meetings following the decision that she could not return to full time work, she was not offered part time employment at lower pay which was available. Her employment was terminated as her old position was not available. The employer sought to have Ms Iannello's application to FWA for unfair dismissal struck out on the basis that her dismissal was as a result of a genuine redundancy.

FWA accepted the economic reasons as to why the full time position was not available. Whilst Ms Iannello bought a claim for unfair dismissal, the same facts would have grounded a claim for an adverse action as Ms Iannello had a workplace right under Section 84 of FWA to return to her pre-parental leave position or if that position no longer exists (as the facts proved) an available position for which the employee was qualified and suited nearest in status and pay to the pre-parental leave position.

Consequently as the employer had a position available to the employee which the employee could have accepted, the employer should not have initiated the termination of the employee's employment in those circumstances without offering the part time lower paid position to Ms. Iannello. The employer to avoid the unfair dismissal claim (as well as an adverse action claim) should have simply advised the employee that there was only the part time lower paid position available. If the employee chose to reject that position, the employee would have been determined to have resigned from her employment rather than the employer making a decision to terminate the employment.

Fair Work Australia has seen a significant rise in the number of adverse actions application filed in 2011. Whilst there is a conciliation process within Fair Work Australia after an application is filed, Fair Work Australia must issue a certificate that the parties to an application have attempted conciliation before proceedings can be commenced before a court.

OH&S Roundup

$225,000 Fine for Fatality

In recent proceedings in the NSW Industrial Relations Commission, an employer was fined $225,000 as a result of a fatality arising from an incident causing death whilst in the course of employment. In Inspector Nguyen v Finray Pty Ltd [2011] the NSWIRC imposed the significant fine due to the actions of the employer in allowing a worker to operate a loading vehicle that lacked a park brake or any braking mechanism.

Finray Pty Ltd ("Finray") was engaged by Hurford Forests Pty Ltd to extract and haul logs which had been felled. Finray's loading and hauling equipment included a loader that had been modified to pick up logs and load them on to a semitrailer for carriage to the sawmill for processing.

Francis Raymond Morton ("Mr Morton") who had worked as a truck driver for approximately 25 – 30 years was employed by Finray for about 10 days up until his death. During that period, his responsibilities predominantly involved delivery work and assisting a colleague and Mr Morton had only been involved in loading operations using Finray's loader for a few days before the fatality.

On the day of the incident, Mr Morton was working on his own about a quarter of a kilometre away from any other individuals. Mr Morton was found deceased and trapped under the loader which still had its engine running. Upon finding Mr Morton, employees of another contractor were not able to turn off the loader's ignition.

Finray entered a plea of not guilty and was legally represented for a period of time. As legal representation was withdrawn, the final hearing proceeded as if it would be defended although there was no subsequent involvement or appearance by the defendant.

On the uncontested evidence before him, Marks J found that Mr Morton was crushed to death following being struck by the loader as it was moving whilst he was in its vicinity. Further, his Honour concluded that the loader had been defective for a considerable amount of time and that had appropriate braking mechanisms been installed in the loader, Mr Morton would not have been killed. The use of such a machine was a "serious and fundamental defect".

His Honour considered Mr Morton's experience in truck driving and noted that it may have led him to use chocks but there was no evidence to suggest that chocks had been made available to him. Further, Marks J held that any inattention or carelessness on the part of Mr Morton would not excuse the defendant.

Ultimately, His Honour found that the defect was fundamentally unsafe and in the absence of any available evidence as to contrition, remorse or co-operation with the prosecutor, the defendant was fined $225,000 of a maximum penalty of $550,000 pursuant to sections 8(1) and 8(2) of the Occupational Health & Safety Act 2000. The fine certainly reflects the seriousness of an incident which led to a fatality and the completely avoidable nature of the fatality.

Workers Compensation Roundup

Employment Indicia – Is The Control Test Still Important?

It has long been held that the "control" test as outlined in Stevens v Brodribb Sawmill & Company Pty Limited (1986) ("Stevens") was a significant but not the sole criteria to judge whether the relationship was one of employment. In Stevens, the High Court noted it was the right to control rather than the actual exercise of control which was the important consideration in determining when an employee relationship existed. This fundamental indicia of employment was again examined by Deputy President Bill Roche in the recent Workers Compensation Commission Presidential decision of *Nguyen v WorkCover Authority of New South Wales (2011)*

The worker (Bong Nguyen) had sustained injuries when he fell through an open skylight whilst assisting his alleged employer (Van Nguyen). Van Nguyen was assisting Bong Nguyen to replace an air conditioning unit. The air conditioning unit was being replaced pursuant to a contract entered into between Van Nguyen and HLT Refrigeration. Bong Nguyen claimed that Van Nguyen employed him. Van Nguyen claimed that Bong was in fact employed by HLT Refrigeration. HLT Refrigeration denied employing the worker or Van Nguyen.

Van Nguyen was uninsured and initially the Nominal Insurer accepted the claim and paid weekly compensation and other benefits acting on behalf of the Nominal Insurer. WorkCover issued a Notice under Section 145 against Van Nguyen seeking to recover compensation benefits paid to Bong Nguyen.

Van Nguyen was a qualified electrician and until four days prior to the incident he was the proprietor of Bhess Electrical and Security Systems. At that time, his daughter became the proprietor of the business but Van Nguyen continued to perform electrical work, allegedly independently. Upon being verbally contracted to carry out the air conditioning replacement job from HLT Refrigeration, Bong Nguyen responded to an advertisement placed by Van Nguyen in a Vietnamese Newspaper. Bong Nguyen had previously worked for Van Nguyen on a different job and had been paid $80. Bong Nguyen agreed to work on this job for $100 cash per day. Van Nguyen paid for the new air conditioning unit given to him by HLT Refrigeration. Van Nguyen also paid for the costs of hiring a hoist and for various electrical components. HLT Refrigeration repaid all those costs to Van Nguyen.

On the day of the injury, Bong Nguyen loaded his tools into Van Nguyen's vehicle and was driven to the site where he was introduced to HLT Refrigeration. Mr Ton, a representative of HLT Refrigeration worked with Van Nguyen and Bong Nguyen to remove the existing air conditioning unit until the accident. After the accident Van Nguyen visited Bong Nguyen in hospital and gave him $100.

Originally the Arbitrator concluded that Van Nguyen had employed Bong Nguyen. The Deputy President Bill Roche agreed. Applying the control test in Stevens, the Deputy President accepted that the worker worked under the control of Van Nguyen. Even though he worked under the direction of HLT Refrigeration when Van Nguyen was absent, Van Nguyen had the right of control. The worker obeyed the directions given to him by HLT Refrigeration as Van Nguyen instructed him to do so.

It was further noted that Bong Nguyen responded to Van Nguyen's advertisement, he only discussed remuneration with Van Nguyen and was paid in cash by Van Nguyen on the days he worked. The worker used Van Nguyen's tools, leaving his own tools in Van Nguyen's vehicle. There was no suggestion that the worker could delegate his work to anyone else. The only real indicia that Bong Nguyen was not an employee of Van Nguyen was that Van Nguyen made no provision for holidays or deducted income tax from the Bong Nguyen's pay. The weight of evidence favoured a conclusion that Van Nguyen had the right of control over the manner and performance of Bong Nguyen in the performance of his work.

Similarly, there was a corresponding lack of indicia that Bong Nguyen was working under a contract of service with HLT Refrigeration. The Deputy President commented that until the job commenced, HLT Refrigeration had not previously met Bong Nguyen. This supported the argument that Bong Nguyen and HLT Refrigeration had no intention to enter into legal relations.

The decision once again underscores that the control test is significant criteria in determining whether a relationship is one of employment. Whilst other indicia such as remuneration, the provision of equipment, the hours worked, the provision of holidays, the deduction of income tax and delegation of work are relevant, these are not the most important criteria. The control test in many, if not in most cases, is the "surest guide as to whether a person is contracting independently or serving as an employee".

The World Really Is Flat – An Enforceable Time Limitation In A Workers Compensation Claim!

The recent Presidential decision of *Pacific National Pty Limited v Schattler [2011] NSW WCC PD 73* indicates that the Workers Compensation Commission will give serious consideration to dismissing claims made more than 6 months after the injury or accident happened. A six month time limitation on making a claim for compensation is contained within Section 261 of *Workplace Injury Management and Workers Compensation Act 1998 ("WIM Act")* unless a worker can establish the failure to give notices was occasioned by ignorance, mistake, absence from the State or other reasonable cause.

Schattler was employed by Pacific National Pty Limited from 1979 until 13 February 1999 as a car wagon assembler. He was subsequently employed by Sweetha International Pty Limited as a flagman between 1999 and April 2004.

On 8 December 2010 Schattler's solicitors gave notice to Pacific National of a lump sum claim for binaural hearing loss. One of the reasons the scheme agent provided for declining the claim was the fact that it had been made outside the statutory time limit fixed by Section 261(1) of Workplace Injury Management Act 1998.

In proceedings before the Commission Schattler provided a statement indicating that his employment with Pacific National exposed him to the loud noise on a daily basis over a period of approximately 20 years. Schattler asserted that his

employment as a flagman with Swetha did not expose him to any loud noise.

Schattler stated in July 2010 he attended National Hearing Care and underwent a hearing test and was advised that he suffered "significant hearing loss". A number of days later Schattler consulted solicitors and was given some legal advice regarding his entitlement to compensation due to his hearing loss. Schattler alleged this was the first time he was aware that his hearing loss may be related to noise at work and the he has entitled to claim compensation and the cost of hearing aids.

At the Arbitration Schattler gave evidence that whilst he was employed by Pacific National he underwent a hearing test arranged by his Union and he was told that his hearing loss was not high enough to make a claim. Nonetheless he sent "the form" to his employer.

Schattler argued that the evidence established that he first became aware that he had received an injury when advised in 2010 and a claim had been made within six months in compliance with the legislation. No argument was advanced by the employer's legal representative that Schattler had failed to give notice of injury as required by the legislation.

The Arbitrator found that Schattler's last employer in which there was noisy employment was Pacific National and therefore the deemed date of injury was 13 February 1999. The Arbitrator accepted Schattler was unaware that he had injury in terms of the legislation until the hearing test in July 2010. The Arbitrator determined that it was not possible for Schattler to give notice of the injury earlier given he did not know he had suffered an injury which could or should be notified. Consequently the Arbitrator found that the notice was given as soon as possible.

On appeal, Pacific National argued that all of the evidence supported a determination that Schattler was aware of his injuries prior to July 2010. Deputy President Kevin O'Grady agreed. Schattler's evidence in fact established that he believed he had in the past received payment of compensation from his employer in respect of hearing loss. Although after investigation by his solicitors this was established to be wrong, Schattler's belief as to payment, although mistaken, necessarily inferred an awareness of a relevant injury. Accordingly, the awareness of the injury occurred at a time significantly earlier than July 2010.

The Deputy President revoked the Arbitrator's decision and concluded that Schattler had been aware of his injury for a period exceeding the six month statutory period in which to bring a claim. Consequently the Deputy President found the claim could not be maintained.

The decision demonstrates that the Commission will, in appropriate cases, uphold a declinature of a claim made more than six months after the injury happened. Whilst each case is determined on the facts, we suggest it would be worthwhile specifically raising the defence provided by Section 261(1) *Workplace Injury Management Act 1998* in all matters where the claim is made more than six months after the injury occurred. The onus rests with the worker to adduce evidence demonstrating "ignorance, mistake, absence from the State or other reasonable cause". The "get out of jail" clause of "ignorance, mistake etc" is usually easy to demonstrate and allows a further 3 years in which to make a claim for compensation. As a final escape, the "ignorance, mistake" excuses can be extended indefinitely if the injury results in death or serious and permanent disablement. Still, it is worth raising Section 261 in a Section 74 notice, especially in minor or nuisance claims.

CTP Roundup

Blameless Accidents-Whose Fault Is It Anyway?

In NSW the CTP personal injury scheme includes provisions that allow for benefits to be recovered by persons involved in blameless accidents. However, whether or not an accident is a blameless accident can be problematic, particularly where the person injured was potentially to blame as was seen in the recent decision of Justice Adamson in *Axiak v Ingram [2011] NSWSC 1447*.

The blameless accident provisions provide no fault special benefits and commenced on 1 October 2007.
"Fault" is defined in the Act as "negligence or any other tort".

If a child less than ten years of age is injured in an accident, the expert evidence in the case will usually be that a person of that age could not have been guilty of negligence and therefore would not have satisfied the definition of "fault". Accordingly, this means that the "blameless accident" provisions are seemingly fully available to infant claimants of less than 10 years of age (although there have been instances of fault being attributed to plaintiffs as young as 7 years of age).
In Axiak v Ingram the circumstances that gave rise to the claim were that Axiak, a fourteen year old pedestrian, suffered

significant injuries after a collision with Ingram's vehicle. Axiak's injuries were so significant that she is a permanent participant of the Lifetime Care and Support Scheme.

Axiak got off a bus with her sister and walked around to the back of the bus. The bus then pulled away and the girls crossed the road in the space between the bus and a vehicle following the bus. The two girls darted behind the back of the bus into the path of a vehicle travelling in the opposite direction to the bus. The applicable speed limit of the area was 80 kms per hour but the driver of the car had slowed to 40 kms per hour when he saw the bus. The view of the girls was completely obscured by the bus. Ingrim first saw the girls when they emerged from behind the bus.

Axiak abandoned any claim that there was negligence on the part of Ingram and proceeded on the basis that there was a "blameless accident". Ingram argued that the accident was not a blameless accident as Axiak had been negligent.

Section 7A of the Act provides that a blameless motor accident is a motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person.

Pursuant to Section 7B of the Act in proceedings on a claim for damages in respect of the death of or injury to a person resulting from a motor accident, an averment by the plaintiff that the motor accident was a blameless motor accident is evidence of that fact in the absence of evidence to the contrary. In essence there is a shifting of the onus of proof and a defendant must prove the accident was "caused by the fault of any other person" to escape from the blameless accident compensation provisions.

In *Axiak v Ingram* the question to be determined was whether the "fault of any other person" could include the fault of the plaintiff, Axiak. This issue was complicated by the provisions of Section 7F of the Act which enables a reduction for contributory negligence even for "blameless accidents". This created the conundrum of a "blameless accident" being balanced against the actions of a plaintiff who was at fault to determine the appropriate reduction for contributory negligence.

Justice Adamson however considered that "contributory negligence" referred to in section 7F was a reference to acts that played a causative role, rather than being a cause or contribution to the injuries. In essence, this was to cater for such acts as not wearing a seatbelt or otherwise failing to take care for one's own safety. These acts play no causative or contributory role to the accident itself, but do have a causative influence on the injuries that may have been sustained.

Justice Adamson agreed with Ingram that a "blameless accident" would be an occurrence where no person could be considered at "fault". Justice Adamson found Axiak was at fault and she was not entitled to damages under the blameless accident provisions.

Justice Adamson found:

> *"I accept the evidence of Mr Griffiths(an expert) that an ordinary child of 14 ought not have crossed the road as the plaintiff did. Not only did she not wait until the bus on which she had been travelling had departed so as to clear a line of sight of oncoming traffic, but she ran across the road at such a rate, when she could not see the side of the road where the defendant was, that she was unable to stop in time to avoid colliding with the defendant's vehicle. Had she been less than ten, there may have been a question whether she could be said to be blameless because an ordinary child of ten would not be capable of appreciating the consequences of crossing the road in that manner. But the plaintiff was already 14 on the day of the accident. Her conduct was the result of carelessness, not youth. Accordingly the accident was not a "blameless accident" because it was caused by her fault."*

Axiak was not entitled to compensation under the blameless accident provisions. We will have to wait and see whether an appeal follows.

This will not be the end of the "blameless accident" analysis.

The issue in relation to single driver blameless accident was also ventilated recently in a matter at the Claims Assessment and Resolution Service ("CARS").

The intention of the provisions is admirable. They were primarily enacted in response to the tragic injuries suffered by Sophie Delezio. However, the wording continues to create some confusion.

At this stage, where the plaintiff's actions cause or contribute to an accident there is a bar to recovery of damages under the blameless accident provisions. However for children the question will be whether they have been negligent having regard to their age and what an ordinary child of that age would do.

If conduct such as Axiak's could reasonably be expected of an ordinary child of her age then she may not be guilty of contributory negligence at all, and it could not properly be found that her "fault" caused or contributed to the accident.

The Cost Implications When Denying Indemnity For A CTP Claim In NSW– Is There Any Point To Section 79 Of MACA?

When a personal injury claim is made against a CTP insurer and it can be argued the circumstances of the incident which occasioned the injury, fall outside the scope of the *Motor Accident Compensation Act* (MACA), a CTP insurer can deny indemnity on behalf of a named defendant, but seek leave to intervene in the proceedings as a separate party pursuant to Section 79 of the Motor Accidents Compensation Act 1999. However the cost implications for a CTP insurer can be significant as evidenced in the recent Supreme Court of NSW decision of *Tarres v Rozelle Carriers Pty Limited (No. 2) [2011] NSWSC1586.*

William Tarres was injured whilst driving a prime mover under a railway bridge when the top of the shipping container collided with the bridge. Tarres claimed that had the seat belt in the prime mover been properly fitted and correctly operating, or had there been a differently designed seat belt, he would not have sustained his injury.

He sued Rozelle Storage, the owner of the truck and Hobbs Bros Carriers which carried on the business of transporting containers from place to place in trucks owned by Rozelle Storage.

Allianz Australia Insurance Limited ("Allianz"), the CTP insurer of the prime mover, successfully applied to intervene in the proceedings pursuant to Section 79 of the MACA which provides:

> "*An insurer may apply to the Court to be joined as a party to legal proceedings brought against a defendant who is insured under a third party policy with the insurer in order to argue that in the circumstances of the case it has no obligation under the policy to indemnify the defendant".*

Rozelle Storage and Hobbs Bros Carriers were represented by Zurich Australia Insurance Limited the liability insurer which indemnified them against liability not covered by the CTP policy.

Allianz, argued that as a result of the broad nature of the pleadings made by Tarres it was necessary for Allianz to intervene to resist any claim made under the MACA. The following particular of negligence was cause for concern:

> *"Failing to ensure that the plant, namely the truck, supplied for use by people was safe and without risk to health when properly used contrary to Section 11(1) of the Occupational Health and Safety Act 2000 as evidence of negligence."*

A year and a half prior to the matter being listed for hearing the solicitors for Tarres and Allianz corresponded in relation to whether the claim was confined to a MACA claim.

The response provided by Tarres' solicitors was as follows:

> *"It is our view it is inaccurate to describe any defence as being filed on behalf of the CTP insurer Allianz Australia Insurance Limited. Any defence must be filed on behalf of the defendant ... the plaintiff does not intend to restrict his claim solely to remedies under the Motor Accidents Compensation Act 1999, but to the extent that his remedies do not fall under the provisions of the Act, the plaintiff will seek to recover damages under the Civil Liability Act."*

On the first day of the trial before Garling J, he asked the plaintiff's Senior Counsel whether he was limiting Tarres claim to one under the MACA and was advised there was no other claim at all being put forward by his client.

Thereafter a discussion ensued which resulted in sole representation on behalf of all three defendants by Allianz.

Garling J delivered judgment in the matter on 25 November 2011 in favour of the plaintiff in the sum of $840,140.00 which applied a deduction of 35% for contributory negligence and an adjustment to account for the apportionment of the fault of the employer of 15%.

Garling J dealt with the issue of costs in his judgment delivered on 19 December 2011.

It was not contended by any of the parties that the plaintiff should not have his costs, however the issue was which of the two insurers, either Zurich or Allianz ought to pay those costs and what should the costs order include.

Allianz accepted it should pay the plaintiff's costs but disputed that the order for costs should include the costs relating to Zurich's appearance on the issues which fell outside those raised by Tarres' claim for damages under MACA.

Allianz submitted the reason it elected to be separately made a party was because of the suggestion the cause of action potentially fell under MACA and because Tarres retracted from that position on the first day of the hearing, Tarres should pay the costs of Zurich.

In the alternative, Allianz submitted Zurich should pay its own costs and Tarres should pay his own costs of the *Civil Liability Act* allegations and pay Allianz costs in respect to those allegations.

Zurich submitted that it should have its costs paid by Tarres and Tarres should have his costs paid by Allianz.

Garling J found the particular of negligence based on the Occupational Health and Safety Act was not an unreasonable one. Further, he was not satisfied the additional pleading, which was ultimately not pursued at the hearing, occasioned any additional factual investigation nor the obtaining of any additional evidence.

Whilst Garling J noted Allianz submitted it was obliged by reasons of MACA to take the course which it did, he disagreed. He stated it was:

> *"Not uncommon for named parties to be indemnified by more than one insurer in respect to the claim…… the circumstances created an occasion for sensible negotiation between the party, the insurer and the lawyers involved in an attempt to ascertain and then develop a proper working relationship which enables the claim to be defended in as cost effective a manner as possible."*

He considered Allianz took an approach which was "unduly restrictive and unnecessary" and resulted in the requirement of dual representation, albeit through Allianz being added as a party. He ultimately determined Allianz should pay the costs of all the parties to the proceedings including the costs of Zurich.

The decision in this matter highlights the potential ramifications for CTP insurers where they seek to intervene in proceedings pursuant to Section 79 of MACA, even in circumstances where the pleadings put forward by the plaintiff are broad and not ultimately pursued as the CTP insurer may still be liable for costs.

For over 40 years, Gillis Delaney Lawyers has delivered legal solutions to businesses operating in Australia. We specialise in the provision of legal services in insurance law, workplace relations, employer liability, commercial law, finance, insolvency and construction law. Our clients include Government agencies, public and privately listed companies, insurers and underwriters, insurance broking groups and insurance brokers, underwriting agencies, third party claims administrators, insolvency practitioners and financial institutions. We deliver quality legal services with commercially focused advice. We will make it easier for you to face challenges and ensure you are 'fit for business'.

We listen

We listen to you and understand. We answer your questions and deliver a service that will meet all of your needs. We invest in lasting relationships and take the time to develop closer relationships focused on better legal outcomes through expert advice. Its simple - its about respect and taking the time to understand what you need.

We understand

Good or bad, you need to know where you are before you can determine where you need to be. We tell it like it is. We won't sugar coat the issues. We see the early warning signs and will warn you before it's too late. We will arm you with informed answers to tough questions and keep you on top of the facts that matter.

We are proactive

Prevention is better than a cure. We strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service.

Our service is personal

Our service is personal and 'hands on' and our mix of professionals ensures that you enjoy high level partner contact at all times. Our people are accessible and responsive and provide creative and innovative solutions cost effectively. We have 24/7 accessibility to lawyers.

We communicate effectively

You need the best service and information at your finger tips. We provide the best of both worlds, proven technology delivering internet access to all of your information and a serious focus on communication in plain English. With our personal service, simpler communication and easy access to information you spend more time doing business and less time chasing down problems.

We deliver results

You need practical ideas that deliver real results. Our people and our ideas can make a difference and we thrive on the opportunity to think creatively and deliver innovative solutions. We listen, understand, provide the best information and deliver value for money. We embrace ideas and use creativity to find better ways to do things.

We are Different !

We set ourselves apart from other lawyers by:

- identifying your needs and responding with the most cost effective solution;
- providing practical expert advice;
- meeting deadlines, building relationships and delivering value for money;
- supporting creativity and diversity of thought and bringing excellence to all that we develop, deliver and achieve;
- utilising a team approach that maximises efficiencies and minimises duplication;
- identifying the right legal strategy for the best commercial outcome;

…and having fun whilst doing it.

Contact Us

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