GD News

Gillis Delaney Lawyers

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Liability of Operators Of Licenced Premises And Coward Punches

The tragic consequences of king hits is pervading the media with regular frequency in Australia. The general public expresses concerns over the severity of criminal sanctions for those responsible for many of the incidents take place in close proximity to licensed premises where the assailant had been drinking. Sometimes these incidents involve security personnel contracted to or employed by the licensed premises.

Criminal sanctions are one thing. The liability of a licensed premises for actions of employees and/or contractors involved in secured who are involved in altercations with patrons is another. In late December 2013 the NSW Court of Appeal handed down decisions in *QBE v Orcher* and *Orcher v Bowcliff* which shed light on the liability of operators of licensed premises for employees and security contractors who are involved in altercations with patrons after they leave licenced premises.

Orcher was felled by a single punch thrown by Mr Paseka. Orcher fell to the ground striking his head on the concrete footpath sustaining serious head injuries. The assault took place across the road from The Bridge Hotel in Rozelle Sydney at 4.50 am one morning.

Mr Keogh was the licensee of the hotel. Bowcliff Pty Limited was the operator, owner and occupier of The Bridge Hotel. Mr Paseka was employed by Bowcliff as a glassie and he was required to pick up empty glasses in the hotel.

Bowcliff outsourced its security to Australian Corporate Protection Pty Limited. Australian Corporate Protection ("ACP") supplied two security contractors to provide security services at the hotel. DSSS, supplied two security guards to ACP who were DSSS' employees.

Orcher brought proceedings against Bowcliff, Keogh and DSSS claiming damages for injuries sustained and DSSS was ultimately placed in liquidation with QBE, its liability insurer, being substituted as a defendant in place of DSSS.

Orcher alleged that Bowcliff/Keogh were negligent in permitting Paseka to assault Orcher and/or failing to take any reasonable steps to prevent him from doing so. It was also alleged that DSSS was negligent as its employees permitted Mr Paseka to assault Orcher and permitted Paseka to act as a security guard with the apparent intention of interfering in an altercation. It was claimed DSSS failed to take steps to prevent Mr Paseka from assaulting Orcher.

It was also alleged Bowcliff breached its duty of care in failing to provide adequate directions to the three security guards that it had subsumed in to the hotel security system.

Orcher argued that there was a substantially complete transfer of control by DSSS to Bowcliff of the services of the security personnel and that Bowcliff were liable for the acts or omissions of the security personnel. In other words, Bowcliff were vicariously liable for any breach of duty on the part of the security officer.

There was a CCTV recording of the incident.

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Orcher argued that the relevant risk of harm for the purpose of Section 5B of the Civil Liability Act 2002 was that an untrained, unqualified employee in security matters might intervene in a dispute between patrons and overreact in such a way as to use unreasonable force and specifically that Mr Paseka might overreact to some comment made by Orcher by throwing an otherwise unprovoked but devastating punch.

The Court of Appeal confirmed that Bowcliff and Mr Paseka were under a duty to take reasonable care to prevent injury to a hotel patron from the violent, quarrelsome or disorderly conduct of other patrons. It was noted the question of liability always turns on the facts in each case and what is reasonable with respect to the safety of the hotel patron always depends on the circumstances.

The law recognises that occupiers of licensed premises may be liable for the tortious or criminal conduct of patrons and the basis of that liability lies in the control exercised by the occupier over patrons and the occupier's knowledge or ability to know about the intoxicated condition of patrons.

Operators of licenced premises have a statutory obligation not to permit intoxication or violent or quarrelsome conduct on licensed premises and to remove those who engage in such conduct.

The Court of Appeal confirmed that the boundary of that duty cannot always necessarily be confined to the licensed premises and may extend beyond it. The Court of Appeal referred to the High Court decision in Adeel's Palace and noted:

> *"The duty is consistent with the duty imposed by statute upon the licensee and which was a duty enforceable by criminal processes. No question arises of translating a statutory power given to a statutory body into the common law "ought". The duty is not absolute; it is a duty to take reasonable care. It is not a duty incapable of performance. .... Although it is a duty directed to controlling the conduct of others (for the avoidance of injury to other patrons) it is a duty to take reasonable care in the conduct of activities on licensed premises, particularly with regard to allowing persons to enter or remain on those premises."*

Orcher had left the premises. He was across the road from the premises when he was assaulted by Mr Paseka. There was a disturbance between two patrons who had left the hotel. The DSSS security guards were at the front of the hotel when the incident occurred.

The original judge rejected Orcher's case that either Bowcliff or Mr Keogh were vicariously liable for Mr Paseka's assault upon Orcher.

Mr Paseka was an on duty glassie responsible for picking up glasses. No employees of the hotel were or could have been aware that Mr Paseka would suddenly proceed across the road without warning and become involved in the altercation. All employees of the hotel were inside the hotel at the time of the assault. Only the licensed security personnel supplied by DSSS were outside the hotel at the time.

The original judge concluded Paseka crossed the road as a result of some unknown and unexplained personal animosity towards or resentment of Orcher.

The original judge ultimately found that Bowcliff was negligent as a consequence of the inactions of its employees to prevent the intervention of Paseka.

The original judge also concluded that Mr Paea, a trained security guard, supplied by DSSS (QBE was the relevant defendant) had ample opportunity to intervene in the dispute between two patrons before Mr Paseka became involved and failed to do so. DSSS was also found to have been liablity.

However, the Court of Appeal did not agree and found that neither the hotel or the security company or its employees had any liability.

The Court of Appeal noted that a dispute between patrons on the opposite side of the street of a hotel, if the circumstances warranted, might call for intervention or a response in accordance with the hotel's security guidelines.

In this case that would depend on whether it could be said that the particular dispute between Orcher or another patron was or ought to have been judged by the security personnel as relevantly disturbing the neighbourhood. Given the particular

occasion of the altercation outside a service station on a major traffic way at Victoria Road, there was some doubt that the neighbourhood was being disturbed in the relevant sense.

The Court of Appeal also noted there was no evidence as to what caused Mr Paseka to cross the road. There was no evidence as to what either Mr Paseka or Mr Paea heard or observed with respect to Orcher or Orcher's dispute with another patron. The CCTV recording did not conclusively show what stirred Mr Paseka into action.

The Court of Appeal noted that a security guard must exercise a significant element of judgment before a decision is taken to intervene in an altercation which may make matters worse rather than better.

In this case in view of the circumstances in which the security personnel were aware, the circumstances were not such as to require them to exercise their judgment to intervene between three persons in circumstances where security were unaware of what Orcher and the two patrons who had left the hotel were talking about. The incident may have been quite benign and there was no sign of any potential violence.

The security personnel were not aware of Mr Paseka's qualifications and there was insufficient evidence which demonstrated the security personnel knew that Mr Paseka was an employee of the hotel.

The security personnel could not be aware of what Mr Paseka's intention was when he commenced across the road and the security personnel's primary job was to remain at their post to control the activities of a large number of intoxicated patrons who were exiting the hotel in the early hours of the morning and who were milling about on the footpath outside the hotel.

As a matter of judgment, what was occurring on the corner outside the service station was of secondary importance, if it was important at all and the Court of Appeal noted that to find DSSS breached its duty of care was to place a far higher burden upon the security personnel than was reasonable in the circumstances. Whilst the security company owed a duty of care, there was no breach of that duty.

The Court of Appeal also noted the evidence was not sufficient to justify a finding that there was a verbal exchange between two patrons across the road which was either potentially violent or constituted quarrelsome and disorderly conduct. In those circumstances there was nothing that called for the security personnel's intervention at or before the time Mr Paseka crossed the road. On that basis the hotel's other employees could have no liability for failing to intervene to stop Mr Paseka crossing the road.

Orcher had argued that there was a substantially complete transfer of control by DSSS to Bowcliff of the services of the security personnel and that Bowcliff were liable for the acts or omissions of the security personnel. In other words, Bowcliff were vicariously liable for any breach of duty on the part of the security officer. Reliance was placed on a decision in McDonald v The Commonwealth which noted that:

> *"If by the agreement the employer vests in the third party complete or substantially complete control of the employee so that he is entitled not only to direct the employee what he is doing but how he is doing it, and the employee was performing services stipulated for, or authorised by, the third party at the time the third party is liable."*

In this case the Court of Appeal rejected the contention that the hotel could be vicariously liable for the actions of the security company employees. The evidence did not come close to establishing that level of control. Whilst the hotel could instruct the security personnel where they were to patrol, it could not and did not instruct them how to perform the job of a professional security guard. This was unnecessary as DSSS guards were engaged by Bowcliff because of their expertise as trained and licensed security guards.

The argument that the hotel was vicariously liable for the actions of the security guard was rejected.

The findings in this case serve as a reminder that there are circumstances where a hotel can be held liable for the actions of a security guard supplied by an independent contractor, however that only occurs if the hotel has not truly outsourced its security arrangements.

At the end of the day the Court of Appeal held that Bowcliff, Keogh and DSSS were not liable for the injuries sustained by Orcher. The injuries were caused by Mr Paseka who was acting outside the course of his employment. Mr Paseka assaulted Orcher and his employer was not vicariously liable for his actions as he was acting outside the course of his employment.

The hotel and security company were not negligent for failing to prevent Mr Paseka from crossing the road and becoming involved in the altercation as there was no evidence that suggested that the hotel and the security guards ought to have been aware that an altercation was about to occur and that Mr Paseka would be involved and act inappropriately.

Licenced premises and security companies will continue to be exposed to claims by patrons injured in assaults by employees of licenced premises and contract security however there are boundaries to the duty that is imposed and operators of licenced premises, their employees and security contractors. Those involved in the hospitality industry are not liable to prevent all altercations and persons may become involved in altercations where intoxicated patrons are involved in incidents and what is reasonable in the circumstances will always turn on the facts of a particular case.

Construction Site Accidents Head Contractor Liability

Construction sites provide fertile grounds for personal injury claims. Those injured on a construction site often have multiple parties to blame for an accident on a construction site. Common targets of employees of subcontractors who are injured are the head contractor and other subcontractors engaged at the site.

Scaffolding accidents are not uncommon and when someone falls from scaffolding it is not unusual to see claims pursued against the head contractor as well as the scaffolder who erected the scaffolding. However, a construction site is dynamic and often scaffolding is altered during the course of the construction project, not always by the head contractor or the scaffolder.

The recent decision of the Court of Appeal in *Parkview Constructions v Abrahim* throws light on the approach the Courts will take to liability when a person falls through scaffolding which has been modified by unknown persons and those modifications have not been detected by the head contractor.

Parkview Constructions was the head contractor on a construction site. It had engaged Erect Safe Scaffolding to erect the scaffolding for the construction works. Abrahim a painter was employed by Blue Star, another contractor to Parkview. Abrahim had been onsite for about a month, working five days a week.

Abrahim fell when a metal plank on a three board hop up platform attached to scaffolding framework gave way as he stepped onto it. He fell in excess of 10 metres and sustained serious injuries. The hop up was made of three planks which when in place were secured by the scaffolding framework and could not move. However, prior to the accident one plank had been removed and the wire tying the plank to the bracket had been cut. When Abrahim stepped onto the plank that was in place it moved and the plank and Abrahim fell through the scaffold.

Abrahim commenced proceedings, claiming damages for injuries he sustained from Parkview and Erect Safe. The primary judge found in favour of Abrahim. The primary judge also found that Blue Star had not been negligent.

The primary judge accepted that Erect Safe had not removed the third plank. The primary judge thought that the plank had almost certainly been removed by renderers in order to enable them to perform work on the wall adjacent to the hop up. It was noted that one of the safety issues repeatedly raised by Parkview in its Toolbox meetings with subcontractors and by others, was the importance of not interfering with the scaffolding.

The safety officer of Parkview would carry out daily safety inspections, usually accompanied by a representative of the scaffolder and this was said to be necessary because of the high risk that trade people would interfere with scaffolding in an unauthorised manner.

The primary judge found that Erect Safe ought to have tied the second plank to the frame as there was a risk that the third plank might be removed by others as it is not uncommon on construction sites for other contractors to move scaffolding. Accordingly Erect Safe Scaffold was negligent.

Parkview had also been negligent as it had not carried out an appropriate inspection of the scaffolding on the day of the incident and if an inspection had been carried out, the problems with the hop up would have been detected.

Both Parkview and Erect Safe appealed.

Erect Safe argued that it was not reasonably foreseeable that the scaffolding would be tampered with by others and that Erect

Safe was entitled to assume that Parkview would implement and adhere to its own system of instruction to contractors and regular inspections of scaffolding. Erect Safe argued that the primary judge had incorrectly applied hindsight reasoning in determining that there had been a breach of duty of care.

Parkview argued that it had engaged a specialist subcontractor and in those circumstances it did not owe a duty of care.

It was also argued on appeal that the finding that Blue Star was not negligent could not stand. A finding of negligence on the part of Blue Star would reduce Abrahim's damages.

The Court of Appeal confirmed that the duty owed by a principal to independent contractors and the duty owed by an employer to its employees is different. An employer owes a personal, non delegable duty to its employees to ensure that reasonable care is taken. The Court of Appeal noted this is a more stringent obligation than a duty to take reasonable care to avoid a foreseeable risk of injury to a person to whom a duty is owed.

The Court of Appeal noted that the Courts have accepted that:

> *"An entrepreneur who organises an activity involving a risk of injury to those engaged in it is under a duty to exercise reasonable care to minimise that risk. The duty of care does not require the entrepreneur to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent to control their systems of work without supervision. But a builder in occupation of a site owes a duty to persons coming onto that site to use reasonable care to avoid physical injury to them, where the risk of injury is foreseeable."*

In this case Parkview had the overall control of the building site. It was the principal of the project and the occupier. It owed a duty to exercise reasonable care to prevent injury by reason of dangers onsite. It owed a duty to take reasonable care rather than prevent a particular injury.

The Court of Appeal concluded in this case reasonable care required daily inspections of the site and the failure to detect the obvious danger created by the removal of Plank 3 from the hop up, either because no inspection occurred or when inspections were carried out inadequately, constituted a breach of duty by Parkview. The Court of Appeal noted if Parkview had discharged its duty, the removal of Plank 3 would have been detected. The finding of negligence against Parkview was upheld.

In relation to the claim against Erect Safe Scaffolding, the Court of Appeal noted that some tradespeople had a propensity to remove planks to facilitate their works. Erect Safe knew that this regularly took place notwithstanding the principal contractor repeatedly giving instructions to contractors that they were not to remove planks themselves and they should ask the principal contractor to undertake or arrange the alteration to the scaffolding. The Court of Appeal noted there was a foreseeable risk that workers would suffer harm by reason of an unauthorised removal of a plank and in light of Erect Safe Scaffolding's knowledge and experiences of the practices on building sites, Erect Safe ought to have secured the planks in a different fashion.

Erect Safe was not under a contractual obligation to carry out inspections on the site, however it was aware of the possible practices of others on a construction site.

In those circumstances the Court of Appeal upheld the finding of negligence against Erect Safe.

The Court of Appeal also determined that Blue Star had been negligent. The Court of Appeal noted it was not open to Blue Star to escape liability by contending that it relied on the expertise of Erect Safe and Parkview. Blue Star owed a personal, non delegable duty to ensure that reasonable care was taken to prevent Abrahim from being injured on the worksite. The circumstances of the accident could not permit Blue Star to escape from liability.

The Court of Appeal then turned to apportionment of liability between the three tortfeasors, concluding that the primary responsibility for the injuries sustained by Abrahim rested with Parkview. Whilst the initial danger was created by Erect Safe, Parkview was aware of the potential danger where planks were removed and Parkview had implemented the system of inspection which had failed in this case. The Court of Appeal concluded that:

> *"Had Parkview not failed egregariously to implement its own system, the accident would have been averted."*

Blue Star's contribution was seen to be less than that of Parkview's. The Court of Appeal determined an appropriate

apportionment was one half to the head contractor, one third to Erect Safe and one sixth to Blue Star.

At the end of the day the head contractor was found to be predominantly responsible for an injury on a construction site as a consequence of unsafe scaffolding. That liability arose as a consequence of the control of the site vested in the head contractor and the inspections it ought to have undertaken during the project. The scaffolder's liability arose as a consequence of the unsafe construction of the scaffolding.

Here, the head contractor had engaged scaffolders to construct scaffolding and that scaffolding had been constructed in a way which made it unsafe when it was tampered with by other contractors.

Other contractors had tampered with the scaffolding, altering its configuration, an occurrence which was known to occur on the site and the head contractor could not escape liability by asserting that the liability should rest with the scaffolder who installed an unsafe platform andit should not be blamed for the unauthorised actions of others.

No doubt those who altered the scaffolding would have also been found liable but as is often the case on a construction site, it will be difficult to prove who actually altered the scaffold and in this case there was obviously insufficient evidence to prove that the renderers had removed Plank 3.

Head contractors will continue to be exposed to personal injury claims for injuries sustained by employees of contractors who are injured on construction sites and as was seen in this case they may bear the lions share of responsibility even where another contractor has created a danger.

Slip & Falls - Pointing the Finger at the Shopping Centre Manager & Cleaner

The NSW Court of Appeal has recently handed down its judgment in *Glad Retail Cleaning v Alvarenga*, a case involving a slip and fall accident in a shopping centre. The case provides guidance on what is an obvious risk to customers in a shopping centre.

Alvarenga was an employee of Woolworths which had a store in the Chester Square Shopping Centre. The Shopping Centre was managed and occupied by Mirvac. Mirvac had engaged Glad Cleaning to perform cleaning services at the centre.

Alvarenga commenced work at 6.30 am one morning, parked her car in the shopping centre car park and proceeded through the door at the back of the Woolworths store that was open to employees only when the centre was closed. Once the centre was open to the public Alvarenga could gain access to the car park only by using the travelator in the centre. At about 7.20 am, 20 minutes after the centre had opened to the public, under the instructions of her manager to go to another store to fetch some bakery ingredients, Alvarenga used the travelator in order to reach the car park. She walked over a surface close to the travelator which was being cleaned and was wet. She attempted to step over the wet section but with limited success because of her short stride and one of her feet made contact with the wet surface. Alvarenga knew that the surface was wet and she walked carefully over the wet section of the floor.

Alvarenga slipped on the travelator when the wet soles of her shoes came into contact with the moving metal surface of the travelator.

It was the cleaner's responsibility to switch on the travelator and the primary judge found there was no reason why the cleaner could not have attended to cleaning the area near the travelator before the travelator was switched on.

Alvarenga commenced proceedings against Mirvac and Glad Cleaning, claiming damages for the injuries she sustained. The primary judge concluded that Mirvac was negligent as it failed to require the cleaning to be done outside public hours and failed to exercise reasonable care and skill in selecting Glad Cleaning as its contractor. The primary judge also found Glad Cleaning was negligent as it allowed water to accumulate near the travelator and had not taken steps to protect Alvarenga from the risk of slipping due to the lubricating reaction between water and a hard surface. Damages were assessed in excess of $500,000. Liability was apportioned 80% to Glad Cleaning and 20% to Mirvac. There was a 10% reduction for contributory negligence.

Both Mirvac and Glad Cleaning appealed.

On appeal it was argued that the risk was an obvious one and there was no duty to warn of the risk and that there was no

breach of duty of care. Sackville AJA delivered the unanimous judgment of the Court of Appeal confirming that the findings of breach of duty should be upheld.

The definition of obvious risk is found in the *Civil Liability Act 2002*.

A defendant does not owe a duty of care to another person to warn of an obvious risk to that person.

Further, a defendant is not liable in negligence for harm suffered by a plaintiff as the result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

Finally, there is a statutory presumption that a plaintiff is aware of the risk of harm if it was an obvious risk. This presumption is important where a defendant relies on the defence of a voluntary assumption of risk.

So was the risk in this case an obvious risk and if so what were the consequences?

A finding that a risk of harm is an obvious risk does not automatically prevent a defendant being held liable for breach of duty. As the Court of Appeal noted, a finding of obvious risk eliminates any common law duty to warn but does not of itself have any other relevance to whether a defendant was in breach of its duty of care. However, the obviousness of the risk may be relevant to the question of breach.

Sackville AJA noted that:

> *"The definition of obvious risk incorporates an objective test but one that is applied by reference to the position of the person concerned. ... since the test is objective it is not a plaintiff's state of mind that is determinative, but what a reasonable person in his or her position would regard as obvious. ... the plaintiff's evidence is relevant to the assessment of what a reasonable person would know about the risk."*

In this case Alvarenga had seen the cleaner with a mop in hand and it would have been obvious to Alvarenga that the cleaner was using water on the surface ahead of her, however the risk here was the lubricating effect of wet shoes coming into contact with a moving (but dry) steel surface.

The onus of proving the risk was obvious rested with Glad Cleaning and Mirvac. Alvarenga had carefully negotiated the section being mopped. There was no suggestion that Alvarenga's footwear was especially likely to accumulate moisture when she passed over the wet surface or that a reasonable person in her position would expect that the extent of accumulation of moisture was unusual.

The way the accident happened needed to be taken into account when determining whether the risk was obvious. The primary judge had found that the risk was not an obvious one and the Court of Appeal noted that common sense did not provide a sound basis for overturning that finding.

Sackville AJA noted that the risk of injury due to a person slipping on a moving travelator because of moisture attaching to their shoes was foreseeable notwithstanding that the danger could not be said to be obvious to someone in Alvarenga's position. The risk was a significant one.

Cleaning the area before the shopping centre opened would have eliminated the risk to which all users of the travelator were exposed when they were forced to walk across a wet area.

The Court of Appeal confirmed in those circumstances the finding of negligence of the primary judge against Glad Cleaning was made out.

Whilst Mirvac had also pursued an appeal, its appeal was dismissed for reasons other than the determination on liability. Mirvac had appealed out of time and was seeking an extension of time to appeal. It was claimed Alvarenga suffered no prejudice if Mirvac was granted an extension of time. The application for an extension of time was ultimately refused as Alvarenga had suffered prejudice.

Alvarenga had a judgment in her favour. Mirvac had paid 20% of the judgement to Alvarenga's legal representatives before it appealed. Alvarenga argued that the effect of that payment was that Alvarenga became liable to pay out of the monies that

she received from Mirvac the amount of workers compensation she had received from her employer and would be unable to claim any further workers compensation payments regardless of the outcome of any appeal by Mirvac and Glad Cleaning. This was said to flow from the consequences of 151Z of the *Workers Compensation Act 1987*.

Mirvac's cheque had been presented to Alvarenga's lawyers and was met on presentation. Section 151Z of the *Workers Compensation Act 1987* has two purposes. It deals with the potential for double recovery by a worker who is entitled to both workers compensation and to common law damages from a third party tortfeasor and it provides for the workers compensation insurer to recover any payments of compensation from a third party tortfeasor responsible for the damages.

The Court of Appeal confirmed the payment of some but not all damages payable by a third party tortfeasor triggers Section 151Z and the obligation to repay the workers compensation insurer had been enlivened even where a judgment was ultimately overturned.

The Court of Appeal determined that the consequence of a grant of an extension of time to file a Notice of Appeal, depending on the outcome of the appeal, could cause irremediable prejudice to Alvarenga and for that reason the Court refused to grant leave to appeal out of time. Mirvac could not pursue its appeal.

Fortunately for Mirvac, Glad Cleaning's challenge to the judgment failed. If Glad Cleaning's appeal had succeeded, Mirvac would have been liable for the totality of damages, not merely the 20% proportion that it had paid based on the apportionment of liability of the primary judge. That is because each defendant who is liable for damages in a personal injury claim is liable to pay the totality of damages notwithstanding any apportionment of liability as proportionate liability does not apply to personal injury claims. Cross claims between defendants and judgments on cross claims ensure that contributions between defendants are appropriately adjusted.

At the end of the day the judgment obtained by Alvarenga against both Mirvac and Glad Cleaning was not disturbed.

Here the cleaner could have simply carried out cleaning activities at an earlier time, before the travelator was activated which would have removed the risk. Interestingly, the Court determined the risk of a slip on the travelator caused by a wet shoe was not an obvious risk and therefore there was a duty to warn about that risk. There was a duty to warn and a warning that the floor was wet may not have been sufficient as the risk properly described was a risk of slipping on the travelator when wet shoes came into contact with a moving steel surface. One ponders what warning would have been appropriate. Was it necessary to provide a warning that spells out there is risk of slipping on the travelator if a customer has water on their shoes?

The timing of cleaning activities was the key to liability in this case and both Mirvac and Glad Cleaning were found liable in circumstances where cleaning had been undertaken during opening hours at the shopping centre.

Amendments to the Insurance Contracts Act 1984 (Cth)-New Provisions Relating to Subrogation and Third Party Beneficiaries

Amendments to the *Insurance Contracts Act 1984* (Cth) (**ICA**) were passed by the Federal Government on 28 June 2013.

Some provisions took effect immediately. However, the commencement date for most provisions have been staggered over 6, 12 and up to 30 months after 28 June 2013.

Two important areas this article will address involve amendments to the ICA regarding subrogation which commenced on 28 December 2013 and the amendments regarding third party beneficiaries which will commence on 28 June 2014.

Subrogation

Section 67 of the ICA has been amended with new provisions to clarify the priority of payments obtained in a recovery action against other persons in respect of a loss for which the insurer:

- is liable to indemnify the insured under a contract of insurance, and
- has a right to exercise subrogation under the contract of insurance.

These new provisions apply to:

- all contracts of insurance entered into after 28 December 2013, and

- all existing contracts of insurance that are renewed after that date.

The provisions will effect recovery actions where the insured is a third party beneficiary (discussed later in this article).

Section 67 ICA now contemplates two scenarios:

- Where the recovery action is conducted by the insurer; or
- Where the recovery action is conducted by the insured.

Although recovery actions are invariably conducted by insurers exercising their rights of subrogation they often involve a claim to recover more than the total amount indemnified to the insured.

As such, before commencing court proceedings for a recovery action, it is incumbent on an insurer to ascertain if the insured has any additional losses that were not covered by the amount indemnified under the policy by the insurer (including any relevant deductible of excess paid by the insured). These are commonly referred to as "uninsured losses" and are included as part of the recovery action.

In those circumstances, the issue which arises for consideration is how the total of any settlement sum or judgment, interest and costs awarded in the recovery action must be divided between the insurer and the insured, particularly if the judgment is significantly below the overall loss which is sought to be recovered.

The new provisions set out how this distribution is to be made. Where the insurer runs the recovery action the insurer is entitled to the following:

- The total amount indemnified to the insured under the policy in respect of the loss, and
- The insurer's costs of the recovery action.

Sub-Section 67(3) provides that where the insured recovers an amount from another person, the insured is entitled to the following:

- The insured's uninsured losses, and
- The insured's costs of the recovery action.

If there is any additional amount recovered (for example interest) the party conducting the recovery action is entitled to that additional money.

However, if the amount recovered is less than the total of the insurer's payments and the insured's uninsured losses (and the costs of the party conducting the recovery action), the insurer and insured will share the recovery on a pro rata basis in proportion to the respective amounts that were claimed in the recovery action.

The amendments provide that the party conducting the recovery action is entitled to the full amount of interest awarded unless both insurer and insured recover interest jointly, then it is to be divided fairly between them having regard to the proportions of their respective losses and the time during which the insurer and insured have lost the use of their money.

The rights of the insurer and insured under the new regime can be varied by conditions in the insurance policy or any agreement made between the insurer and insured after the loss occurred.

The insurer and insured can therefore agree on how much is to be claimed in the recovery action and who will conduct it.

Third Party Beneficiaries

Pursuant to the new Section 11(1) ICA, which will commence on 28 June 2014 "third party beneficiary" under a contract of insurance means:

> *"...a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends."*

The rights of third party beneficiaries under contracts of insurance have been clarified.

These new provisions relate to requests by third party beneficiaries to insurers under a contract of liability insurance for

information and applies to:

- all contracts of liability insurance entered into after 28 June 2014, and
- existing contracts of liability insurance that are renewed after 28 June 2014.

Section 41 ICA has been amended. That section applies to contracts of liability insurance where it would constitute a breach of the contract if:

- an insured or third party beneficiary were to settle or compromise a claim against the insured or third party beneficiary, or
- to make an admission or payment in respect of such a claim

without the consent of the insurer.

In such contracts, the insured or third party beneficiary may give written notice at any time to the liability insurer requiring the insurer to provide a written decision confirming that indemnity has been admitted and that the insurer will conduct the claim including any legal proceedings and negotiations.

If the liability insurer does not provide these responses within a reasonable time, the insurer may not refuse to pay the claim and cannot seek to reduce the amount payable if the insured has otherwise breached the contract by either settling/compromising the claim or making an admission without the insurer's consent.

These new provisions provide more clarity regarding the benefits and obligations available to third party beneficiaries and the insurer. They apply to:

- all contracts of general insurance entered into after 28 June 2014 and
- existing contracts of general insurance that are renewed after 28 June 2014.

The amendments also provide that the duty of utmost good faith will apply to the relationship between the insurer and as that duty requires an insurer to clearly inform the insured (and now a third party beneficiary) of the general nature of the insurance provisions requests from a third party beneficiary for a copy of the relevant insurance policy will need to be looked at in a new light.

Section 48 ICA more clearly sets out a third party beneficiary's entitlements under Sub-Section 48(1) as follows:

> *"A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract."*

Sub-Section 48(2)(a) ICA provides that a third party beneficiary has the same obligations to the insurer as the third party beneficiary would have if the third party beneficiary were the insured.

Accordingly, third party beneficiaries who make a claim for indemnity under a contract of general insurance owe the insurer a duty of utmost good faith. If applicable, the obligations upon an insured not to settle or compromise a claim or to make admissions without the insurer's consent (provided Section 41 is complied with, if it arises), extends to include third party beneficiaries.

Sub-Section 48(3) ICA has been extended. Not only does the insurer, in respect of a claim brought by a third party beneficiary, enjoy the same defences that are available had the claim been made by the insured, those defences include but are not limited to the conduct of the insured whether such conduct occurred before or after the contract was entered into.

Therefore, an insurer would be entitled to investigate whether any non-disclosures by the insured (being conduct of the insured before the contract was entered into) are material, even though the claim is made by a third party beneficiary. This new provision suggests that the behaviour of the insured continues to be relevant even if the claim is by a third party beneficiary.

Conceivably, an insurer can also consider whether any conduct of the insured that represents a breach of contract such as compromising the claim or making admissions without the insurer's consent (being conduct of the insured after the contract was entered into).

If so, the insurer can defend the claim by a third party beneficiary based on the conduct of the insured even after the contract

of insurance was entered into.

The new provisions certainly clarify and define the role, rights and entitlements of third party beneficiaries to:

- request information from an insurer, and
- make a claim under the contract as though they were an insured.

In respect of third party beneficiaries, the new provisions make two things abundantly clear:

- They can make a claim under the insurance contract despite being unnamed, and
- They have the same obligations (and thus owe duty of utmost good faith) as the insured to the insurer.

Failure to comply with those obligations would constitute a breach of the third party beneficiary's duty of utmost good faith.

Similarly, the insurer's entitlement to rely upon all defences available to it in a claim by a third party beneficiary, as though it were a claim by the insured, including the conduct of the insured before and after the contract was entered into is a significant benefit for insurers.

As with the benefits given to third party beneficiaries, however, there are obligations and duties that come with them such that the insurer's obligation to respond within a reasonable time to a request from a third party beneficiary to provide written confirmation regarding indemnity and the conduct of the claim (including a request for a copy of the policy) has also been clarified.

Significantly, if the insurer fails to comply with this obligation to respond within a reasonable time will constitute a breach of the insurer's duty of utmost good faith. This could trigger the new provisions which empower ASIC to bring a representative action against the insurer to impose penalties that could impact upon the conditions under which the insurer's licence is issued or renewed.

The importance of these new provisions, when they commence on 28 June 2014, will be felt mostly by liability insurers. Examples commonly seen in the industry include:

- A liability policy issued to a head contractor or builders which contains an insuring clause under which cover extends to include all sub-contractors of the insured even though those sub-contractors are not named in the policy schedule.
- A construction works policy issued to an insured may contain an insuring clause that extends cover to include principals of the insured though they are not named in the policy schedule.
- Unnamed people in the policy schedule but who are referred to in the insuring clause such as company officers, directors, and even related and subsidiary companies who are often simply described as such without being named as insureds in the policy schedule.

In all these examples, the un-named party who is described in the contract of insurance whether by name or not, is a third party beneficiary for the purpose of the new provisions.

Insurers must therefore exercise care upon receipt of requests for copies of insurance policy documentation or claims made by parties who are not the named insured but who may have a relationship with the insured that provides them with cover under the policy as a third party beneficiary.

Such requests cannot be ignored given the potential ramifications for insurers who fail to implement adequate procedures to ensure such requests are responded to efficiently and within a reasonable time.

The New Anti Bullying Regime – A Primer for Employers

The Commonwealth Government's Workplace Anti Bullying regime joined the industrial landscape on 1 January 2014. The legislation is introduced to the Fair Work Act 2009 by the Fair Work Amendment Act 2013.

The provisions reflect the significant consequences that can arise from bullying in the workplace. Various calculations estimate that workplace bullying results in costs to employers totalling $6 billion to $13 billion per year, arising from reduced productivity, absenteeism, staff turnover, poor morale, regulatory activity and litigation.

This article serves as a short introduction to the regime's objectives and methodologies and also considers implications and

responsive strategies for employers.

Commencing 1 January 2014 a worker (as defined by work health and safety legislation) can apply to the Fair Work Commission (the "Commission") for an order to stop bullying in the workplace.

The definition of worker includes employees, contractors/subcontractors, employees of contractors/subcontractors, employees of a labour hire company assigned to a particular workplace, apprentices or trainees, students performing work experience and volunteers.

The provisions cover employers who are, to use the language of the legislation, "constitutionally-covered businesses". These businesses include Propriety Limited corporations, any Commonwealth Government Authority and companies incorporated in Federal Territories. Businesses that are not covered include sole traderships or partnerships, State government Departments and some Local Government organisations.

Section 789FD of the Fair Work Act 2009 identifies behaviour the regime is designed to capture. Bullying is defined as behaviour affecting a worker, in a covered business, performed by an individual or group, that is unreasonable, that is repeated and that creates a risk to health and safety. The behaviour does not include reasonable management actions carried out in a reasonable manner.

Proceedings at the Commission begin when a worker completes application documentation (available online) and lodges it. An "anti-bullying team" at the Commission will then serve relevant documentation on the employer, and possibly on the persons reportedly responsible for bullying, and prepare a report. The matter is assigned to a Commission officer. The Commission must take these steps within 14 days of receipt of the application. The employer, and possibly the person/s identified as bullies, are required to reply, again utilising particular pro-forma documentation, within seven days. All submitted documentation is then provided to all parties to the investigation. The manner in which the complaint will proceed then rests in the hands of the Commission officer. A number of steps may then ensue and we discuss the options below.

If the Commission considers the matter appropriate for a mediation session it will take steps to organise this. This mediation will be a voluntary, informal, private and typically confidential process facilitated by a Commission officer. The officer will have considerable independence when determining how to conduct the mediation but will remain neutral and will do all practically possible to help the parties reach agreement through identification of common ground and resolution options. The mediator will aid reduction of an agreement to writing, if appropriate. Mediations may be in person, by telephone or by video conference. The Commission will never endorse or recommend resolution of an application via payments of money.

If the Commission officer deems the matter unsuited to mediation or if mediation does not succeed, a preliminary conference will usually ensue. One or more preliminary conferences may precede a hearing. A Commission officer might issue orders seeking submissions or other materials from any party. The officer is empowered to perform investigations, require documents, take evidence under oath or seek oral submissions. Rules of evidence do not apply at hearings but their effect may be persuasive. A Commission officer is also entitled to take into account investigations by external investigators, whether representing an authority or either party.

When conducting its hearing the Commission will contemplate steps taken by an employer to minimise risk, investigate an event, create responsive protocols and procedures. The Commission will not issue an order if it concludes that bullying has already ceased and will not recur. The employer ought therefore investigate a scenario thoroughly, resolve all issues conclusively and formulate adequate evidence of those steps.

It is noteworthy that the Commission Guides encourage workers to raise issues in the workplace and seek resolution via supervisors/managers, health and safety representatives, human resource departments and unions. The Commission implies that its jurisdiction ought to be treated as a final resort.

Orders can arise from the Commission when it is satisfied that a worker has been bullied at work and there is a risk the bullying will continue. When considering the content of its orders the Commission must contemplate outcomes arising from investigations by other bodies, alternative grievance resolution procedures available to the worker and the possible outcome of those procedures.

Orders can include a requirement that a particular behaviour ceases; a requirement that an employer monitors the conduct of specified persons; provision by an employer of information and support to specified persons; a requirement that an employer

or other persons comply with workplace policies; and review by an employer of its workplace policies and systems. The Commission can also refer a matter to the Work Health And Safety Authority or Human Rights Commission if it believes the jurisdiction of those bodies is enlivened.

Employers will be alert to direct effects of bullying in the workplace that go to morale, productivity, relationships with suppliers, relationships with customers and publicity issues. The Commission's new jurisdiction will enliven indirect consequences including investigation costs, systems and documentation reviews, responses to hearings and implementation of orders. Additionally, bullying can trigger scenarios involving discrimination, harassment, negligence and unfair dismissal that can find their way through the Courts, generating costs and awards of damages; discrimination cases can move to the Human Rights Commission; local work health and safety regulations can be implicated and giving rise to investigations and prosecutions; Workers Compensation claims can, of course also ensue.

A range of strategic objectives should animate an employer's mind when responding to an application in the Commission: minimisation of disruption to productivity; preservation of workplace relationships; retention of valued staff; maintenance of supply chain rapport; protection of customer relations. An employer should strenuously endeavour to prevent referral by the Commission to Work Safe Australia. The employer will do all possible to preclude emergence of harassment, discrimination, contractual, negligence or unfair dismissal proceedings from the behaviour that is construed as bullying. Minimisation of unfavourable publicity will be a factor in an employer's deliberations.

These strategic objectives will inform the employer's response. It will be incumbent on an employer to seek to manage the proceedings, to the extent practically possible, at the earliest stage. This is an acknowledgment of the duty that Courts have placed on employers to assume control of problematic situations and respond adequately and in a manner that is curative. The employer should ensure that a suitable timetable for investigations, submissions, accrual of evidence, mediation and hearing is devised. The employer can assist direction of the Commission as to the nature of its further enquiries. The employer will need to ensure its response is not prejudiced by the initial seven day response time. Adjournments and preliminary conferences can be obtained where necessary and where they will assist the Commission's deliberations. The role of witnesses, written evidence and oral evidence will need to be considered. Mediation is of prime importance to an employer and, presuming it serves as a less stressful device, to the worker. Mediation is private and confidential and it may result in a scenario where no formal orders emerge. This compares favourably with hearings that are public and give rise to published decisions. If a hearing must ensue an employer should remain alert to the possibility of privacy orders and the removal of names from published decisions.

Defences that may be available to an employer, in circumstances where a consensual outcome is precluded, include arguments as to: whether bullying occurred; whether bullying was repeated; whether there is a risk of harm to health and safety; whether the behaviour was a reasonable management action performed in a reasonable manner; whether the alleged bullying occurred at work; whether the complaint is frivolous, vexatious or has no reasonable prospects of success; whether there is a risk of further bullying; when the worker's employment is likely to end, the Commission's jurisdiction could be extinguished; whether the employer is covered by the legislation.

Ostensibly the Commission is a cost free environment, however the Commission retains power to award costs in circumstances where it deems that appropriate. Those costs can be party/party or indemnity based.

The Commission will not order payment of monies by any party by any party. It does not have that power. Nor can it levy fines or penalties. However, if an employer contravenes a Commission's anti-bullying orders further proceedings, with pecuniary penalties against companies and/or officers, can ensue. The limitation period for these letter proceedings is six years.

Finally, an employer ought to remain alert to the possibility of an appeal from a decision of a single Commission Member to the Commission Full Bench. Bases for appeal can emerge from purported errors of fact, errors of law, public interest, diverse precedents requiring guidance from an Appellate Court or a decision that is inconsistent with other decisions.

Changes To The NSW Tribunal System

From 1 January 2014 NSW statutory tribunals will merge under a single operational structure known as the New South Wales Civil and Administrative Tribunal or "NCAT". This will bring NSW in line with the changes already undertaken in Queensland and Victoria where all statutory tribunals now come under the acronyms of QCAT and VCAT respectively.

The change comes as a result of a Legislative Council's Standing Committee on Law and Justice Inquiry which recommended the consolidation of the more than twenty tribunals to provide a single gateway to the tribunal system of NSW in an attempt to make access to tribunals less complex for the public.

It is hoped there will be a seamless transition to the new operational structure with business as usual for all tribunals. The tribunals will remain at their existing locations. A new NCAT website will be formulated along the lines of the existing CTTT website.

The new system comes into operation under the legislation enacted in the Civil and Administrative Tribunal Act 2013 and will be under the oversight of the Supreme Court. In line with this aim the Attorney General, in October 2013, appointed Robertson Wright SC as a Supreme Court judge and as President of NCAT. Mr Wright has been a practising barrister for 30 years and has been a judicial member of the Administrative Decisions Tribunal since 2007.

The existing tribunals will be condensed into four divisions known as:

- Administrative/Equal Opportunity Division;
- Consumer and Commercial Division;
- Occupational and Regulatory Division; and
- Guardianship Tribunal.

Each division will contain what is known as a 'List' of tribunals administered by that division. The Lists at present are:

Administrative/Equal Opportunity Division:

- Administrative Decisions Tribunal;
- Local Land Boards;
- Victims Compensation Tribunal; and
- Charity Referee.

Consumer and Commercial Division:

- Consumer Trader and Tenancy Tribunal;
- Administrative Decisions Tribunal – Retail Leases;
- Local Land Boards – Dividing Fences

Occupational and Regulatory Division:

- Aboriginal Land Councils PIDT;
- Health Tribunals (too numerous to list but includes dental, medical, etc);
- Local Government PIDT; and
- Vocational training Appeal Panel.

Guardian Tribunal:

- Guardianship Tribunal.

The formation of NCAT should have little impact for those who regularly use or attend various tribunals and time will tell whether it is seen as a more simplified and easily accessible system.

Workers Compensation Roundup

Workers Compensation Journey Claims Travel to and From Work is not Enough to Attract Compensation

In our November Edition of our Newsletter we reviewed the legislative amendments introduced on 18 June 2012 in relation to journey claims. In particular we examined the Arbitrator's decision of Anna Bina v ISS Property Services Pty Limited.

Arbitrator Sweeney was required to determine whether a routine journey to and from work was sufficient to be considered a

"real and substantial connection with employment" as set out in Section 10(3A) of the Workers Compensation Act 1987.

Ms Bina was unsuccessful in her claim. Arbitrator Sweeney was of the opinion that an injury on a journey, namely between a worker's place of abode and place of employment, does not arise out of employment unless there was some greater connection with the employment than simply having to get to and from the place of your employment.

President Keating heard the matter on appeal and delivered his judgment on 19 December 2013. He also determined that the mere fact the worker was driving to and from work was not a real and substantial connection to employment He reiterated Arbitrator Sweeney's essential conclusions that:

- a substantial connection is "one of substance";
- employment is the same as in Section 9A of the Workers Compensation Act 1987, that is, the activities of or incidental to the employment as opposed to the mere fact of being employed;
- the mere fact that the worker must travel to and from work is insufficient to establish a real and substantial connection between employment and the accident - there must be some real relationship (connection) between the activities of the employment and the accident out of which the personal injury arose; and
- if merely travelling to and from work was sufficient to establish the relevant connection, the amended legislative provisions in Section 10(3A) would be superfluous.

President Keating further commented that the circumstances of Ms Bina's case, such as a lack of convenient public transport or the fact that Ms Bina was working a split shift and making two journeys to and from work each day was insufficient to bring her within the terms of the provisions. Unfortunately President Keating declined to provide examples of circumstances where there would be a real and substantial connection. He however note the terms of Section 10(3A), should be applied in "a common sense and practical manner in each case".

We note this was the second decision of the Presidential Unit of the Workers Compensation Commission with regards to the new journey provisions. We are of the view the law is now established that the simple fact of travelling to and from work is not a real and substantial connection to employment. It will be interesting to see whether workers now attempt to bring cases based on dual purpose journeys whereby they were undertaking employment tasks such as taking work home and making related phone calls whilst in transit. Workers have had some success in the South Australian workers compensation jurisdiction when relying upon such factual scenarios.

CTP Roundup

SICORP Is Not An Insurer And Is Not Liable Under Dual Insurance Principles In CTP Claims

The NSW Supreme Court has recently delivered judgement in QBE Insurance (Australia) Limited v NSW Self Insurance Corporation [2013] NSWSC 1841, and the NSW Government is sure to be relieved that SICORP and TMF are not liable to contribute towards CTP claims where vehicles involved in motor accidents are owned by Government Agencies whose liabilities are managed by TMF and SICORP.

Mr Mannall, a NSW Police Officer, was injured in the course of his employment when he was a passenger in a motor vehicle accident caused by the negligence of his colleague driving a Police vehicle.

There was no dispute as to the quantum of damages paid to Mannall. QBE was the CTP insurer of the Police vehicle.

Hammerschlag J of the Equity Division was asked to determine whether QBE was entitled to an indemnity from the NSW Self Insurance Corporation (SICORP) for a common monetary obligation in respect of the damages paid to Mannall.

SICORP manages claims made against the NSW Police however in this case QBE the CTP insurer dealt with the Mannall claim. After the Mannall claim resolved QBE sought contribution from SICORP on the basis that both SICORP and QBE were liable for Mannall's damages.

The Court heard evidence that the Treasury Managed Fund (TMF) came into existence on 1 July 1989 as an indemnity scheme which provided security in relation to the liability risks of budget dependent agencies of the NSW Government. On 1 July 2005 SICORP became the manager of TMF.

QBE relied on Section 8 of the Self Insurance Corporation Act which provided that one of the functions of the SICORP was to act for the State or Authority of the State in respect of claims under the Scheme.

QBE argued this created a binding obligation on SICORP to ensure the Police Force had its liabilities met from a fund of money under SICORP's management. QBE argued SICORP had liability to the plaintiff which was coordinate with the liability attaching to QBE's CTP policy.

In response, SICORP argued that the Police Force was not a separate legal entity and TMF was not an employer of the injured Police Officer. TMF did not of itself have any corporate existence but was merely a fund belonging to the Crown that was administered by SICORP.

Hammerschlag J acknowledged that SICORP was managed like an insurance company but TMF was used as a pool of funds for insurance claims for which the State was liable, however, in reality it was not an insurer.

Hammerschlag J held that there was an insufficient commonality of interests between QBE and SICORP to engage the principles of contribution.

The Court held that the fund which underlies TMF had no separate legal existence and the monies in it belonged to the State. The TMF was managed by SICORP on behalf of the State.

Hammerschlag J held that SICORP's obligation was to manage the TMF by meeting claims made against Government agencies. This obligation was in no way coordinate with that of QBE under its CTP policy which rendered it liable for the claim brought by the injured Police Officer.

Hammerschlag J dismissed the claim for contribution brought by QBE and reserved his decision on costs.

This decision concludes that SICORP is merely a statutory entity established to manage a pool of funds that covers liabilities of Government agencies. TMF and SICORP are not liable as co-contributors in motor vehicle accidents involving negligence of employees of the Crown as they are not insurers and their liability is not co-ordinate with the liability of a CTP insurer.

Pushbikes And Motorcycles - CTP Liability. Two Judgments For Defendants At First Instance, With Very Different Results On Appeal

Egan v Mangarelli [2013] NSWCA 413

Mitchell Egan, aged 16 years, was riding a bicycle when he was run over by a bus owned by Westbus on 1 July 2007. Egan sustained a right above knee amputation and a brain injury.

Egan alleged that he was walking his bike across the roadway with his feet straddling the frame when Johnny Mangarelli, the bus driver, pulled the bus from a kerb, collided with Egan and/or the bike, knocked Egan to the road and ran over him. Egan argued that the bus was stationary when he commenced walking his bike across the road and when he looked around the front of the bus to ensure there were no other vehicles coming. Egan claimed he then heard the roar of the engine whereupon the bus took off and Egan fell under its front. It was alleged that Mangarelli failed to keep a proper lookout and brake in sufficient time to avoid colliding with Egan.

Liability was denied. Mangarelli gave evidence that he pulled his bus from the kerb and travelled 4-5 metres when he saw a boy (Egan's friend, Mr Aslett) riding a bike across the path of the bus, causing Mangarelli to release the accelerator and slow down. Mangarelli continued approximately 2 further bus lengths when he felt a bump as a wheel rolled over something (the something being Mr Egan). Mangarelli said did not see Egan prior to the collision.

The trial judge, Justice Hoeben, gave detailed reasons and held that Egan had not established that the defendant was negligent. His Honour rejected evidence from Egan and two lay witnesses as to the circumstances of the accident, on the basis that their evidence was unreliable and nconsistent with objective evidence (including CCTV footage, the location of the bicycle and biological matter on the roadway). Expert mechanical and biomechanical engineers gave evidence that the accident could not have occurred in the manner alleged in the Statement of Claim.

His Honour concluded there were too many unknown factors as to how the accident occurred. Putting Egan's case at its

highest, it could be said was that there were possible scenarios that were consistent with a failure by Mangarelli to keep a proper lookout, but Egan was unable to prove any of those scenarios on the balance of probabilities.

His Honour referred to principles applicable to civil matters where direct proof of how an accident occurred is not available, as articulated by the High Court in *Bradshaw v McEwans Pty Limited (1951) 217 ALR 1* and *Luxton v Vines (1952) 85 CLR 352*.

His Honour noted *"it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture … The circumstances give rise to nothing but conflicting conjectures of equal degrees of probability and no affirmative inference of fault on the part of a driver of a motor car can reasonably be made."*

His Honour concluded that the present case fell within those established principles and entered judgment in favour of the defendant.

On appeal, Egan argued that Hoeben J erred in rejecting his evidence and evidence from the two lay witnesses. It was alleged that His Honour did not adequately deal with all evidence as to the circumstances of the accident. Egan argued his Honour did not adequately address Mangarelli's initial statement to Police which, Egan alleged, was inconsistent with later evidence, suggesting that Mangarelli reconstructed his version after viewing CCTV footage. It was also alleged, amongst other matters, that His Honour's findings of fact in respect of where and how the collision occurred were erroneous.

Mangarelli's insurer argued that Egan had failed to establish precisely when Mangarelli ought to have seen Egan and taken evasive action.

The Court of Appeal unanimously dismissed Egan's appeal, upholding the findings of the trial judge.

Tobias AJA agreed that the evidence gave rise to conflicting inferences that possess equal degrees of probability, so that the choice between them can only be a matter of conjecture. The evidence of the lay witnesses did not offer assistance. The evidence from the experts on the liability was also of equal degrees of probability, with the consequence that no reasonable and definite conclusion could be drawn.

The decision is an important reminder that all avenues of investigation should be pursued from the outset in matters where liability is questionable. The evidence from all possible witnesses should be considered. The existence of several plausible factual scenarios can give rise to a favourable finding for defendants.

It should be noted that the case was determined prior to *Axiak v Ingram [2012] NSWCA 311*. Had the accident occurred under the Axiak interpretation of the blameless accidents provisions, Egan would have been successful on the issue of liability, via a deemed finding of fault, and the insurer would have been liable to pay damages of $6,795,055 (less any contributory negligence) plus funds management.

Sexton v Homer [2013] NSWCA 414

In Sexton v Homer [2013] NSWCA 414 the trial judge found in favour of the defendant, but a very different result ensued on appeal.

That case concerned a motorcycle accident on 16 May 2008. Callum Sexton was badly injured when his motor cycle was struck by a motor vehicle driven by the respondent, Martin Homer, at a T-intersection. Sexton was not wearing a helmet and his injuries were severe enough that he qualified as a participant in the Lifetime Care and Support Scheme. The parties agreed on damages and the trial was confined to liability.

Numerous factors were associated with the insurer's decision to deny liability. The motorcycle ridden by the plaintiff was not designed for use on urban roads. It was unregistered. It did not have a headlight nor any other lights or reflectors. It was ridden at high speed immediately prior to the accident. The accident occurred in poor light conditions at dusk.

On 1 February 2012, judgment was entered in favour of Homer by Johnston DCJ. Sexton was ordered to pay Homer's costs. His Honour accepted that Homer did not see Sexton prior to the collision, and this was reasonable in the circumstances. His Honour found that Homer was not liable. In the alternative, his Honour assessed contributory negligence of 80%.

Sexton filed a Notice of Appeal containing 13 grounds. The majority of the grounds related to findings of fact relating to the clothing worn by Sexton at the time of the accident, the state of the ambient light, the noise and audibility of the motor cycle and the visibility of Sexton to Homer. There were also grounds alleging that the trial judge erroneously assessed the contingent contributory negligence of Sexton and that the Trial Judge had erred in determining a claim for client legal privilege, the latter of which is beyond the scope of this article.

The Court of Appeal found error in respect of each ground of appeal relating to determinations of fact made by the trial judge.

In respect of the issue of ambient light the Court of Appeal concluded that there was probative evidence inconsistent with the trial judge's findings. Further, there was evidence to which the trial judge did not refer and the judge both misstated and failed to reconcile the evidence on which he relied.

The Court of Appeal applied a statement by McColl JA in Pollard v RRR Corporation Pty Limited [2009] NSW CA 110; "*where it is apparent from a judgment that no analysis was made of evidence competing with evidence apparently accepted and no explanation is given in the judgment for rejecting it, it is apparent that the process of fact finding is miscarried.*"

The Court of Appeal found that Johnston DCJ's judgment fell into the error described by McColl JA in Pollard. Johnston DCJ reasons did not mention testimonial evidence concerning ambient lighting and visibility that favoured Sexton's case. His Honour similarly failed to supply adequate reasons or explain why he disregarded certain evidence given at trial in respect of the clothing Sexton wore and the noise and audibility of the motorcycle.

The trial judge made an alternative finding of contributory negligence of 80% because "[e]ven if it were to be found that the defendant was negligent, his relative culpability could, in my evaluation, be extremely minimal, and the overwhelming responsibility for the collision rests with the plaintiff." The Court of Appeal noted that, prior to making a finding of contributory negligence, there must exist the premise that the defendant was in breach of his duty of care and that the breach caused the collision. The Court of Appeal noted that although Sexton failed to take reasonable care – by riding on the road at dusk, without light or helmet, as fast as he could, on an unregistered motorcycle, contrary to his mother's express instruction - the trial judge erred in failing to clearly set out the alternative findings of fact on which the assessment of contributory negligence was based.

The appeal was allowed and a new trial ordered, with the costs of the first trial at the discretion of the judge presiding over the new trial.

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