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## Are The Owners Or Occupiers Of Premises Liable For Falls On Stairs?

The New South Wales Court of Appeal in *Loose Fit Pty Limited v Marshbaum & Anor* was recently called on to determine the liability of an occupier and owner of premises where a visitor to the premises fell down stairs. The judgment is sure to bring fear to the hearts of owners.

Loose Fit were the lessee and occupier of the first floor of premises in which it operated a gymnasium and fitness centre as part of the "Vision" franchise of fitness centres.

Mr Kocx and Ms Hickie owned the building. Marshbaum fell down a flight of stairs. She alleged that there was no handrail installed, the steps were constructed of pale coloured polished timber without visually contrasting nosings and were construed with different riser heights and varied tread depths. Marshbaum sued Loose Fit alleging her injuries were caused by the negligence of the occupiers but did not sue the owners of the premises.

Loose Fit brought a cross claim against the owners of the premises.

The Trial Judge found that Loose Fit had breached its duty of care by failing to install a handrail on the upper portion of the staircase, however dismissed the cross claim against the owner on the ground that the absence of a handrail could not be characterised as a "dangerous defect" so as to give rise to liability on the part of the owners.

An appeal followed.

In that appeal it was argued that Loose Fit was not liable in negligence, and if it was, then the owners ought to be liable.

In a unanimous judgment the Court of Appeal dismissed Loose Fit's appeal against its judgment and upheld the award of damages of \$433,441.57. The Court of Appeal also found that the owner was liable in negligence and found that the owner and the occupier were equally liable for the damages payable to Marshbaum.

The determination of the claim was governed by the provisions of the Civil Liability Act 2002 (NSW). The Court of Appeal noted that the original concrete staircases were installed in 1977. Handrails were not installed in accordance with the approved plans which required pipe handrails to be installed on the upper and lower levels. The pipe handrails were apparently not in place when the owners acquired the premises. After the premises were acquired, the owners arranged to carry out substantial renovations including covering the concrete steps with blackbutt timber and constructing a stud wall along one side of the upper stairs, without Council approval. The renovations did not include the installation of handrails on the upper flight of stairs and this was a failure to comply with the Building Code of Australia as relevant at the time of the renovations.

Prior to the execution of the lease of the premises by Loose Fit there were no handrails in place. However by the time the lease commenced a handrail had been installed on the lower flight of stairs.

Marshbaum was 60 years of age and of short stature (4 feet, 10 inches) and of solid build. After

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completing a session at the gym she changed into her street wear and proceeded to the staircase and she fell as she was descending the upper flight of stairs. A joint expert report confirmed the upper flight of staircase was not fitted with a continuous handrail as required by the Building Code of Australia.

The Court of Appeal noted there was no dispute that Loose Fit as the occupier of premises owed a duty under the general law to take reasonable care to avoid a foreseeable risk of injury to the plaintiff and what constitutes the exercise of reasonable care depends on the circumstances of a particular case.

The Court of Appeal noted that it was incumbent on the plaintiff to show in relation to a occupier's failure to take reasonable precautions against a risk of harm that:

- the risk was foreseeable;
- the risk was not insignificant; and
- in the circumstances a reasonable person in the occupier's position would have taken those precautions having regard to the matters in the *Civil Liability Act 2002*.

The Court of Appeal concluded:

*"The evidence established that there was a real possibility that, in the absence of a handrail, a patron might fall while descending the staircase. If that occurred, the injury sustained by the patron could be serious, perhaps even fatal. Further, it was common ground that the installation of a handrail was a simple and inexpensive measure that would in no way curtail or impede business activities conducted on the premises."*

Whilst the Court of Appeal accepted that stairs are inherently, but obviously dangerous, occupiers are obliged to take reasonable precautions to minimise the inherent risk and what is reasonable is a question of fact dependent on the circumstances of the case.

The Court of Appeal concluded that the primary judge's findings against Loose Fit were correct.

However when it came to Loose Fit's claim against the owners, the Court of Appeal came to a different conclusion. The Court of Appeal noted that:

*"The High Court has considered the duty owed by a landlord to entrants on leased premises in a number of cases ... In Northern Sandblasting v Harris, the Court discarded the common law rule that a landlord was under no duty of care to persons injured by reason of the landlord's failure to keep the premises in repair."*

In that case, Dawson J and Gummow J in Northern Sandblasting stated that:

*"the landlord's duty of care is, that which arises under the original principles of law of negligence, namely, a duty to take reasonable care to avoid foreseeable risk of injury to the respondent. The nature and extent of the duty in the particular instance depends upon the circumstances of the case"*.

In a number of cases the Courts have determined that the duty of a landlord in relation to the safety of premises does not in general require a landlord to commission experts and inspect premises to look for latent defects nor is it a duty to make premises as safe as reasonable care can make them.

*Jones v Bartlett* is a case which has stood as the leading decision on landlord's liability for a long time. Sackville AJA noted:

*"Jones v Bartlett does not stand for the proposition that a landlord of commercial premises breaches a duty of care owed to an entrant onto the premises only if the entrant is injured by a 'dangerous defect'." I think that the primary Judge was diverted from the correct enquiry by confining his attention to determining whether the absence of a handrail amounted to a 'dangerous defect'.*

*The questions that have to be addressed are whether there was a foreseeable risk of harm to the entrant and, if so, what (if anything) a reasonable person in the landlord's position would have done in response to that risk. The existence of "dangerous defect" might be an important consideration in answering those questions but it is not necessarily the only decision. In New South Wales it is necessary also to take account of Section 5B of Civil Liability Act 2002.*

*As a general proposition, as between the tenant occupier and the landlord of commercial premises, liability for injuries sustained by an entrant onto the premises will rest primarily with the former. That is because a tenant is generally in possession and control of the premises and can determine who enters and under what conditions ... but everything must depend on the particular circumstances of each case."*

In this case, renovations were undertaken and Council's approval was not obtained. When the renovations were undertaken the reconstruction of the staircase did not incorporate handrails which were actually required by the initial approval of the construction of the premises. The Court of Appeal noted that whilst the Courts have been reluctant to find that a landlord breaches its duty owed to entrants onto lease premises where the risk to safety was ascertainable only by careful inspection of the premises prior to the lease being entered into, this was not such a case.

As Sackville JA noted that:

*"The owners created the risk to safety by carrying out the renovations on the premises in a manner that did not comply with safety standards. A simple enquiry, either at the time the staircase was installed or at any subsequent time would have revealed the true position."*

The Court of Appeal held that a reasonable person in the position of the owners would have installed a handrail in the upper level before entering into the 2006 lease with Loose Fit. The Court of Appeal also noted that had Marshbaum sued the owners she would have satisfied the requirements in the Civil Liability Act 2002 and have succeeded in a claim against the owners.

When it came to assessing contribution, the Court of Appeal noted that the owners created the risk in the first place and failed to make any enquiries that would have established that the staircase contravened safety standards. However Loose Fit's representatives had identified the risk created by the absence of the handrail on the lower level but did not turn their attention to the equivalent risk created by the absence of a handrail on the upper level. Accordingly liability was apportioned equally between the owner and occupier.

Owners of premises cannot escape liability for claims relying on the concept that they should only be liable for injuries that result from dangerous defects. It is always necessary to examine the circumstances of a particular case to examine what steps a reasonable person in the owner's position would have taken to prevent the risk which manifests. Where there is a foreseeable risk of injury it is incumbent upon an owner of premises to take steps to address that risk and the owner cannot simply rely upon the argument which prevailed for many years namely that an owner should only be held liable in respect of "dangerous defects" in the premises. Nor can an owner escape liability by simply arguing it is not in control of the premises as they have been leased to someone else.

## **Can Two Lawyers Represent A Party When There Is An Insurance Dispute Concerning Coverage**

Most liability insurance policies contain clauses that exclude liability for claims arising in connection with liability assumed by an insured under contract, unless the liability would have arisen independently of the contract.

Problems arise when there is a claim against an insured based on negligence and based on an indemnity provided by an insured in a contract with another negligent party. An insurer may be liable for that part of the claim attributable to negligence but not for that part of the claim that arises as a consequence of liability assumed under contract. An insurer will need to protect its interests in running the claim and managing its relationship with the insured. There can be tension as a consequence of a potential policy coverage dispute and the management of the defence of the claim becomes problematic.

Why not simply appoint two lawyers to act in the defence of the claim for the insured?

In New South Wales the Uniform Civil Procedure Rules 2005 governs Court practice and there is no specific provision in the rules either permitting two lawyers to act and appear in one claim for an insured nor is there any provision prohibiting it.

In some cases the District Court has allowed two lawyers to represent one defendant. However the New South Wales Court of Appeal in *Elphick v Westfield Shopping Management Pty Limited* through the judgment of Young JA has delivered a clear message to the legal profession that it is not tolerable to have two lawyers representing one party in Court proceedings.

Elphick was employed by a cleaning contractor that was engaged by Westfield to carry out work at the Tuggerah Shopping Centre. Elphick was injured whilst carrying out his duties. He commenced proceedings for claiming damages for his injuries against Westfield and ACS. There was a contract in place between Westfield and ACS. Westfield argued that even if it was found to be negligent ACS would be obliged to indemnify Westfield's for its liability pursuant to the terms of an indemnity found in the contract between ACS and Westfield.

Young JA noted that the District Court Judge hearing the claim had allowed two lawyers to appear for ACS, one representing the interests of ACS and one representing the interests of the insurer.

Young JA noted that:

*"It now appears to be assumed that where different insurers are involved, that there is a right for each to have its own counsel and solicitors appear in the name of the nominal party."*

However Young JA noted that this is not permissible and commented that:

*"This myth should be exposed".*

Young JA noted that:

*"The state of the law is that unless the Court gives leave under its inherent power, there should not be separate representation even though, commercially speaking, a nominated party is a person behind whom different insurers stand or who is involved in more than one capacity. Furthermore,..leave is not likely to be granted and full evidence must be submitted as to why an exceptional order should be made."*

Young JA noted that plaintiffs must always be represented by the same solicitor and the same party cannot be plaintiff and defendant even though different interests are involved.

Further it was noted that a party cannot be sued twice in one action, once in his or her personal capacity and again, in a representative capacity.

Young JA also noted that the general rule is that the insured and insurer cannot be separately represented even if there are "insured and uninsured elements of the claim".

Young JA cited the example of *Tindall v Ansett Transport International (Operations) Pty Limited*, where a third party insurer wanted to be separately represented from the workers compensation insurer in a personal injury case before a jury. The Court assumed it had the power to permit two representatives to appear for Ansett Transport Industries but ruled that it was not appropriate in the conduct of proceedings before a jury.

So the myth is exposed. Young JA has clearly delivered a message to the legal profession that Courts should not allow a defendant to have two representatives.

This presents a problem for insurers where part of the claim may not be insured, for example, part of the claim results from a liability assumed under contract.

Insurers will be faced with four options:

- Deny liability for the claim in entirety and deal with an indemnity dispute;
- Permit the insured to appoint its own defence counsel and liaise with that defence counsel during the course of the trial. Problems arise during settlement discussions when defence counsel is acting in the interests of its client, the insured, and not the interests of the insurer. The same problems arises in the running of the claim as where a lawyer is acting for a defendant, from a policy coverage perspective it would be preferable to run the case in a way where the insured's liability for negligence is maximised and the uninsured liability is minimised. In Elphick's case to ensure policy coverage, ACS would be better off if the negligence claim against Westfield failed to ensure there was no potential liability pursuant to the indemnity (the claim against Westfield did fail). In the absence of ACS's contractual liability to Westfield it would be better for ACS to succeed against Westfield and be responsible for part of the claim.
- The insurer can seek to appoint its lawyers to conduct the defence of the claim and discuss the conduct of the defence with the insured however the lawyers will find themselves in a potential conflict of interest. Conflicts of interest can be managed where all parties are fully informed however it can be problematic to manage the claim in this way.
- The fourth option is to encourage an insured to commence proceedings against the insurer seeking indemnity under the Policy with the insurer admitting its liability under the Policy but denying the claim to the extent of the uninsured loss. This will permit lawyers to appear for both the insurer and the insured in the proceeding.

Generally the last option will be the most preferred for both the insurer and the insured.

The management of claims involving insured and uninsured losses will continue to trouble insurers and insureds. However one thing is certain, the Courts will be reluctant to permit two representatives to appear for the one party in light of the comments of Young JA in *Elphick v Westfield*.

## Is Intoxication a Defence to a Personal Injury Claim?

Throughout Australia the different States and Territories have legislation that regulate personal injury claims and contain provisions that prescribe that where an injured person is intoxicated any entitlement to damages should be reduced where the intoxication played a role in the accident. For example in NSW Sections 49 and 50 of the Civil Liability Act 2002 provide:

### **" 49 Effect of intoxication on duty and standard of care**

- (1) *The following principles apply in connection with the effect that a person's intoxication has on the duty and standard of care that the person is owed:*
  - (a) *in determining whether a duty of care arises, it is not relevant to consider the possibility or likelihood that a person may be intoxicated or that a person who is intoxicated may be exposed to increased risk because the person's capacity to exercise reasonable care and skill is impaired as a result of being intoxicated,*
  - (b) *a person is not owed a duty of care merely because the person is intoxicated,*
  - (c) *the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person.*
- (2) *This section applies in place of a provision of section 74 of the Motor Accidents Act 1988 or section 138 of the Motor Accidents Compensation Act 1999 to the extent of any inconsistency between this section and the provision.*

### **50 No recovery where person intoxicated**

- (1) *This section applies when it is established that the person whose death, injury or damage is the subject of proceedings for the recovery of damages was at the time of the act or omission that caused the death, injury or damage intoxicated to the extent that the person's capacity to exercise reasonable care and skill was impaired.*
- (2) *A court is not to award damages in respect of liability to which this Part applies unless satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated.*
- (3) *If the court is satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated, it is to be presumed that the person was contributorily negligent unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage.*
- (4) *When there is a presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25% or a greater percentage determined by the court to be appropriate in the circumstances of the case.*
- (5) *This section does not apply in a case where the court is satisfied that the intoxication was not self-induced."*

Further in NSW the legislation governing personal injury claims for motor accidents contains provisions that require a Court to make a finding of contributory negligence as a result of intoxication unless the intoxication did not in any way contribute to the accident.

Section 138 of the *Motor Accidents Compensation Act 1999* provides:

- (1) *The common law and enacted law as to contributory negligence apply to an award of damages in respect of a motor accident, except as provided by this section.*
- (2) *A finding of contributory negligence must be made in the following cases:*
  - (a) *where the injured person or deceased person has been convicted of an alcohol or other drug-related offence in relation to the motor accident, unless the plaintiff satisfies the court that the alcohol or other drug involved in the commission of the offence did not contribute in any way to the accident,*
  - (b) *where:*  
.....
    - (ii) *the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol or any other drug and the injured person or the deceased person was aware, or ought to have been aware, of the impairment,*  
*unless, in the circumstances of the case, the injured person or deceased person could not reasonably be expected to have declined to become a passenger in or on the motor vehicle,*

.....  
(3) *The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case."*

However it is not always easy to prove that a person is intoxicated and it is unusual for a person to admit that they are intoxicated when they bring a personal injury claim. So where can the evidence come from?

When an ambulance officer attends an injured person they may make comments in their report about the perceived intoxication of the person. On admission to hospital a blood alcohol analysis is not routinely administered unless the person was injured in a motor accident however the hospital notes may contain entries by doctors or nurses commenting on their observation of the state of the person and the history of pre-accident drug or alcohol consumption provided by the patient. Doctors may receive a history of alcohol ingestion which they record in their clinical notes. Witnesses at the scene of the accident may have a recollection of the behaviour of the injured person before the accident and any perceived intoxication. Those who have served alcohol to the person at licenced premises or during a party may be able to help. Expert pharmacologists may be requested to provide reports commenting on the effect that a certain number of drinks would have had on a particular person where there is some evidence about the extent of alcohol consumed by a person before the accident.

However even where a defendant does have evidence that alcohol was consumed by a person before an accident and that the person was intoxicated a defendant must show that the intoxication played a role in the accident if the personal injury damages are to be reduced and the recent decision of the NSW Supreme Court in *Amanda's On The Edge Pty Ltd v Dries* demonstrates the difficulties that defendants face when they seek to establish that intoxication played a role in an accident.

Andrew Dries fell from an unguarded wall. The wall was adjacent to a sloping driveway leading to a garage underneath a building that housed a restaurant known as Amanda's On The Edge which is located in the Hunter Valley. Dries had been one of a number of guests celebrating the wedding of two friends, Rebecca and James Bax.

At the end of the evening, Dries and his partner Ms Amy Tunbridge had headed off from a marquee where the wedding reception was and crossed the lawn in front of the restaurant heading to where their car was parked, to the north of the restaurant. While they were walking in that direction, they were called by friends who were standing at the lamp post at the top of the driveway to the south of the restaurant building. Mr Dries and Ms Tunbridge apparently turned to move towards the voices and came to a garden bed which he crossed and through some shrubs and bushes. On the other side of the bushes, some feet further, there was the concrete wall and a drop from where he fell some six feet. The area where the fall occurred was in darkness.

At the hearing of the claim the Trial Judge made a finding that Dries consumed five to six beers and one to two bourbon and cokes during the occasion, over about six to six-and-a-half hours alcohol and this finding was not challenged in the Court of Appeal.

The trial Judge found:

*"In respect of alcohol, the plaintiff conceded that he drank five to six beers and one to two bourbons in the course of the wedding reception. The defendant argued that this affected his capacity for reasoned judgment.*

*The plaintiff was holding an unopened stubby of beer at the time of the fall. The plaintiff said this had been given to him but he did not feel like drinking it and was proposing to take it back to his overnight accommodation.*

*Miss Tunbridge, who was trained in the Responsible Service of Alcohol, said that the plaintiff was not significantly intoxicated. She accepted that he was to some degree affected by the alcohol he consumed during the function.*

*It was not suggested to the plaintiff, Miss Tunbridge, Miss Becker, Miss Hawes or Mr Backs, that the plaintiff was so heavily intoxicated that his judgment of physical coordination was affected. Further, Miss Tunbridge, who was driving and therefore drank very little during the course of the function, made the same decision as the plaintiff to take the route through the garden bed.*

*I therefore declined to conclude that the incident was the consequence of, or contributed to, by the plaintiff's level of intoxication."*

On Appeal the defendant challenged these findings.

To trigger section 50(1) of the Civil Liability Act a defendant must show that the person's capacity to exercise reasonable care

and skill was impaired. Even if section 50 is triggered a claimant will escape a finding of contributory negligence if the person's intoxication did not contribute in any way to the cause of the death, injury or damage.

President Allsop of the Court of Appeal in a unanimous judgement concluded that requirement under Section 50(1) was not established. The Court of Appeal concluded:

*"The "extent" of the intoxication relevant for such a finding will depend on the circumstances and the subject or subjects in respect of which the reasonable care and skill may be impaired. Operating machinery, driving a car or flying a plane may be tasks where very little alcohol would be required for the person's capacity to exercise skill and care to be impaired (adequately satisfied by six beers and two bourbons). Here, the care and skill was walking over open ground to get to a destination. There was no reason for him, in the dark, to suspect such a danger as befell him. The findings of the primary judge were adequate as to s 50(1) not being satisfied, or, alternatively, as to s 50(3) being made out. "*

It appears there was no expert pharmacological evidence on the extent of impairment that the alcohol consumption would have had on Dries, however even that type of evidence may not have assisted the defendant. Whether a person's capacity to exercise reasonable care and skill is impaired as a result of being intoxicated turns on a consideration of the tasks they are undertaking at the time. Walking is something very different to operating machinery and the issue is whether intoxication impairs a person's capacity to exercise reasonable care in the task they are undertaking. Here Dries was walking in the dark and came across a wall without a ballustrade to guard from a drop. Witnesses at the wedding did not believe Dries' physical co-ordination was impaired. A person who had not consumed alcohol made the same decision as Dries to take the path through the garden bed to reach the friends.

The case serves as a reminder that a finding of contributory negligence does not necessarily follow a finding that a person has consumed alcohol which has had some effect on them. The fact remains that a finding of contributory negligence will only be available when a person's capacity to exercise reasonable care and skill in the task they are undertaking at the time of the accident is impaired as a result of being intoxicated and a claimant will escape a finding of contributory negligence if the person's intoxication did not contribute in any way to the cause of the death, injury or damage.

## **Future Economic Loss - Are Buffers Permissible?**

A claimant's entitlement to damages for future economic loss involves a comparison between the economic benefit to the claimant from exercising earning capacity before injury and the economic benefit from exercising earning capacity after injury. However that calculation is not always easy and the calculation is not always based on an arithmetic analysis. Sometimes a Court or Assessor tribunal will assess damages by way of a so-called "buffer". A buffer is allowed when the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine and a weekly allowance is not appropriate. There is still a comparison between the economic benefits, although the difference cannot be determined otherwise than by the broad approach of a buffer.

The NSW Court of Appeal in *Leichardt Municipal Council v Montgomery* noted that:

*"A buffer or cushion award is usually reserved to the situation where there is a smallish risk that otherwise secure employment prospects may come to an end, in consequence of the tort-related injury, at some distant time in the future".*

However not all buffers are small and where arithmetic calculation proves difficult some very large buffers have been allowed. The NSW Court of Appeal in *State of New South Wales v Moss* noted that when assessing future economic loss:

*"strictly the issue does not turn on a comparison between what money the plaintiff would have earned apart from the injury and what money the plaintiff will earn after the injury. The compensable loss is not a loss of income but the loss of capacity to earn income in a manner productive of financial loss: ... The income earned before the injury is relevant, but only as an evidentiary aid in assessing damages for the loss of capacity to earn income: ... Evaluation of the worth of a loss of capacity to earn - of a lost chance to earn - is of its nature a more imprecise inquiry than calculation of a lost income. It rests on the hypothesis - that the plaintiff will have undiminished capacity - which has been rendered false by events. It does not depend on calculating the income from a particular career which is no longer possible, but in calculating the damage to a capacity to carry on various careers. It is an exercise in estimation of possibilities, not proof of probabilities....."*

*It is not necessary for the plaintiff to establish the future loss with the same degree of precision as the present and past loss ... The court is really being asked to estimate as best it can the future effect of the injuries from which the*

*plaintiff has been proved to be suffering as a result of the defendant's wrongful act....,*

*.. the mere fact that the quantum of damages is difficult to assess does not mean that the plaintiff is only entitled to a nominal sum. This principle applies as much to the assessment of damages for impaired earning capacity in injured plaintiffs as it does to pecuniary loss caused by negligent advice ... or equitable damages .. or damages for breach of contract ... In the last case, Dixon and McTiernan JJ put the following general proposition: "Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages."*

The Courts have also noted "where earning capacity has unquestionably been reduced but its extent is difficult to assess, even though no precise evidence of relevant earning rates is tendered, it is not open to the court to abandon the task and the want of evidence does not necessarily result in non-recovery of damages."

The calculation of economic loss will not always be an easy task and there are legislative provisions in NSW that also affect the calculation of damages for future economic loss.

In NSW the *Civil Liability Act 2002* and the *Motor Accidents Compensation Act 1999* regulate the award of damages for personal injury claims other than work injury damage claims. Those Acts have introduced provisions in identical terms. Section 13 of the *Civil Liability Act 2002* and section 126 of the *Motor Accidents Compensation Act 1999* provide:

*"Future economic loss—claimant's prospects and adjustments*

- (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.*
- (2) When a court determines the amount of any such award of damages it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events concerned might have occurred but for the injury.*
- (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."*

The reference to a deduction in these provisions is seen as a reference to a reduction in damages for vicissitudes.

It has been argued that this provision restricts the entitlement of a Court to award a buffer.

The NSW Court of Appeal in *Leichhardt Municipal Council v Montgomery* concluded that it was open for a Court to allow a buffer under the damages regime in the *Civil Liability Act* in that case noting:

*"it is open to assess future economic loss by way of a buffer: In such cases, the deduction for vicissitudes will be nil; and failure to state this as required by s13(3) is immaterial."*

However a significant buffer for future economic loss can lead to appeals and in recent times there have been a number of challenges to awards of Assessors under the *Motor Accidents Compensation Act*. An Assessor's award is binding on a CTP insurer and the only avenue of challenge available is a challenge to the assessment based on an argument that that the Assessor erred in law in reaching their decision or that they committed a jurisdictional error. It may be argued that

- The claims assessor failed to comply with the requirements of s126 of the Act.
- The claims assessor purported to award a damages component, contrary to the provisions of s126 of the Act.
- The claims assessor failed to take into account a relevant consideration eg. that the claimant was still working and that the award would operate in such a way as to impermissibly add to his current high earnings.
- The claims assessor fell into error of law in making an award for future economic loss that did not conform with the compensation principle that guides the award of common law damages.
- The claims assessor's decision on this issue was wrong because it was afflicted with manifest irrationality or unreasonableness and cannot stand.

Whilst there has been criticism by the Courts that some challenges "appear to be thinly veiled attempts at a merits appeal where no such appeal is provided for under the Act," the fact remains that an Assessor is still obliged to assess damages according to the established legal principles and an award of an Assessor that does not apply the legal principles is vulnerable to challenge.

However the warning of Hoeben J in one of those challenges highlights the Court's reluctance to explore the merits of an award. Hoeben J in *Allianz Australia Insurance v Sprod* warned:

*"It is to be hoped that in future CTP insurers, in accordance with the philosophy of the Act, restrict applications to circumstances where there is a genuine jurisdictional issue or error of law on the face of the record, rather than as appears to be the situation here, disagreement with a particular head of damage found by a claims assessor."*

In *Allianz Australia Insurance Limited v Kerr*, the plaintiff, Allianz commenced an administrative law challenge to a determination in which the CARS Assessor allowed a buffer of \$200,000 for future economic loss.

The matter came before Hislop J of the Supreme Court of New South Wales who dismissed the application. Section 126 of the *Motor Accidents Compensation Act 1999* was the subject of discussion in that matter and whether that section of the Act, prevented a Court awarding damages by way of a buffer in an appropriate case.

Hislop J determined that the CARS Assessor adequately complied with the requirements of Section 126 when allowing the buffer, relying on *Penrith City Council v Parks* [2004] NSW CA201 ("*Parks*"):

*"The occasion for a buffer is when the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine".*

In the recent decision of Rothman J of the Supreme Court of New South Wales in the matter of *Allianz Australia Insurance Limited v Cervantes* there was again an administrative challenge to several aspects of the CARS Assessors determination, however, the allowance of a buffer of \$400,000 for future economic loss and \$75,000 for past economic loss was addressed at length. Allianz argued that a buffer was not an inappropriate means of awarding future or past economic loss, but the amount of the buffer was inordinately high, to a point where a buffer was no longer appropriate and that there was no reasoning process that was disclosed to "*enable an understanding of the basis upon which the buffer has been awarded or calculated*".

At CARS, Dr Cervantes alleged she was unable to work the long hours necessary to run a successful private practice as a Nephrologist and to maximise her income as a full-time hospital specialist.

Rothman J found that as a consequence it was necessary for the CARS assessor to compensate Dr Cervantes for the possibility of the loss of future income that was difficult, if not impossible to measure. Rothman J stated:

*"unlike some cases, there are no figures that disclose the earnings of comparable employees or practitioners to Dr Cervantes other than the general estimate of Dr Cervantes herself. That is not surprising considering that reliable information of that kind may be extremely difficult to obtain".*

Rothman J concluded that the Assessor had not failed to identify the head of damage, how he arrived at the number for each head of damage and did not fail to make the findings of fact necessary to arrive at the conclusion that the buffer that had been awarded for past and future economic loss was a buffer that was well within the range available in the circumstances of the case.

Importantly, Rothman J commented:

*"nothing in the foregoing should give rise to an implication that an amount of \$400,000 (or an amount of \$75,000 for past economic loss) would ordinarily be an appropriate figure for a buffer. These proceedings and the earnings of the claimant before the claims assessor were quite extraordinary".*

Rothman J was of the view it is only appropriate in "quite extraordinary" or "peculiar circumstances", when reliable information in relation to a claimant's income is unable to be or is extremely difficult to be obtained, to award a buffer in that vicinity.

As can be seen challenges to "buffer" awards made by Assessors will have their difficulties as a CTP insurers are not entitled to bring merit appeals. There will be a viable challenge when an error of law is identified however that requires an incorrect application of the relevant legal principles by the Assessor.

Buffers are permissible when compensating claimants for future economic loss under the Civil Liability Act 2002 and the Motor Accidents Compensation Act 1999 and even large buffers will be permissible when the calculation of the loss of earning capacity requires speculation.

## Termination Of Injured Workers

Fair Work Australia has recently rejected a claim for an unfair dismissal remedy following the termination an injured worker by Forbes Australia Pty Limited t/as Hunt Boilers. The decision confirms that a dismissal is not necessarily unfair when a worker is terminated when the injury prevents the employee from performing the inherent requirements of his position or role.

Harte was employed by Forbes Australia Pty Limited t/as Hunt Boilers as a technician. He was involved in a work accident and sustained a serious injury to his foot. Approximately two years after his accident he returned to work and undertook some office type duties for a short period of time before moving back to his technical work. He was promoted on two occasions and ultimately was promoted to the position of a service supervisor.

Subsequently Harte had further surgery to his injured foot to remove a plate. Following this surgery he came to the view that his foot would never fully recover to its pre-injury status and settled a permanent disability claim.

The employer wrote to the treating doctor and Harte expressing its concern that Harte would not be able to return to his pre-injury duties.

In April 2001 Harte was given five weeks notice of termination. The reason for the termination was that Harte could no longer perform the inherent requirements of his job. Harte claimed that his dismissal was unfair.

Section 394 of the Fair Work Act 2009 provides that a dismissal is unfair if it is harsh, unjust or unreasonable. The question for Fair Work Australia was whether or not there was a valid reason for termination of Harte's employment in that he was unable to perform the inherent requirements of his job. Harte claimed that he could perform the inherent requirements of his position.

The Commissioner noted that when an employer relies upon an employee's incapacity to perform the inherent requirements of his position or role, it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position.

The Commissioner cited the full bench decision in *J Boag & Son Brewing Pty Limited v Button* noting:

*"It is well established that a valid reason is one which is 'sound defensible or well founded', but not 'capricious, fanciful, spiteful or prejudice'. An inability to perform the inherent requirements of the position will generally provide a valid reason for dismissal but this will not invariably be so. For example, the dismissal may be prohibited by State Workers Compensation Legislation or otherwise unlawful. It is highly likely, bordering on certain, that there could be no valid reason for the dismissal in that event. Further a dismissal based on an incapacity to perform the inherent requirements of the position may not be valid for dismissal if the employee has a capacity to perform the inherent requirements of their job. Plainly there can be a valid reason for dismissal of an employee where he or she simply does not have the capacity (or ability) to do their job. But, again, there may be circumstances where such incapacity does not constitute a valid reason in the relevant sense."*

The Commissioner noted that it was necessary to identify Harte's substantive position and the tasks he was required to undertake in that position. Forbes argued that Harte's substantive (pre-injury) position was a service technician however the Commissioner found that the substantive position was the position that he was promoted to namely as service supervisor.

The Commissioner noted that Harte's capacity to fulfil the inherent requirements of his job (position) must be considered against the substantive position unmodified by any return to work plan that had been put in place. The Commissioner noted that that role included the need to work at heights, climb ladders, lift weights either alone or assisted and undertake work requiring some degree of balance while working on boilers.

After balancing the medical evidence and the evidence of Harte, the Commissioner concluded that Harte was not fit for the inherent requirements of his job in particular could not perform site work. Accordingly his incapacity was found to be a valid reason for the termination of his employment and there was no unfair dismissal.

Whether or not a dismissal of an injured worker is unfair will turn on an examination of their substantive role and the tasks in that role and whether or not they are fit for the inherent requirements of that role. If a worker is not capable of fulfilling the inherent requirements of their job or position an employer can validly terminate the worker's employment.

## OH&S Roundup

### \$600,000 In Fines For Fatalities

The NSW Industrial Court has recently handed down fines totalling \$600,000 as a consequence of a fatality when a worker was crushed by material that fell from racking.

Ullrich Aluminium Pty Limited was prosecuted for a breach of Sections 8(1) and 8(2) of the Occupational Health and Safety Act.

Ullrich Aluminium operated premises in Mayfield West and had an employee and a labour hire employee supplied by Selected Industrial working at the premises.

Aluminium product was stored in the warehouse in bulk storage racks. Cases stored on the racks were approximately 4 metres in length and 300mm to 400mm in width and 200mm to 300mm in depth and weighed between 66 kilograms to 331 kilograms. A crane was used to move the product. At all times persons at the premises were at risk of being struck, trapped and/or crushed by falling cases of aluminium product. The racks did not incorporate vertical bollards or other means of support to prevent the cases falling from the racks.

A crane had been used to move some cases and the slings were detached from the load when the cases toppled from the racks and six to seven cases fell on to Mr Merrill who was killed.

The company had a previous conviction following an incident in 1996 when unrestrained cases at a warehouse that were stacked one on top of another collapsed striking an employee and killing him. The company was fined \$50,000 in relation to that incident. Consequentially the bulk racking had been installed to ameliorate that risk.

The Court noted that there seemed little difference in terms of risk between cases stacked up against a wall and a stack of cases resting up against racks if the stack of cases is unstable and capable of falling on a person in the vicinity. The defendant knew from what occurred in 1996 that a person could be killed if an unstable stack fell. Even though the cases were stacked in bulk storage racks, that did not eliminate the risk as the death of Mr Merrill demonstrated.

It was noted that the steps taken by the defendant after the 1996 incident did not eliminate the risk and did not do everything that was reasonably practicable to do so. In this case, the Court held that the defendant knew of the risk having experienced the death of an employee in 1996 from the very same risk and the racking did not adequately address that risk.

The Court noted that Mr Merrill did not receive any formal documented training in the use of overhead cranes and the defendant should have provided adequate training and information in respect to the safe use and operation of the crane. The Court also noted the defendant failed to carry out any formal risk assessment relating to the use of the bulk racking in the warehouse and this contributed significantly to the presence of the risk.

After the event, the racking was redesigned and a new system installed at a cost close to \$1 million dollars. The Court noted whilst the design and installation of the new racking system might not fall into the category of simple and straightforward steps that could be taken to avoid the risk, other remedial steps were steps and straightforward including the provision of training and the maintenance of a safe system of work for recovery of slings. The provision of a written work method statement or safe operating procedure concerning rigging and lifting cases of aluminium was another straight forward step to take.

Whilst the company was prosecuted as a consequence of the risks to both employees and others (labour hire employees), the principle of totality applied as the risk to the two classes of persons arose from the same circumstances so the company should not be doubly penalised. The Court considered that an appropriate penalty for each offence would be \$450,000 in respect to the risk to Mr Merrill and \$350,000 for the risk to the labour hire employee but applying the principles of totality to determine the total amount which was appropriate an amount of \$600,000 was decided. The penalty was split on the basis of \$350,000 for the injury for the offence relating to Mr Merrill who was killed and \$250,000 for the risk created for the labour hire employees.

A second fatality for an employer, in not dissimilar circumstances, in this case led to very substantial penalties.

## Workers Compensation Roundup

### Work Injury Damages Claim For Psychiatric Injury Fails

The NSW Court of Appeal in *Miskovic v Strike Corporations Pty Limited t/as KSS Security* upheld the rejection of a claim for psychiatric injury by a security guard where the alleged negligence did not make any substantial contribution to the psychiatric injury.

Miskovic was a security guard. He suffered a nervous breakdown during his employment which was exacerbated by an incident at work when he was trapped in a lift for some hours. His psychiatric illness was diagnosed as a major depressive and obsessive compulsive disorder. He sued his employer for damages alleging a psychiatric injury.

Miskovic was a night patrol officer and worked long hours. He had to hurry to complete his visitations to buildings and he became stressed when he got behind in his work.

On one night Miskovic found himself trapped in a lift. He was stuck there for approximately 3.5 hours. His psychiatric illness was diagnosed before the lift incident and the medical evidence concluded that his condition had a constitutional component and that his employment was a substantial contributing factor to his psychiatric condition.

Miskovic's case at trial was that he was unreasonably overworked and this precipitated his psychiatric injury. The case failed at trial because the judge found that Miskovic acting reasonably could have comfortably finished his shift and still had breaks. The Trial Judge also noted the system of work did not deal with the risk that persons with criminal intent might wait for a security guard to obtain access to the premises or might accost a guard or that a guard might become trapped in the lift or behind a self closing door. The Trial Judge concluded that the defendant had been negligent in failing to have a simple and inexpensive means of checking on the safety of personnel.

However the Trial Judge noted that that negligence had not caused the plaintiff's psychiatric injury which had predated the lift incident in March. The Trial Judge noted that the negligence was not a necessary condition of the occurrence of harm.

An appeal followed.

Handley AJA in the Court of Appeal noted that Section 5D(1)(a) of the *Civil Liability Act 2002* requires that negligence is a necessary condition of the occurrence of the harm. Handley AJA noted the common law test of negligence is satisfied if the plaintiff's injury was caused or materially contributed to by the defendant's wrongful conduct.

Handley AJA commented that there is no appreciable difference between a material contribution and a substantial one. In this case, the psychiatric condition had predated the lift incident. The safe system if in place would not have ameliorated any contribution of the lift incident to the plaintiff's psychiatric injury as this condition would have developed as it did in any event. However Handley AJA's comments in relation to the lack of inappreciable difference between a material contribution and a substantial one was not a finding which the other judges were prepared to comment on. So we are left with a decision of the Court of Appeal that does not extend liability to situations where the negligence substantially contributes to the injury. The law remains that there must be a material contribution.

In order to establish a claim for negligence it is essential to establish causation. The test of causation under the *Civil Liability Act 2002* is based on a but for test. Any negligence on the part of the security company did not cause his psychiatric injury as the injury would have resulted in any event, this was not a case where the Court could determine that but for the negligence of the employer the harm would not have occurred.

### Disease Cases – Is It Getting Easier For Workers?

The recent decision of Deputy President Roche in *Department of Aging, Disability and Homecare v Findlay [2011] NSWCCPD 65* demonstrates that a worker can succeed in a "nature and conditions" claim for injury by way of aggravation of a disease despite the absence of any radiological or other objective evidence of the presence of a disease.

Mrs Finlay was employed as a care worker for the Department in August 1997. Her duties required her to shower, dress and generally care for elderly and disabled clients. She claimed lump sum compensation in respect to 12% whole person impairment for the neck and back, allegedly caused by her heavy and repetitive duties since 1997. The injury was said to be

an aggravation, acceleration exacerbation or deterioration of a “disease” pursuant to Section 16 of the Workers Compensation Act 1987.

The Department admitted liability in respect of the injury to the lumbar spine but disputed liability in respect of the alleged injury to the cervical spine because Mrs Finlay suffered no injury to her cervical spine. In the absence of any radiological evidence of a disease, the Department argued that it was not open to find an injury in the nature of an aggravation of a disease.

The Arbitrator accepted evidence from Dr Matthew Giblin and Mrs Finlay’s evidence that the nature of her duties aggravated a disease of her cervical spine (neck). The Department appealed the Arbitrator’s decision, which was confirmed by Deputy President Roche. The Deputy President noted Dr Giblin commented that even in the absence of x-rays of the cervical spine, given her age she probably had degenerative changes in the cervical spine and most likely suffered an aggravation of those changes.

The Department argued that Dr Giblin’s evidence failed to comply with the principles enunciated in *Makita v Sprowles* for satisfactory expert evidence. The Deputy President commented that the Commission was required to be satisfied that expert evidence provides a satisfactory basis on which the Commission can make its findings. An expert’s “prime duty” will be satisfied if the expert has identified the facts and applied a reasoning process to justify the opinion. That was sufficient to enable a Tribunal to evaluate the opinion expressed. In jurisdictions without strict pleadings, such as the Workers Compensation Commission, the question of expert evidence was not whether it should be admitted but rather the weight that should be given to it. All that was required was that the expert set out the facts observed, facts that had been assumed, the history obtained from the worker and information obtained from investigations such as x-rays.

Noting Dr Giblin’s opinion it was open to the Arbitrator to find that Mrs Finlay had degenerative changes in her cervical spine that had been most likely aggravated by extensive repetitive bending and lifting. This was despite the absence of x-rays to confirm the presence of those degenerative changes. It was also noted that the Department called no expert evidence to contradict Dr Giblin’s opinion.

The parties had agreed on a date of injury of 4 February 2008 for the lumbar spine given this was the first date of incapacity. As there was no evidence that the aggravation injury to the cervical spine caused any incapacity, the correct deemed date of injury for the cervical spine was found by the Deputy President to be the date on which Mrs Finlay claimed compensation for that injury, namely 8 February 2011.

The fact there were two deemed dates of injury raised a question of whether the separate assessments for whole person impairment resulting from the cervical spine and lumbar spine injuries could be aggregated for the purposes of reaching the threshold for compensation for pain and suffering under Section 67. As we have commented in previous newsletters, pursuant to decisions such as *Department of Juvenile Justice v Edmed*, impairments can only be aggregated in certain circumstances. These circumstances are where a worker suffers the same injury (pathology) from separate incidents or two separate injuries arising from the same incident. The Deputy President observed that the injuries to Mrs Finlay’s cervical spine and lumbar spine resulted from the same injury or incident, namely the heavy repetitive duties the applicant performed with the Department from 1997.

The Deputy President reminded the profession that the Commission determines whether a worker had received “an injury” in disease cases by applying Section 4 and not Section 15 or Section 16. The latter two sections assume an injury has occurred and each provides the mechanism of determining when the injury is deemed to have happened to determine by whom compensation is payable. It remains for the worker to prove the happening of an injury within Section 4 and Section 9(1) before consideration turns to Sections 15 & 16.

The Deputy President determined that Mrs Finlay had a slow deterioration of problems in her neck and back in performing her work tasks over time and that the aggravation injury to her cervical spine and the lumbar spine had resulted from the “same incident” under Section 322(3) of the 1998 Act. Any impairments resulting from that incident should be assessed together for determining an entitlement to compensation for pain and suffering.

Although it is not surprising, the Commission has again shown its discretion to beneficially apply the legislation to maximise the compensation available to workers.

## CTP Roundup

### MAS Certificates Versus Credit And General Damages Awards

An assessment that a claimant exceeds the Section 131 threshold is no guarantee that significant non-economic loss will be awarded. The Court of Appeal in *Gulic v O'Neill* [2011] NSWCA 361 considered the issues of non-economic loss in light of adverse findings in relation to the claimant's credibility and contributory negligence.

O'Neill was turning right at an intersection and collided with Gulic's oncoming vehicle. O'Neill accepted liability, but alleged that Gulic's negligence contributed to the accident. O'Neill claimed that Gulic was travelling at a speed greater than that of a truck in the adjacent lane and should have appreciated the view of O'Neill's vehicle was obscured by the truck.

The trial judge, Her Honour Judge Balla assessed contributory negligence at 25% and awarded Gulic the sum of \$216,513. An appeal followed. O'Neill's argued that the trial judge had erred in finding contributory negligence and, alternatively, in the assessment of contribution, and had erred in the quantum of damages awarded.

The Court of Appeal recognised the force of the principle that requires intermediate and ultimate appellant Courts to show restraint in reviewing a trial judge's apportionment on liability. However, the Court of Appeal determined that there had been a marked misapplication by the trial judge of the apportionment exercise that must be undertaken in assessing to what degree each party contributed to the collision and reduced the contributory negligence finding from 25% to 10%.

In awarding damages, the Trial Judge made significant adverse findings in relation to Gulic's credibility. The Trial Judge found that Gulic had been evasive in answering questions in relation to his work history and had exaggerated his level of disability for the purpose of the proceedings.

The Court of Appeal held that the trial judge was correct to find there was no significant organic pathology or injury to the spinal bones so as to warrant Gulic's allegations of pain in the back area. The Court of Appeal also upheld the Trial Judges finding that Gulic was exaggerating his allegations of pain, although had "some ongoing neck and back pain". The Trial Judge had found that Gulic exaggerated his level of pain, that he was not a reliable witness, and that the corroborating evidence of his father and wife was "evasive and inconsistent".

Taking into consideration the overall medical evidence, the Court of Appeal considered that there was justification for The Trial Judge's findings that, having regard to the nature of the injuries Gulic had sustained, his level of disability would "improve over time" and that the Trial Judge did not err in awarding non-economic loss in the amount of \$50,000.

The low award for non-economic loss is consistent with what the Court said about the purpose of MAS certificates in *Brown v Lewis* [2006] NSWCA 87 wherein it was held that a MAS Certificate assessing permanent impairment at greater than 10% is merely a gateway and that, once through that gateway, the assessment of the amount of damages for non-economic loss proceeds according to common law principles. Mason P stated that:

*"it is fallacious to regard a high percentage (if the medical assessor chooses to go beyond what is required by s61(2)(a)) as any guidance in itself in assessing the quantum of damages to be awarded for non-economic loss."*

Given Judge Balla's findings in relation to Gulic's credit, it was open for Her Honour to refer the matter back to MAS for a further assessment pursuant to Section 62 of the Motor Accidents Compensation Act 1999. If the further MAS assessment determined Gulic's impairment was less than 10%, no damages for non-economic loss would have been payable. This is another issue that can confront a claimant who is less than frank during their evidence.

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*Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.*

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