GD News

Gillis Delaney Lawyers

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Sexual Harassment Leads to Record Verdict

The Federal Court has awarded a South Australian woman damages of over $400,000 following sexual discrimination in the workplace.

The case is remarkable not only for the size of the damages award - which is extremely large - but also for being almost a textbook example of how not to deal with allegations of sexual or other harassment in the workplace.

The claimant was engaged as a building consultant by a large residential developer. Her role, essentially, was to market off-the plan house and land packages. The workplace was, according to the judge, a "robust" place.

The Court found that a number of instances of sexual harassment had taken place:

1. A co-worker sent the complainant an email which included the words:

   " *… I think you are a very attractive woman and would love to catch up and have a little fun some time …*"

   The claimant responded that she was not interested in any "fun".

   Her co-worker then sent her another email which said in part:

   "*…I thought that maybe you were sexually interested in me. My sex drive is extremely high and my wife appears to have none …. You have an incredible body and I have fantasized about you many times …*"

   The claimant did no reply to this. Her co-worker then sent the claimant a number of SMS messages, to which the claimant again did not reply.

   Finally, the co-worker sent the claimant a third email, obviously regretting his earlier correspondence, and begging the claimant not to report his conduct to their mutual employer.

   The claimant did report the co-worker's action to her superior. Her superior said: "*What do you expect with a face like yours*", and took no further action.

2. A month or so later, the claimant expressed reservations to her superior about working with a particular co-worker. The superior said: "*I've already told him not to go f…..g my women*."

   The claimant complained about this comment to a senior manager. The complaint was not recorded in any structured or formal way. There was no written acknowledgement of the complaint. No written notice of the complaint was given to the person the subject of the complaint.

Inside

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The response to the complaint was delayed, and consisted of a meeting between the complainant, her superior and the senior manager. The superior apologised for her inappropriate language.

The senior manager did not give the superior a reprimand in writing. He did not send any memo or give any instruction to staff generally about appropriate behaviour and language.

3. At around the same time, the complainant received an MMS photograph on her mobile phone from a co-worker. The photograph showed an act of oral sex by a woman on a man, with a text message "*U have 2 b better*".

Over the following weeks, the complainant received a number of telephone calls from the same co-worker asking her to have sex with him, including requests for oral sex.

The complainant did not report these actions immediately. After several weeks, however, the receipt by the complainant of the photograph became common knowledge in the workplace. A senior manager spoke to the worker who sent the photograph. Nothing much else happened.

Events 1 and 3 above are clearly incidents of sexual harassment; event 2 is not so obviously conduct which would be considered harassment.

They are all incidents which ought to have been and could have been properly dealt with by the employer. Clearly, they were not.

To make matters even worse, the employer then began to lay a 'paper trial' as a prelude to terminating the claimant. There were a series of "warning letters" given which alleged unsatisfactory performance of various work duties.

On the basis of the "warning letters" the employer then dismissed the claimant.

The Court found that none of these warnings were justified. In addition, the Court found that the procedure followed by the employer in dealing with the alleged performance issues was unsatisfactory - for instance, the complainant was given no particulars of alleged customer complaints, and she was given no opportunity to consider the claims made against her and put forward submissions or material to answer them.

The Federal Court had no hesitation in finding that all of the above conduct amounted to illegal discrimination against the complainant on the basis of her sex. It found that she had suffered psychological injury as a result of the discrimination. The Court awarded the complainant damages for her hurt and distress, for her past and future medical expenses, and for her inability to work - including into the future.

Including the costs it will have to pay, the employer is looking at a bill of over half a million dollars as a result of the way it handled a single employee.

How can an employer avoid such a disaster? Some key points:

- ensure written protocols are in place for harassment and discrimination
- document and investigate all alleged instances of behaviour
- take complaints of harassment seriously
- ensure all staff - especially managers - comply with reporting obligations
- don't concoct reasons for dismissal - these are easily seen through!

Swine Flu and Workers Compensation

Swine flu will have a significant impact on Australian employers through down time caused by illness and may also have a financial impact as a result of workers compensation claims by employees who contract the flu as a consequence of their employment.

Although it is commonly known as Swine Flu, the correct medical term is H1N1 Influenza V09. Common symptoms for H1N1 include an acute respiratory illness such as a history of fever and cough, sore throat, rhinorrhea or nasal congestion. The body will also experience an elevation in temperature.

The incubation period for H1N1 is a maximum of seven days although medical information indicates three days is a more common incubation period. It can be communicated from person to person from 24 hours prior to the onset of symptoms until either seven days after the onset of symptoms or until the resolution of fever, whichever is longer. The most common means of this viral transmission from person to person is through the inhalation of infectious droplets produced while talking, coughing and sneezing. Contrary to some media reports the H1N1 influenza cannot be contracted by eating pork or other swine products. At this present point in time there is no anti-vaccine available for prevention of H1N1 but there are some treatment options available to ameliorate the affects of the virus. This includes treatment with Oseltamivir (Tamiflu) or Zanamivir (Relenza). The most effective treatment regime is the anti-viral treatment to be given to probable and confirmed cases within 48 hours of the onset of the symptoms.

The medical literature suggests that anti-viral treatment more than 48 hours after the onset of symptoms is unlikely to be significantly effective. Although there has been 5 deaths related to the contraction of H1N1 influenza in Australia, it has not been confirmed the deaths were solely due to the H1N1 influenza. Current statistics indicate that out of a world wide confirmed 32,000 cases of H1N1 influenza, 231 deaths have occurred. H1N1 influenza is confirmed through testing by using viral sequencing, influenza virus H1N1 V09 specific testing and isolation of the influenza virus H1N1 V09.

A worker can claim compensation for incapacity and medical treatment arising from H1N1 influenza by virtue of contracting the virus within the course of their employment. The H1N1 influenza could be characterised as a disease (although not of a gradual onset) or simply an injury caused by the exposure to another H1N1 infected person. The definition of “injury” in Section 4 of the NSW Workers Compensation Act 1987 "1987 Act" includes the following provisions:

> *“Injury:*
> *(a) means a personal injury arising out of or in the course of their employment; and*
> *(b) includes:*
> *(i) a disease contracted by the worker in the course of employment where employment was a contributing factor to the disease.."*

Section 4 must also be read together with Section 9A of the 1987 Act. Section 9A provides that:

> *"no compensation is payable under the Act in respect of any injury, whether personal injury or disease, if employment was not a substantial contributing factor."*

To complicate matters further, Section 9A will not be applicable to a number of clearly defined employment injury circumstances such as journey claims (Section 10), recess claims (Section 11) or claims by trade union representatives (Section 12). Having said that, irrespective of the type of employment injury situation, the onus remains with the worker to prove on the balance of probabilities he contracted the virus in the course of their employment.

The easy nature of transmission of H1N1 influenza through casual contact will make some claims difficult to defend, depending on the factual circumstances of the worker’s employment. For example casual contact with other infected humans is a likely day to day occurrence in the course of employment for a shop assistant or medical professional. Nevertheless, the simple opportunity to be exposed to the H1N1 influenza will not discharge that onus. In Flounders v Miller (2007), Justice Ipp of the NSW Court of Appeal commented:

> *“It remains necessary for a plaintiff, relying on circumstantial evidence to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstances must do more than give rise to conflicting inference of an equal degree of probability or plausibility. The choice between conflicting inference must be more than a matter of conjecture. If the Court is left to speculate about possibilities as to the cause of the injury, the plaintiff must fail. … It is a test of common sense, with the onus of proof at all times being on the plaintiff.”*

Deputy President Schnell of the Workers Compensation Commission of NSW in *The Office of the Public Guardian v Manning* (2008) examined the contracting of the meningococcal virus in a teaching environment. The Deputy President commented the worker must prove that the probable inference is that the worker contracted the virus in the course of his employment. This will turn on the medical and factual evidence presented in the case and in that matter the worker failed. The worker failed due to the fact the meningococcal virus was not contracted through casual contact. The Commission determined, it was more probable the exposure would have been outside the employment environment. The Commission was not prepared to speculate as to the cause of the injury.

For journey and recess claims, employment being a substantial contributing factor to the injury is not applicable. The journey provisions contained in Section 10 of the 1987 Act are designed to cover the situation where an employee is injured on his way to or from work. Journey claims which could result in the exposure to the H1N1 influenza include public transport, airline travel or taxis etc. We would suggest if a worker was travelling for the purposes of an employment activity and factual information came to light that the another plane, train or ship passenger was subject to a confirmed case of H1N1 influenza, the worker would have little difficulty demonstrating injury whilst on that journey.

Recess claims pursuant to Section 11 of the Act cover situations where a worker has attended a place of employment, is temporarily absent from that place during an ordinary recess or authorised absence and an injury during that absence. The worker will be disentitled to compensation if, during the absence, the worker voluntarily subjects himself or herself to an abnormal risk of injury. Recess claims commonly fall within meal intervals or other breaks within the span of daily work hours. Section 9A also does not apply to recess claims but contains specific provisions as to abnormal risk of injury. The courts have held in order for someone to subject themselves to an abnormal risk of injury they must have knowledge of the risk and a determination to proceed with disregard for its consequences. An error of judgment on the part of the worker is not sufficient. A successful claimant would need to demonstrate with come certainty an exposure to a confirmed H1N1 influenza individual whilst on the ordinary or authorised recess (such as in a café whilst on a meal break) in order to discharge their onus on the balance of probabilities. Part of their claim should include evidence that accepted exposure/incubation/symptom timeline matches with the alleged exposure in the course of their employment. For example, if a worker was to develop H1N1 influenza symptoms say 14 days after their alleged exposure, the claim should fail.

To date approximately 3700 confirmed cases of Swine Flu have been reported in Australia with more than 100 cases requiring hospitalisation. Recent media releases from the Federal Government have confirmed Australia has to moved a "protect" level in light of an impending pandemic. Nevertheless, the relatively low number of "confirmed" cases means it would be difficult for workers to provide the necessary factual and medical evidence to demonstrate the contraction of H1N1 influenza was in the course of their employment. Workers will need to adduce evidence of exposure to a "confirmed" and not just "probable" case of H1N1 influenza within their workplace or whilst on their journey or recess. This is not forgetting the necessary medical evidence to confirm that the worker has in fact actually contracted the H1N1 influenza. The flip side to this is that the relative rarity of the H1N1 influenza means that medical evidence diagnosing the H1N1 influenza and factual evidence of exposure to another "confirmed" individual within the auspices of a work environment should be enough for the worker to demonstrate injury on the balance of probabilities. Gathering this evidence however will present some challenges given the relatively short incubation and symptom period.

For workers travelling overseas in the course of their employment, specific care will need to be taken to avoid a potential exposure. The Federal Government regularly provides updates and warnings in relation to H1N1 influenza. The smarttraveller.gov.au website currently issues specific travel advisories with regards to the H1N1 influenza. As at mid June 2009 the travel advisory was that Australians "reconsider their need to travel to Mexico due to an outbreak of the H1N1 influenza." They have also identified confirmed cases in a number of countries ranging from Argentina to Vietnam. It is recommended that employers consult the smart traveller website and contact the Commonwealth Health Hotline on 1802 007 to confirm the travel advisory before their staff travel.

Specifically, for any workers who travel overseas in the course of their employment, consideration should be given to workers who are at high risk of serious complications from any influenza. These include pregnant women, the elderly, persons with chronic conditions such as diabetes, lung disease or heart disease. Travel should be discussed with an appropriate general practitioner before deciding whether to travel. Vaccinations against seasonal influenza two weeks prior to travel is still recommended although it is generally accepted that there is no known degree of protection against the H1N1 influenza. General hand hygiene such as the washing and drying of hands should also be practised. Workers should also avoid contact with any persons who are currently experiencing flu like symptoms such as fever, sneezing and coughing.

Employers can minimise the risk of exposure within the work place by taking measures such as:

- immediately isolating a "confirmed" worker with H1N1 influenza at home. This should be for a minimum period of 7 days;
- contact any other workers who have been in contact with a confirmed case and exhibiting flu like symptoms to seek medical treatment with a general practitioner;
- disinfect any utensils and the general work place of any confirmed H1N1 influenza worker.

Employers should also consider their Occupational Health and Safety obligations and a risk assessment should be carried out

in light of the H1N1 influenza outbreak. The results of this risk assessment may include:

- delaying any travel of workers to countries to high risk countries such as Mexico or the United States;
- instructing workers not to frequent public places whilst on overseas travel and the use of a mask when in a public environment;
- use alternative means of conducting business in high risk countries such as the use of tele or videoconferencing;
- education and training of workers as to the symptoms of H1N1 influenza and requesting they immediately consult their general practitioner if they exhibit symptoms;
- immediate home isolation for a period of 7 days for any workers who return from high risk countries with flu like symptoms.

Fortunately, the H1N1 influenza symptoms are relatively mild. Although like any influenza, H1N1 can be spread relatively easily, it still remains that the worker must demonstrate on the balance of probabilities that it was contracted in the course of their employment. Of course, the worker will have the normal recourse to sick leave and should not return until they have been cleared by their general practitioner. Hopefully, with simple strategies and education, the impact of H1N1 influenza on employers and insurers should remain minimal.

Negligence and Shopping Centre Falls

Shopping Centres that are faced with the need to upgrade and carry out building works are regularly confronted with the difficulty of dealing with the interaction of pedestrian traffic with construction works. When accidents occur whilst construction works are taking place shopping centres will be faced with damages claims from visitors injured as a consequence of the construction works.

In NSW the *Occupational Health & Safety Act* imposes obligations on employers and controllers of premises to ensure the health and safety of employees and other persons attending locations where work is carried out. So is there an interaction between the Occupational Health & Safety Act and the common law when it comes to the assessment of negligence on the part of a shopping centre manager when a damages claim is brought by a person who is injured allegedly as a result of the construction works.

The NSW Court of Appeal in *Wynn Tressider Management -v- Fiona Barkho* was called on to determine a claim by Fiona Barkho who was injured when she slipped on water which had leaked through the roof of the centre onto a carpeted temporary access ramp near the entrance to the car park and had been carried onto the tiled floor at the top of the ramp by pedestrian traffic. Barkho alleged that the shopping centre manager had been negligent and had breached a statutory duty of care created by the Occupational Health & Safety Regulations. In the original trial she succeeded in her claim and it was held the centre management had breached a statutory duty under the Occupational Health & Safety Regulations and she was awarded damages of $134,068.16.

Barkho had sued both the centre manager Wynn Tressider, Glad Cleaning Services who had entered into a cleaning contract with Wynn Tressider and also Moonlight Cleaning Services that had entered into a subcontract with Glad Cleaning Services to provide those cleaning services. The original trial judge whose findings on the circumstances of the accident were not challenged, found that the carpeted ramp was a temporary structure and the top of the ramp near the sliding doors had a tile/terrazzo floor. With the construction work, the ceiling and the ramp foyer area was open with no cladding but covered by timber roof and it had been raining very heavily during the night with intermittent rain in the morning. When arriving at work the cleaner noticed water leaking through the roof onto the carpet area and yellow warning cones were placed along the length of the ramp and the leak was reported to security. Security instructed the cleaners to dry the area. The leak through the roof continued notwithstanding a plastic cover placed over the timber roof so a yellow caution sign was placed on the vinyl/terrazzo floor near the sliding door. Water flowed from the carpet onto the hard foyer surface. To meet the continuing problem the water was mopped every 20 to 30 minutes. The judge found there was a path along the ramp and across the tiled floor to the sliding doors which was free of water.

Barkho entered from the car park through the sliding doors, across the vinyl/terrazzo floor and down the carpeted ramp to the street exit. She did not notice the water leak or the wet floor or the three warning cones or the caution sign which was in place. When she re-entered the centre and ascended the ramp to return to her car she was walking with her head down, did not see the water on the floor or the warning cones as she reached the top of the ramp and she first saw a yellow caution sign near a cleaner using a mop and bucket. Momentarily she stepped onto the floor and she slipped on the surface which was wet from water transferred from the carpet area due to the ceiling leak. She was wearing a pair of thongs.

An employee of the shopping centre conceded that it was possible to tape off the wet area to allow use of the clear pathway which was not wet but this was not done as he did not have any barrier tape. The shopping centre manager also conceded that it was possible to close off that entrance way and require patrons to use a different entrance from another level of the car park. The trial judge rejected the case against Moonlight which was based on a failure to warn of the presence of water on the floor. The judge determined it was not part of Moonlight's responsibility or in its authority to close the area or otherwise barricade it. As the case against Moonlight was not made out the case against Glad also failed.

In relation to the claim against the shopping centre management Barkho argued that there had been a breach of statutory duty and therefore any contributory negligence of Barkho was irrelevant and there should be no deduction for contributory negligence. The judge found the Occupational Health & Safety Regulations provide that a controller of premises must take steps to identify any foreseeable hazard and require the elimination of any risk as far as reasonable practicable. The trial judge found there had been a breach of that statutory duty. Further , the trial judge found that Barkho had not been negligent in her approach to the accident and even if she had contributed, negligence was not a defence to a claim for breach of a statutory duty count.

Wynn Tressider appealed. Justice McColl delivered the leading judgment. When dealing with the issue of negligence Justice McColl J found:

> *"as I have said, it was common ground that Wynn Tressider was the occupier of the Centre. This status arose from its care, control and management of the premises. By virtue of its power of control, it owed Barkho as a lawful entrant to the centre, a duty to take reasonable care to avoid a foreseeable risk of injury. The measure of the discharge of its duty what a reasonable person would in the circumstances do by way of a response to the foreseeable risk. . . . Determining whether the duty has been breached turned upon the probability of the risk occurring, the magnitude of the consequences and the expense and inconvenience of eliminating the risk. . . . In the assessment of breach weight had to be given to the expectation that (Barkho) would exercise reasonable care for her own safety and also to the possibility of "in inadvertence" and thoughtlessness". However it must also be accepted that while persons exercising reasonable care would be able to avoid injury in some situations, other situations present "foreseeable risk of harm" even to persons taking such care. Wynn Tressider and Moonlight had a degree of control and management in relation to the premises Moonlight's opportunity to deal with the consequences of the leak in the roof was, as the primary judge found, circumscribed by its contract. In particular it had no authority to barricade areas of the centre. It was open to the primary judge, accordingly to conclude that the answer to the question whether Wynn Tressider and Moonlight had breached their duty of care was not necessarily answered merely by reference to what Moonlight did. Their duties of care were not coterminous, but depend upon the extent to which they could exercise control and management."*

The Court of Appeal determined that it was open to the trial judge to find that the occupier had been negligent. The fact that the plastic sheeting over the roof did not prevent the leak and the failure to close the area of the wet carpeted ramp on to which water was leaking so as to permit pedestrian passage along a dry path were both reasons to find negligence. It was noted there was no suggestion that these steps would be costly.

The Court of Appeal rejected an argument by the centre management that there was not sufficient weight given to Barkho's own carelessness. It was noted that the cones were sufficiently distant from the actual location of the water on which she fell as to not alert her to the danger that she was about to encounter. Accordingly the challenge to the finding that Barkho had been negligent and had contributed to her own demise was rejected. The Court of Appeal held that a case of negligence had been made out and there was no contributory negligence.

However the Court of Appeal decided not to express any definitive view on whether or not a claim based on a breach of a statutory duty could be made out. To the contrary the Court of Appeal suggested that such a determination should be reserved for another day. Justice McColl noted that it seemed prima facie improbable that the OH&S legislation's object is to secure the health, safety and welfare of persons at work which would extend to provide a private cause of action to members of the public. However Justice McColl noted there are some indications that the Act was intended to have a wider reach than the employment relationship. Duties are imposed on controllers of premises used by people as a place of work and it might equivalently be accepted that taking those matters into account on a literal reading of the Occupational Health & Safety Regulations they appear to afford protection to members of the public accessing places of work.

It was however noted there are substantial policy reasons which appear to militate against the conclusion that the legislature

intended to extend to the protection of the OH&S Act and Regulations to members of the public entering shopping centres. The duties imposed by the Regulations are arguable absolute and if they do confer a private right of action on a person injured then it would appear that members of the public in Barkho's position who are injured on premises which are places where people work and places to which members of the public have access, may be in a substantially better position than members of the public whose causes of action for injuries arise out of allegedly defective premises which would be governed by the Civil Liability Act. Justice McColl noted:

> *"the alternative and larger, proposition is that the effect of the enactment of the Civil Liability Act is that all causes of action for breaches of statutory duty pleaded since its enactment which are, in the substance, a claim for damages for harm resulting from negligence whether or not the injury involved arose in the course of the relationship of employer/employee, are governed by that Act."*

Justice McColl also referred to a decision of the Court of Appeal in Booksan which had found that contributory negligence was available as a defence to a breach of a statutory duty based on a breach of the Construction Safety Regulation 1950.

So was there a claim for breach of a statutory duty and if so was contributory negligence a defence to that claim? In light of the finding of negligence and the finding that there was no contributory negligence it was not necessary for the Court of Appeal to decide these issues. Those issues will need to wait for another day.

So for now the issue of whether or not the Occupational Health & Safety Act and Regulations gives rise to a statutory duty of care which can be relied on by an injured person remains up for grabs. However this time the plaintiff has retained her judgment without reduction for contributory negligence.

Injury in First Accident Causes Second Accident. Complications Assessing Damages

Sorting out the liabilities of an employer and a third party that have been negligent and have caused an employee's injury is not always a simple matter. This is particularly the case when a person is injured and a subsequent injury is a direct result of the initial injury. For example, a second injury may be causally related to the first injury where an accident results in an injury to a knee and the weaknesses in the knee makes it susceptible to collapse and a second accident occurs as a consequence of the knee collapsing. The persons responsible for the first accident will be liable for the damages claimed from the first accident which may well include any injuries and damages flowing from the second accident.

The New South Wales Court of Appeal in Birdon Marina Pty Limited - v - Glenn Jepp recently considered those very circumstances and was called on to determine the manner in which damages must be assessed and worker's compensation payments refunded where the first accident was the result of negligence on the part of the employer and a third party and the second accident was not the result of any negligence and was simply a result of the original injury.

Jepp approached Birdon Marina for employment. He was referred to Macquarie Business Centre, a labour hire company which engaged Jepp and Jepp was then sent back to Birdon Marina to undertake duties as a fitter and turner. Whilst working in the shipyard Jepp fell from a large circular tank while placing a hose in an opening in the tank. He suffered an injury to his right knee which came to surgery. After his injury he returned to Macquarie Business Centre on light duties which involved interviewing clients. His return to work was co-ordinated by injury management consultants. Jepp was a very tall man and his supervisor at Macquarie Business Centre asked him to attend at work one Saturday to replace some ceiling tiles. To complete the task he needed to stand on the first flat step of a lower ladder. Whilst standing on the ladder his right knee gave way and he fell to the ground suffering a spiral fracture of his right leg. Jepp sued Birdon Marina claiming damages for his injuries. He was unable to sue his employer Macquarie Business Centre as his injuries did not satisfy the threshold which would entitle him to bring a damages claim against his employer. His injuries resulted in less than a 15% whole person impairment. In the claim Jepp also argued that the second accident was the direct result of injuries in the first accident. Macquarie Business Centre's workers compensation insurer had paid workers compensation benefits in relation to the first accident and continued to pay workers compensation benefits following the second accident.

In the original claim the trial judge determined that Macquarie Business Centre, the employer was not in any way negligent in either asking Jepp to do the task or permitting him to carry out the task which he was performing when he fell from the ladder. The trial judge accepted it was foreseeable that the knee might give way at any time and cause a further injury however the ankle injury caused in the fall was not some separate unrelated injury, but was an injury which was causally linked to the first injury.

An appeal to the Court of Appeal followed.

President Allsop of the Court of Appeal noted that in the circumstances in this case where the employer and a third party were both negligent and the whole person impairment of the injured person was less than 15% , no damages could be awarded to Jepp in any common law action against his employer Macquarie Business Centre and Birdon Marina was not able to recover against Macquarie Business Centre on any cross claim however the liability of Birdon Marina to Jepp for damages would be reduced by the percentage contribution of Macquarie Business Centre to the accident. If Macquarie were X% liable for the accident the damages payable by Birdon Marina would be reduced by X%. However President Allsop went on to note that Section 151Z of the Workers Compensation Act does not provide a mechanism for recovery of compensation payments made in connection with the second accident rather the damages which would be awarded to Jepp would need to be reduced to take into account the workers compensation payments he would recover in relation to the second incident.

President Allsop noted in summary:

> *"(a) Birdon Marina was entitled to a percentage reduction in any judgment against it equivalent to Macquarie's responsibility for the injuries;*
>
> *(b) As to the past workers compensation payments made referrable to the first injury, these were to be included in Mr Jepp's judgment but refunded to Macquarie;*
>
> *(c) As to future workers compensation payments otherwise payable in respect of the first injury these were no longer payable as they were extinguished by virtue of the judgment in the proceedings(the judgement for negligence that caused the first injury);*
>
> *(d) As to the past workers compensation payments made and referrable to the second injury these were to be deducted from Mr Jepp's judgment and (so not refunded to Macquarie); and*
>
> *(e) As to the future workers compensation payments payable in respect of the second injury these are still payable and an assessment of them must be made and the value deducted from Mr Jepp's judgment."*

As can be seen this can be a very complicated scenario. The Court of Appeal concluded the second accident would not have occurred had Jepp not been in the physical condition caused by Birdon Marina's negligence and accordingly the added damage should be treated as caused by that negligence.

Birdon Marina challenged the finding that Macquarie Business Centre were not negligent in requiring Jepp to perform the duties to perform when he was injured. It was argued that there was a heightened duty of care as Jepp had a pre-disposing injury. It was argued that it was foreseeable that the knee might give way and together with the nature of restrictions placed on Jepp by the return to work co-ordinator Macquarie Business Centre should not have required Jepp to undertake the type of activity he was performing when he fell. The Court of Appeal did not accept these arguments. The Court of Appeal noted that it was clear that Jepp's knee was weakened and susceptible and that these circumstances required conformance with the work restrictions suggested however the activity fell within the constraints of those restrictions and did not amount to any real or apparent risk to him. The Court of Appeal held that in those circumstances the finding of no negligence on the part of Macquarie Business Centre was correct.

The trial judge had determined that Macquarie were 20% to blame for the accident. Accordingly the totality of damages was to be reduced by 20%.

Nevertheless when the Court of Appeal came to determine the workers compensation payments referrable to the second accident it noted that it was hampered in doing so as at the original trial Birdon Marina had argued that the best way to deal with the issue was by a broad brush approach and deduct a further 5% from the damages awarded. There was no attempt by Birdon Marina at the original trial to identify what part of the totality of workers compensation payments made related to the second injury. The Court of Appeal noted that that as this issue was not dealt with at the trial as the broad brush approach was propounded the Court of Appeal should not permit Birdon Marina to argue a new case on appeal. The Court of Appeal noted that the correct approach is to have a trial within a trial to value the past paid compensation and future payable compensation that should be deducted from the judgment and the defendant bears the onus of proof of these amounts. The Court of Appeal concluded that whilst the judgment of the trial judge might lead to the conclusion there was a failure to deal with the deduction of workers compensation payments attributable to the second accident it was set against a background of how the submissions were put to the judge namely that there be a broad brush approach in dealing with the matter. On that basis the appeal on this issue failed as Birdon Marina had not proved the amount of workers compensation payments that

should be deducted.

Had there been evidence before the trial judge to permit the delineation of compensation payments between the two accidents then the past and future compensation payments attributable to the second accident would have been deducted from the damages awarded.

At the end of the day Jepp finds himself in the fortunate position that payments of workers compensation attributable to the second accident were not deducted due to Birdon Marina's failure to properly run the argument in the first case and Jepp continues to be entitled to receive workers compensation benefits referrable to the second accident as his rights do not end as a consequence of the resolution of his claim for the negligence of Birdon Marina arising out of the first accident.

This may seem a convoluted result however the case serves to demonstrates the caution with which parties need to approach claims where there is more than one accident and arguments that the second accident is the result of injuries sustained in the first accident.

Medical Examinations and Personal Injury Claims

When defending a personal injury claim an insurer will often seek to have an injured person examined by an independent medical expert to determine the extent of injuries. Sometimes a medical practitioner may require additional testing to be performed to carry out their assessment and a question arises as to whether or not an injured person is obliged to undertake those ancillary assessments.

In NSW the Uniform Civil Procedure Rules provides a regime for requiring persons to attend for medical examinations. In particular Part 23 of the Rules provides that a party may give the other party a notice for medical examination by a specified medical expert at a specified time and place. The Court has the power to make orders for the medical examination and order that a person concerned submit themselves to an examination by a specified medical expert. The rules also provide that if a party fails to comply with their obligations to attend to the medical examination an application may be made to dismiss the proceedings. The Court may also from time to time by Order stay any proceedings either permanently or until a specified day.

So is there a limit on the nature of the medical examinations which can be imposed?

The NSW Court of Appeal in *Rowlands - v - State of NSW* was called onto determine whether or not an injured person could be required to attend upon a medical practitioner for a blood test to screen for illicit drug use before the injured person could undertake a neuropsychological testing.

Rowlands claimed damages for personal injuries including brain injury. Evidence had been produced by the injured person that before the date of injury and since they had used illicit drugs including cannabis and amphetamines. The solicitors for the defendant had been informed that neuropsychological testing would be unreliable if the injured person was using illicit drugs at least a week before testing although there also may be long term effects of the drug use. The solicitors for the defendant then wrote to the plaintiff's solicitors requesting that the plaintiff submit for blood, urine and hair testing for the purposes of drug screening as it would provide a more accurate representation of the plaintiff's drug abuse or non use, as alleged by the plaintiff. No response was provided by the plaintiff's solicitors to that request or subsequent follow ups. Subsequently the lawyers for the defendant applied to the Court for orders requiring the test. A District Court judge who heard the application determined that there was ample evidence and material before the Court to indicate that the needs for those tests were necessary and ultimately the trial judge granted an order that the plaintiff attend for the blood tests. The order was made despite arguments by the plaintiff that the orders sought were beyond the power of the Court. An appeal followed.

The Court of Appeal did not believe the orders were beyond the Court's power but held in the circumstances the orders ought not to have been made.

Hodgson J A of the Court of Appeal with whom President Allsop agreed found that:

> *"the (Uniform Civil Procedure) Rules in question should be construed in the light of the generally understood circumstance that medical examinations now often involve the co-operation of a number of different experts; and often include examination by medical experts, who are pathologists, of samples that are routinely taken, not by medical practitioners, but by employees. Under r 23.1, medical examination is defined as including any examination by a medical expert; and in my opinion that would include examination by an expert pathologist of samples taken from a party, even though the pathologist does not directly examine the party. What is authorised by r 23.4 is "orders for*

medical examination"; and in my opinion that extends to orders directed to and appropriate for the bringing about of medical examination, including the kind of medical examination routinely carried out by pathologists. Such orders could extend at least to routine procedures for obtaining samples that are necessary for that kind of medical examination. ."

The Court of Appeal also considered the plaintiff's claim that an order requiring a party to submit to a medical examination would disregard a person's right to refuse to give samples on the basis of his privilege against self incrimination. The Court of Appeal noted that to provide an injured person with a right to either attend a medical examination ordered or to have their proceedings stayed offends against the right of privilege against self incrimination unless that privilege has been waived. Privilege could be waived where it would be inconsistent with this plaintiff maintaining his claim in which he alleges deficiencies in his cognitive abilities whilst denying the defendant a proper opportunity to have his cognitive capacity tested. Unfortunately adequate evidence was not presented to the trial judge on this issue and more evidence ought to have been required by the trial judge before ordering a stay of proceedings if there was non compliance with an order to attend the medical examination ordered. On that basis the Court of Appeal determined the orders should be overturned. The Court of Appeal ultimately determined that the trial judge's discretion miscarried as the judge had determined that the tests were needed to test the veracity of the plaintiff's contentions and matters of that kind coupled with the comment that causation loomed very large in the case.

The Court of Appeal noted that the ordering of a particular medical examination must be for the purpose of obtaining evidence about a plaintiff's medical condition and cannot be justified for the purposes of obtaining evidence that might go to the plaintiff' veracity generally. On that basis the decision was wrongly made.

The Court of Appeal ultimately made orders requiring Rowlands to attend the testing including the drug testing but declined to grant any orders which would stay the proceedings if he did not comply with that timetable. Rather the Court granted liberty to the parties to apply for a stay of proceedings if Rowlands did not comply with that timetable. It was noted that this approach would have the advantage that if Rowlands chose to claim privilege against self incrimination the merit of that claim could then be considered on an adequate basis on the defendant's application for a stay of proceedings and if that claim is made and not upheld and it appeared that the defendants were thereby prevented from obtaining reliable test results, it could then be a sound basis for a stay of proceedings or the establishment of a further timetable with appropriate cost orders made against Rowlands.

So at the end of the day the Court has power to make orders for injured plaintiffs to undergo medical examinations including blood and hair analysis however whether or not the Court will ultimately stay those proceedings by virtue of a failure to attend an examination in accordance with a court order is a different matter. What is certain is that the Court has the power to order plaintiffs to undertake x-ray, CT scans and MRI scans as well as a blood and hair sample analysis.

Responsibility for Skylarking of Customers

The New South Wales Court of Appeal has recently found in favour of Coles Supermarkets Australia Pty Ltd ("Coles") in a claim where a shopper was struck by a shopping trolley and sustained significant injury as a result of skylarking by two customers.

Rebecca Tormey was shopping at Coles in Gladesville with her eleven year old daughter Melissa on a Saturday around midday. This was the busiest time at the store and there were many other customers shopping. Tormey was in the aisle selling cleaning products when she crouched down in order to pick up an item that she intended to purchase. Whilst crouching down Tormey was struck in the back of the head by a shopping trolley as a consequence of which she sustained significant injuries.

Two men who were in their late twenties or early thirties had been mucking around with the trolley and one of the men had been pulling the trolley from the front while the other held on to the bar at the back and lifted his feet so they were off the ground. The man in front would then let go and the momentum would propel the trolley forward with the other man holding on to the back.

Tormey gave evidence in proceedings commenced in the District Court that prior to the shopping trolley colliding with her she had seen the men behaving the same way.

The trial judge found in favour of Tormey and awarded damages totalling $298,064.58. The trial judge found that Coles had

been negligent in asking the two men to cease their behaviour as a consequence of which Tormey sustained her injuries.

Coles appealed.

The Court of Appeal dismissed the appeal and found in favour of Coles. The Court of Appeal noted that the trial judge found that Coles should have foreseen possible harm to other customers as a consequence of the noise that the men were making and also the fact that they must have seen the men misbehaving with the trolley. In Justice Ipp's opinion the fact that the men were noisy did not in itself mean that the men may cause harm to others in the store. Evidence was given by Tormey and her daughter of a couple of prior incidents involving the men and the trolley, including the second incident when the trolley was let loose by the men, however this was not sufficient to get Tormey over the line.

As noted by the Court of Appeal

> *"The trial judge considered that, for two reasons, the Coles' employees should have foreseen possible harm to customers. Firstly, they must have heard the noise the men were making. Secondly, they must have seen the men misbehaving with the trolley. I shall deal first with the noise. The evidence as to the noise the men were making was undoubtedly cogent. Melissa(Tormey's daughter) said she heard the noise even before entering the store. Both Ms Tormey and Melissa said that the men were very loud. They were laughing and yelling. Ms Tormey said they were "trick acting". She said that that meant "joking around". Throughout the period Ms Tormey and Melissa were in the store, they heard the men making a very loud noise. Importantly, the men, although noisy, were not aggressive. Both Ms Tormey and Melissa made it clear that they were "joking around". Their noise was not directed at any particular customer. Ms Tormey and Melissa did not say that, prior to the accident, the men were in any way obstreperous. The men's general rowdiness and boisterousness, however, was clearly abnormal and they displayed a lack of concern for the sensibilities of the other customers in the store. Nevertheless, their noisiness, on its own, did not suggest that the men might cause harm to others in the store. Accordingly, a finding that Coles' employees should have foreseen that harm might arise from the men's activities is dependent upon the employees knowing what the men were actually doing with the trolley."*

Importantly, Ms Tormey testified that, before the trolley hit her in the back, she saw the two men indulging in horseplay with the trolley on two different occasions and places within the supermarket. Melissa described only one such incident before her mother was struck.

Justice Ipp noted:

> *"It may be arguable that knowledge of the first incident, together with the continuing noise, should have led the Coles' employees who observed the first incident to have monitored the men. This point, however, was not raised at trial and not investigated there, nor was it raised in argument on appeal. I shall therefore say nothing more about it."*

Perhaps if that case was argued Coles may have faced difficulties overturning the trial judges judgement. However, Justice Ipp also noted

> *"In my view, the second incident was significantly more serious than the first. The trolley was pulled at a greater speed and travelled a relatively long distance. Any person seeing such behaviour would have perceived that, if it continued, other persons would be at risk of harm.*
>
> *The Court of Appeal found that while Coles must have known of the first incident, it was not proved that it knew of the second incident. In my opinion, Ms Tormey failed to prove that Coles knew of all the activities of the two men in the store on the day she was injured. As Ms Tormey did not prove that Coles knew of the second incident, Coles' knowledge of the relevant circumstances was insufficient to give rise to a duty on its part to take reasonable care to avoid a risk of injury arising from those activities. Alternatively, as Ms Tormey did not prove that Coles knew of the second incident, she did not prove that Coles failed to respond adequately to the risk of harm constituted by those activities and, therefore, did not prove that Coles breached any duty of care imposed on it.*

The decision is again a reminder that it is not enough that an accident has occurred to succeed in a claim - there must be some negligence. No doubt no claim was brought against the men mucking around with the shopping trolley as they would not have had any sufficient assets to meet any judgment. Coles may well have faced difficulties resisting the claim if it had been argued there was a duty to investigate the unruly behaviour and if the two incidents were witnessed by Coles employees no doubt a different result would have ensued. An occupier will have a duty to deal with unruly behaviour of customers in some circumstances.

OH&S Roundup

Union's Right of Entry- OH&S

Section 136 of the *Occupational Health & Safety Act, 2000* provides that a person must not obstruct hinder or impede any authorised official in the exercise of the officer's functions under the *Occupational Health & Safety Act*. In addition a person must not intimidate or threaten or attempt to intimidate an authorised official in the exercise of the official's functions under the Act. An authorised official can include an authorised representative of an industrial organisation as pursuant to the legislation for the purpose of investigating any suspected breach of the Occupational Health & Safety Act, at a place of work that has members of that organisation, or persons eligible to be members of that organisation.

A confrontation with an authorised representative of an industrial organisation such as the CFMEU can lead to a prosecution under Section 136 of the *Occupational Health & Safety Act, 2000* as was seen in a recent decision in the Industrial Relations Commission of NSW.

Michael Dalzell was convicted by the Chief Industrial Magistrate for an offence under Section 136 and fined $6,500.00 in relation to an incident involved a CFMEU representative who attended a building site on 16 May 2006. What happened at the premises was the subject of two conflicting versions.

Dalzell contended that he received a telephone call from his site manager that several CFMEU organisers were outside the worksite and after that call he attended the site to see a Mr Quirk who allegedly on a previous occasion had threatened Dalzell with violence when Mr Quirk had demanded payment of a site management fee. Dalzell claimed he attempted to pass Mr Quirk at the main gate and Mr Quirk allegedly swore at him and said "*The Union is going to crush you . . . Ferguson has the whole Union after you*." Dalzell allegedly ignored Quirk went inside where he saw Mr Whitehead, requested Whitehead's right of entry permit which Whitehead refused to provide and at that time and without warning Mr Quirk shoulder charged Dalzell forcing him back through the office doorway. Dalzell subsequently telephoned the police and then asked both men to leave the site. There was an exchange of shouts between Mr Quirk and Dalzell, and Dalzell noticed a water hose and picked it up and ultimately turned the hose on Mr Quirk. Quirk and Whitehead were then locked out of the site, the police attended and then two representatives from WorkCover with four union officials attended and following a site inspection seven improvement notices were issued.

According to Quirk and Whitehead they had been advised of problems with the site and were there to carry out a safety audit. Whitehead and Quirk showed their right of entry permits. Whitehead and Quirk claimed it was Dalzell who became agitated and kept ordering Whitehead to leave the site and when Whitehead indicated he was not going to leave and asked to look at Work Method Statements and Dalzell simply picked up the hose and turned it on him. Effectively the version of events was that any pushing and shoving was instigated by Dalzell.

Dalzell argued that he believed that there were other purposes behind the visit of the two men all of which fell outside the Occupational Health & Safety Act. These purposes were that

- both men had come to the site for the purposes of causing him harm and damage
- they had come to the site to unlawfully solicit bribes' and
- there were in fact no safety problems on the site and Quirk's claim to the contrary was therefore a bogus claim in order to utilise the legislation.

The Chief Industrial Magistrate analysed each of these claims and made findings rejecting each one. Essentially the Chief Industrial Magistrate heard evidence from witnesses including a site worker who saw Dalzell push one of the persons with both hands on his chest and heard him speak in a loud and aggressive manner. The Chief Industrial Magistrate determined that Quirk and Dalzell had a relationship which was based on mutual dislike and contempt and found that the evidence given by both men during the proceedings was unreliable and calculated to paint each other "in the worse possible way rather than concentrating on accurately recalling what ensued at the relevant time."

Photographic evidence demonstrated that there were flaws on the construction site with open penetrations at ground level with a drop of between 2 and 2.5 metres. The improvement notices were also evidence of the fact that there were matters relevant to safety which required investigation on the site.

The Chief Industrial Magistrate noted that the section 136 offence was a strict liability offence and there is a potential defence

based on evidence established by the defendant to the effect that whilst conducting himself he was motivated by a genuine and reasonably held belief that the Union officials in question were there for the purposes other than purposes referred to in the Act and that as a consequence to obstruct them was not an offence under Section 136.

As Dalzell argued there were three broad reasons why he believed the representatives did not have the right to attend the site and as each of those reasons had been rejected by the Chief Industrial Magistrate it was held that there could be no genuine or reasonably held belief that Quirk or Whitehead were attending the site for the purposes alleged. The Chief Industrial Magistrate found that Dalzell's conduct was motivated by determination to stop a legitimate and duly authorised site and safety inspection from taking place. The allegation that the two union officials had stormed onto the site were false and the spraying of the union officials with a water hose was a highly provocative and foolish course of action as were his attempts to push or shoulder the two men in the direction of the entry gate.

Dalzell appealed to the Industrial Relations Commission. In essence the Full Court the of the Industrial Relations Commission was called on to determine whether or not there was a defence to section 136 of the Act. The Court noted that the raising of a defence of an honest and reasonable mistake of fact is more accurately described as a ground of exculpation rather than a defence. As the Court noted:

> *"where it is a ground of exculpation, the law in Australia requires that the honest and reasonable but mistaken belief be in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent. Without context, the word innocent means not guilty of the criminal offence. In the case of an offence, or a series of offences, defined by statute, it means that, if the belief were true the conduct of the accused would be "outside of the operation of the enactment".*

The burden of establishing an honest and reasonable mistake is in the first place upon a defendant and he must make it appear that he had reasonable grounds for believing the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. For this form of defence to exist for an *Occupational Health & Safety Act* breach the following must be satisfied:

- it is incumbent on a defendant to introduce material in evidence which gives rise to an honest and reasonable belief in the existence of facts, which if true, would render the impudent act or conduct innocent;
- once a defendant has discharged that evidential burden, the onus falls on the prosecution to negative, beyond reasonable doubt, that the belief was reasonably held; and
- the notion of honest and reasonable belief contains in it both a subjective element consisting of facts within the knowledge of a defendant and objective elements that must be measured or assessed against the evidence by the tribunal of fact.

At the end of the day the Full Court determined that the defence of honest and reasonable mistake of fact was available to Dalzell and in fact that defence would be available to a corporate defendant as well. Whether or not a corporation may be able to rely on the defence depends upon whether the person operating under the mistaken belief was the directing mind and will of that corporation. The issue will fall to be decided by reference to the facts and circumstances in each case.
After the Court of Appeal determined that the defence was available the Full Court determined that the Chief Industrial Magistrate had not erred in determining the facts were not sufficient to establish the defence. Unfortunately for Dalzell his appeal was unsuccessful.

There is a defence to a prosecution of obstructing, hindering, impeding or an authorised official in the exercise of the official's functions under the Act where the defendant has an honest and reasonable but mistaken belief in a state of affairs such that, if the belief were correct, the conduct of the defendant would be innocent . An authorised official can include an authorised representative of an industrial organisation as pursuant to the legislation for the purpose of investigating any suspected breach of the Occupational Health & Safety Act, based on an honest and reasonable but mistaken belief be in a state of affairs that the representative had no right to be there however the proof that there was a reasonable belief will be difficult particularly where there are safety issues on site.

Workers Compensation and Accidents Whilst Overseas

The recent Workers Compensation Commission Presidential decision of Da Ros - v - Qantas Airways Limited [2009] NSW WCCPD58 examined in detail the limits of the requirement that employment be a substantial contributing factor to the injury in a workers compensation claim as specified in Section 9A of the NSW Workers Compensation Act 1987.

The worker was employed with Qantas Airways as a Long Haul Flight Attendant. Whilst in Los Angeles in the course of his employment he was injured in a bicycle accident whilst cycling for fitness. The bicycle he was riding was struck by another bicycle, causing him to fall to the ground. At the time he was in the course of his employment in an interval between arrival and departure time from Los Angeles. This interval is known as "slip time". In accordance with his Enterprise Bargaining Agreement which governed the terms of his employment, he was paid by Qantas for each hour that he was absent from his home base in Sydney. This included the slip time. Consequently, there was no dispute that the worker was within the course of his employment for the purposes of Section 4 of the NSW Workers Compensation Act 1987. It also meant the specific provisions relating to journey claims or recess claims were not applicable.

The specific facts the worker sought to rely upon in demonstrating employment was a substantial contributing factor included:

- at all relevant times he was on slip time occupying hotel accommodation provided by Qantas,
- he was a member of the Qantas Flight Staff Recreation Club and had access to bicycles provided by Qantas,
- Qantas encouraged the worker to familiarise himself with slip ports,
- Qantas encouraged and required him to maintain his physical fitness for physical tests conducted on a bi-annual basis,
- Qantas encouraged the worker not to remain inactive whilst in slip ports

Deputy President O'Grady made it clear that a substantial contributing factor to the worker's injury was the apparent negligence of a bicycle riding courier who collided with the worker's bicycle. The question then remained as to whether or not employment added a factor of substance to that non employment factor. The Deputy President determined despite the presence of those factors, relative to the negligent conduct of the bicycle courier it could not, in his view be said to be important.

Following from previous Court of Appeal decisions, Deputy President O'Grady commented that the factors relating to employment were not serious, weighty, sizeable or large. It followed employment was not a substantial contributing factor.

A final submission made by the worker was to bring the matter within Section 9A due to a similar decision in *White - v - Qantas Airways Limited* determined in 2006. In that matter the Commission found in favour of a worker injured during slip time. The factual difference was in that situation the worker was injured during slip time when he fell in a bathroom of the hotel suite provided by Qantas. Even then, in finding for the worker it was observed that with regards to Section 9A the matter was "borderline". Deputy President O'Grady reminded the worker in the current case that in all matters pursuant to Section 9A, the determination of each matter will turn on its own facts. Simply because a decision was made in favour of another worker during a slip time incident would not mean the current factual circumstances would also mean a decision in the worker's favour.

This decision reminds us of the question of degree applied to matters concerning substantial contributing factor. The Workers Compensation Commission is consistently applying the relevant principles of substantial contributing factor to ensure the legislative intent of the 1995 introduction of Section 9A is maintained. Nevertheless, it should be remembered that had the worker been on an authorised recess rather than within the course of his employment, substantial contributing factor would not have applied and he would have been successful in his claim for compensation.

Can Impairments From 2 Accidents be Aggregated in Workers Compensation Claims?

In our March 2008 edition of GD News we discussed the decision of Department of Juvenile Justice v Edmed which considered the aggregation of entitlements from different injuries to meet the threshold to receive compensation for pain and suffering under the Workers Compensation Act in NSW.

Pursuant to the Workers Compensation Act, 1987 (the "Act") if an injured worker has 10% whole person impairment or greater they are entitled to benefits for pain and suffering up to $50,000.00 under Section 67 of the Act.

If an injured worker has two injuries the impairments cannot be added to get over 10% unless the pathology caused by each incident is identical. Impairments cannot be added together simply because the same body part was injured in the separate incidents.

This issue was again addressed in the recent Workers Compensation Presidential decision of Walker v Roberts.

Roberts sustained an injury during the course of his employment as a labourer in rural NSW whilst working for Walker. He lodged a claim for compensation benefits in the Workers Compensation Commission and was assessed for the purposes of determining his whole person impairment.

Roberts suffered injury to his rotator cuff in his right shoulder in November 2006 when he was pulling bales of hay off the back of a utility. On 13 April 2007 he was attempting to connect the terminals from a battery charger when he suffered an electric shock causing him to throw his right arm back to the left suffering a fracture of the right humerus.

Roberts's solicitors retained Dr Burgess who assessed a 16% whole person impairment in total for both accidents. CGU Workers Compensation requested Dr Burgess assess the two separate incidents separately for the purposes of Section 67 as the pathology arising out of the two incidents were not identical. CGU argued that Roberts had received two injuries each of which resulted in different pathology, the first resulting in a rotator cuff tear and the second resulting in a fracture to the right humerus.

The solicitors for Roberts disagreed. They were of the view, based on the decision of Edmed, that the pathologies were the same and therefore the assessments could be added together. This issue was referred to arbitration for determination.

The Arbitrator found the pathology in the incidents were identical. The Arbitrator referred the matter to an Approved Medical Specialist for a single assessment of whole person impairment. CGU appealed.

On appeal the Arbitrator's decision was overturned. It was found Roberts did not sustain a fracture in the first incident to his humerus. The pathology in the first incident was simply of a soft tissue nature and therefore they were separate and distinct injuries to the same body part.

Each injury or pathology resulting from each injury must be assessed and compensated separately.

Injured worker's will continue to attempt to group injuries together to reach the Section 67 threshold and in these cases the medical evidence must be closely scrutinised. A determination must be made as to the exact pathologies arising out of the separate incidents.

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