GD News

Gillis Delaney Lawyers

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If You Have Knowledge Of A Danger You May Not Be Owed A Duty

The NSW Court of Appeal in *Stephens v Giovenco* and *Dick v Giovenco* have delivered a surprising judgment which determined that a person with knowledge of a danger which ultimately eventuated was not owed a duty of care. The Court of Appeal was divided on this issue however the majority view was that a duty of care reflected by a duty to warn of a risk did not extend to a person who was aware of the risk.

Dick was the owner of a residential property managed by L J Hooker at Newton. Prior to November 2001 the hot water was supplied by a solar heater system on the roof. The solar panels were damaged in a hail storm. The damage was noticeable to Mr Dick when he went onto the roof to inspect the damage. L J Hooker retained Mr Stephens a plumber to inspect the hot water system and identify any problems. Dick asked Stephens for a quote to install a gas hot water system. A quote was provided which included disconnection of hot and cold water to existing hot water system and drain. Stephens installed the gas hot water system and disconnected the water to the solar hot water system rendering it redundant. However at no stage did he disconnect the electrical supply to this system. Stephens did not advise Dick of the necessity to disconnect the electricity supply. The final invoice supplied by Stephens noted amongst other things "redundant Solar Hart HWS on roof drain and cut off from water supply".

In or about August or September 2004, Mr Harley, a handyman, inspected the roof and the redundant hot water system with his assistant, William Gell. Gell observed water leaking from a pipe of the redundant hot water system which was steaming hot. Gell and Harley identified that there was a risk of working on the system while it was potentially still electrified.

In October 2004 Harley was seen on the roof wearing white overalls and the occupants of the house heard the gutter overflowing with water and a loud noise. Later that afternoon Harley returned home changed into shorts and a T-shirt and returned to work on the premises. Before leaving home he told his partner Ms Giovenco that he had called an electrician.

Sometime later Harley was electrocuted by electricity that was still connected to the solar hot water system and he was killed. He had removed the cover to the electrical panel on the storage tank for the hot water system.

Giovenco, Harley's partner, brought claims against Dick and Stephens seeking damages for loss suffered as a consequence of the loss of her partner.

The trial judge concluded that Dick and Stephens owed a duty of care and had breached that duty of care. Stephens was found to owe a legal duty to advise Mr Dick of the need to effect a disconnection of the electricity supply when the hot water system was decommissioned. Dick was found to have owed a duty to action the disconnection of the electrical system well before Harley was electrocuted. The trial judge also concluded that Dick and Stephens had failed to discharge the onus they carried to prove any contributory negligence on the part of Mr Harley.

An appeal followed.

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The Court of Appeal considered the evidence and noted that despite Mr Dick's denial that he did not know of the live connection to the hot water system it should be inferred from the evidence including that of Mr Gell that about six weeks before the electrocution Harley had telephoned Dick and advised that there was an electrical connection to the solar hot water system. However the evidence did not justify an inference that Dick knew at any earlier time of the live connection.

The Court of Appeal did not agree with the trial judge although the three judges were divided when it came to identifying whether a duty of care was owed by Stephens and/or Dick. President Allsop found that neither Dick or Stephens owed a duty of care to Harley.

President Allsop noted:

> *"The analysis to be undertaken in consideration of whether a duty of care exists, its scope and to whom it is owed is to be undertaken at a level of abstraction enabling an inquiry as to the foreseeability of harm to the plaintiff resulting from the acts or omissions of the defendant considered generally as those of the party about to undertake them. This higher level of abstraction extends to defining the class of persons whose exposure to the relevant risk is foreseen or reasonably foreseeable."*

President Allsop concluded that the risk was that:

> *"over time and as the hot water system including the solar panels apparently deteriorated in appearance as a disused body of equipment, someone might deal with the structure on the assumption or in the belief that it was disused, dormant and disconnected. The risk that Mr Stephens' conduct permitted to remain did not, however, increase any danger or risk of injury for someone in Mr Harley's position who knew of the power connection. In that sense, at that level of abstraction, a reasonable person in the position of Mr Stephens could reasonably foresee someone being seriously injured or killed who interfered with the structure assuming or believing the system to be disconnected."*

President Allsop went on to conclude that the risk of injury to someone who knew of the power connection was not reasonably foreseeable.

President Allsop noted:

> *"it was not reasonably foreseeable that someone who knew of the power connection and of the need to obtain an electrician to disconnect it was within the class of persons who might be put in danger by the risk and who could be reasonably foreseen to be possibly injured if reasonable steps to advise the owner appropriately were not taken."*

Harley's knowledge of the electrical connection to the system meant that Stephens did not owe him a duty. Effectively, President Allsop concluded that Stephens did not owe Harley a duty of care. Tobias J A agreed with President Allsop when it came to the views expressed in relation to the claim against Stephens and agreed that Stephens owed no duty and even if there was a duty it did not extend to Mr Harley. He also agreed with President Allsop's analysis on the issue of causation. Accordingly the finding of the Court of Appeal on this issue is that no duty was owed by Stephens.

President Allsop did however note that if he was wrong in finding that there was no duty, Stephens had breached his duty in that he should have advised Dick to disconnect the power, however that negligence did not cause the harm. Harley had undertaken the task with full knowledge and appreciation of the risk of live electricity in the system.

President Allsop concluded there was no reason why responsibility for the harm should be imposed on Mr Stephens, even if he was negligent.

President Allsop also concluded that the facts did not support a finding that Dick was negligent. The question was whether, in failing to retain an electrician properly to disconnect the power he had failed to take reasonable precaution for Mr Harley or anyone else's safety in respect of a foreseeable and not insignificant risk.

President Allsop did not consider the risk of injury to Harley was foreseeable nor was there any basis to think persons were likely to deal with the system. The risk was not foreseeable. Therefore Dick was not negligent. President Allsop went on to conclude that if he was wrong on the question of duty the claim failed on the question of causation. However both Hodgson JA and Tobias JA disagreed with this conclusion and the majority finding on this issue was that Dick did owe a duty that was breached. Tobias J A found that it was reasonable to conclude that it was foreseeable from Mr Dick's perspective that Mr Harley would after a period (and six weeks is more than sufficient) return to the building assuming that the power supply had

been disconnected from the system. That was sufficient to find that a duty was owed and the failure to arrange the disconnection within the six weeks period amounted to negligence. Hodgson J A concluded that both Stephens and Dick were negligent.

Accordingly the claim against Stephens failed but the claim against Dick succeeded.

President Allsop in his judgment went on to determine contributory negligence and assessed contributory negligence for completeness, no doubt to cover the event of any subsequent appeal. His additional findings on contributory negligence were in relation to the claim against Stephens the contributory negligence of Harley should be assessed at 85% and in relation to the claim against Dick it should be assessed at 80% as Harley had a "slighter smaller relative percentage of culpability" when it came to Dick's contribution to the incident.

President Allsop also apportioned liability between Stephens and Dick on the basis of an overall assessment of 65% contributory negligence for Harley and 35% contributory negligence by Stephens and Dick if he was wrong in finding that Dick and Stephens did not owe a duty.

The Court of Appeal was divided on the issues in the case. The majority findings which prevailed were that Dick did owe a duty and had been negligent but Stephens did not owe a duty to a person who knew of the risk.

The limited scoping of the duty to a class of persons which did not include knowledge of a risk is a bold step. The boldness of that step can be seen in President Allsop's approach to go on and make findings which addressed issues such as the extent of contributory negligence, the apportionment between the parties if all parties were negligent and the question of causation which would be live issues if the High Court ultimately overturned the findings on whether a duty was owed.

At the end of the day the three judges of the Court of Appeal were divided on many issues in this case. An appeal to the High Court is probable but for now the Court of Appeal's majority judgment of President Allsop on the issue of whether a duty was owed by Stephens will ensure there are arguments that a duty is not owed to classes of persons that have knowledge of the risk as it is not foreseeable that those persons with knowledge would be harmed. We will wait and see what transpires if the High Court is called on to consider the issue.

Aggravated And Exemplary Damages Are Alive And Well In NSW

Exemplary damages are awarded as a punishment to the guilty and to deter the occurrence of similar conduct in the future. The leading judgment on exemplary damage is *Lamb v Cotogno* which noted "such damages will be awarded where a defendant engages in conduct "variously described as 'wanton and malicious', 'conscious wrongdoing' and 'contumelious disregard of the plaintiff's rights as 'outrageous', 'atrocious', 'vindictive', 'arrogant', 'high handed' or 'insolent.'"

Generally, it is accepted that conscious wrongdoing in contumelious disregard of another's rights will result in an award of exemplary damages. Exemplary damages are awarded rarely.

Aggravated damages on the other hand may be awarded where a defendant has acted in committing a tort with contumelious disregard for the plaintiff's rights in an insulting or high-handed way or with malice. The award of aggravated damages is made as the high-handed actions increases a plaintiff's suffering, warranting an award of aggravated damages.

Conceptually, aggravated damages are compensatory in nature where exemplary damages are punitive and intended to act as a deterrent. Some actions may be sufficient to attract aggravated damages but not exemplary damages. It is generally accepted that aggravated damages are awarded to compensate a plaintiff for increased mental suffering due to the manner in which the defendant has behaved in committing the wrong. Aggravated damages are intended to compensate the injured plaintiff because the more reprehensible the wrongdoer's conduct, the greater the indignity the plaintiff suffers and the greater the outrage of his or her feelings.

The NSW Court of Appeal in Whitbread & Anor v Rail Corporation NSW & Ors was recently called on to consider an appeal in relation to an award of aggravated damages and the rejection of a claim for exemplary damages. The judgment provides a useful guidance on the approach to the Courts to claims for aggravated and exemplary damages.

Two brothers, Sebastian and Christian Whitbread, were involved in an incident at Gosford Railway Station in the early hours of one morning when they were confronted by State Rail Transit Officers. The brothers had been drinking heavily for some hours

and were well affected by alcohol.

The brothers were drinking on the railway station. They were directed to leave the railway station. They had been giving the security guard on duty a hard time. The brothers were abusive and threatening and neither brother was going to leave the railway station on their own volition. The behaviour and offensive language continued for a period of time.
One of the Transit Officers assaulted both assailants.

The upshot was that the brothers were arrested and taken to Gosford Police Station where they were retained for a number of hours. Infringement notices were issued to the brothers upon their release alleging breaches of Railway Regulations. Later, however, these notices were withdrawn and one Transit Officer was prosecuted for assault committed against the brothers.

The brothers then sought damages against RailCorp and a number of Transit Officers. They sought damages for assault and battery, false imprisonment and injurious falsehood and each claimed general damages, aggravated damages, exemplary damages, interest and costs.

The trial judge determined there was no need for a violent reaction by the Transit Officer. The brothers were clearly outnumbered and they could have been physically escorted and retained without the necessity of the type of assault launched by one of the Officers. The Court examined CCTV footage which demonstrated that, leaving the assault aside, the brothers were physically escorted and restrained in a reasonable fashion. Sebastian appeared to be the more belligerent. Christian suffered a lip injury as a result of the assault upon him and his head was banged into the ground, but he did not seem to have any lasting injuries or ill effects. The original trial judge awarded $10,000 to Sebastian and $12,000 to Christian in relation to the injuries they sustained and rejected the claims of false imprisonment and injurious falsehood. The brothers appealed. The damages awarded by the trial judge included $5,000 of aggravated damages for each of the brothers. There was no award of exemplary damages.

An appeal followed. The Court of Appeal was not unanimous in its approach to the claim. Giles JA and Whealy JA concluded that it was appropriate to award aggravated damages in the case and the appropriate compensation had been determined by the trial judge and exemplary damages should not be awarded. The judgments obtained by the brothers were increased for interest, which was not awarded, but otherwise the judgements were not disturbed.

McColl JA, on the other hand, determined that the aggravated damages should be increased to $7,500 and exemplary damages of $10,000 should have been awarded in favour of each brother.

McColl JA noted that exemplary damages are awarded rarely, and something more must be found than a mere finding of fault. McColl JA commented:

> *"In considering whether to award exemplary damages "the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged": ….. "the conduct of the wrongdoer is central to that enquiry….In contradistinction, in the case of aggravated damages the assessment is made from the point of view of the plaintiff:"*

The trial judge found that the Transit Officer who committed the assault acted in a high-handed fashion. The trial judge found the assault was a frightening experience and unnecessary and unjustified. McColl JA concluded that conduct which attracts the epithet "high handed" falls within that class described as demonstrating a contumelious disregard of the plaintiff which would attract an award of exemplary damages".

McColl JA noted the Transit Officer was in a position of power and he abused that position and his conduct could not be excused as a simple loss of temper. Therefore, exemplary damages ought to have been awarded.

The majority of the Court of Appeal, however, concluded that an analysis of the CCTV footage and the statement of the various Transit Officers showed that the Transit Officer who committed the assault had been present during attempts by other Officers to make the brothers listen to reason and, at the same time, to curb their behaviour and language. The Transit Officer observed and listened to the brothers arguing with other Transit Officers for three minutes and after directions to leave, and one of the brothers said "I'll kill you, you f!!! c!!!. I'm not leaving the station." And "I will f!!! smash you". Both brothers had been using offensive language and speaking aggressively during the period and it was immediately after the aggressive language was used that the Transit Officer lunged at the brothers. In those circumstances, it was appropriate not to award exemplary damages.

As can be seen the awarding of exemplary damages will be exercised rarely and shall always be exercised with restraint.

As Whealy JA noted:

> *"In Australian law, an award of exemplary damages is intended to punish the defendant and also to deter the defendant, and others, from behaving in the same or similar reprehensible manner. The objects of such an award encompass condemnation and admonition of the defendant and its behaviour. The purpose of damages of this kind is to mark out the Court's strong disapproval of the conduct and to visit retribution on the person thus sanctioned. It also embraces the notion that such an award will assuage the victim's potential desire or need for revenge and thus avoid any temptation to engage in self help likely to endanger the person".*

On the question of aggravated damages, the Court of Appeal was of the unanimous view that aggravated damages should be awarded however it was noted that it was appropriate to take into account the conduct of the plaintiff when assessing aggravated damages. Aggravated damages being compensatory in nature may be reduced if the plaintiff's conduct has been provocative, since all circumstances must be taken into account in determining the hurt of the plaintiff's feelings and that such circumstances include the fact that the plaintiffs' behaviour may have brought the attack on themselves.

Justice Whealy noted that:

> *"The findings made by the trial judge did not suggest that Schofield (the Transit Officer) was in any way entitled to assault either of the brothers as he did. It was unjustified and unnecessary as the trial judge found. Nevertheless, the behaviour of both Sebastian and Christian was quite unwarranted and justified the giving of directions for their removal from the railway station. Both brothers made it completely clear that they were not going to leave and it was in those circumstances, that they were seized and physically escorted from the premises. It is true that Schofield's assault precipitated the removal process, but it did not alter the fact that the brothers were going to have to be physically restrained and removed in any event. His Honour was entitled to bring their behaviour to bear in assessing the award for aggravated damages".*

At the end of the day, the Transit Officer had overstepped the mark and his conduct justified an award of aggravated damages, but not exemplary damages but there was no neet to deliver any punishment with an award of exemplary damages.

IN NSW the *Civil Liability Act 2002* provides in Section 21 that in an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a Court cannot award exemplary or punitive damages or damages in the nature of aggravated damages. However, Section 21 does not apply to civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person. Accordingly, aggravated and exemplary damages are alive and well in NSW.

There Is No Liability For Negligence Unless Causation Is Established

In a personal injury claim in New South Wales factual causation is an essential element that must be proved by the claimant. Findings that there is a duty of care owed and a breach of duty is not enough. A claimant does not succeed by merely showing that a particular conduct might have deterred or prevented the harm.

But what do you need to show to establish that negligence caused the harm? The recent decision of NSW Court of Appeal in *Jovanovski v Billbergia Pty Limited* provides guidance on the way that the Courts will approach the question of causation where it is alleged that an entity's failure to warn persons from committing criminal acts is the basis of the alleged negligence.

Jovanovski was a contract truck driver for Billbergia Pty Limited. There was a major building project at Meadowbank involving the construction of 680 home units and at times there were up to fifteen trucks on site. Jovanovski left his truck at the site overnight. The site was fenced off and the gate was locked from 6.00pm to 6.00am but there was no separate compound for trucks within the site. Apart from truck drivers there were four excavators on the site which loaded the trucks and labourers and others were also on site during the day.

Jovanovski was not well liked by the men at the site. In February 2004 he found grease had been placed on the door handle of his truck. He complained to a Manager in Billbergia. A few days or perhaps a week later more grease had been placed on the door handle and also on the steps behind the truck cabin that provided access to the top of the truck. Once again a complaint was made by Jovanovski.

On 18 February 2004 Jovanovski checked for grease on the door handle and the steps behind his truck but did not check the steps at the rear of the truck and when he used those steps he fell to the ground as a result of grease on those steps.

Jovanovski sued Billbergia alleging that they owed Jovanovski a duty if care and breached that duty when they failed to warn people at the site that the conduct would not be tolerated. The trial judge found that Billbergia owed Jovanovski a duty of care which would have been owed to an employee and it was required to provide a safe system of work including proper supervision of other persons on the worksite for whose behaviour Billbergia was responsible.

The trial judge found that because of the complaints of grease on the door handle Billbergia should have warned all other working on the site that if they were caught putting grease on any person's truck they would be dismissed. The trial judge concluded a written notice posted at the site or at a toolbox meeting was necessary and that one employee that had previous run ins with Jovanovski should have been specifically warned. Billbergia did nothing. However the trial judge concluded that Jovanovski failed to establish that the negligence was a necessary condition of the occurrence of harm.

Accordingly the claim against Billbergia failed and Jovanovski appealed to the NSW Court of Appeal.

In the Court of Appeal's unanimous judgment Giles JA concluded:

> *"The risk of injury to the appellant(Jovanovski) from grease on the steps was plain, and it is difficult to accept that whoever applied the grease was a mere prankster, or was unaware of the seriousness of what he or she was doing.*
>
> *The appellant (Jovanovski) had gained unpopularity, not limited to Mr Denton or the excavator operators. A number of persons on the site, a class left rather open ended on the evidence and one over members of which the respondent (Billbergia) held varying sway, could have been determined to apply grease to the truck. Given the risks of injury, the perpetrator had departed from fully rational conduct, as shown by the series of applications of grease in February 2004, and was intent on something of a campaign against the appellant (Jovanovski). It is likely that the perpetrator already appreciated his or her exposure to criminal liability and to dismissal from lucrative employment if discovered as the perpetrator.*
>
> *In may have been that a warning would have deterred the person from the last application of grease but that depended on the person's resolve and the likelihood of discovery, and the resolve appears to have been firm and there were ready opportunities for application of grease without discovery. It is not enough that the warning might have had effect."*

Even though there was a duty to warn persons on site that they would be dismissed if they applied grease to trucks there was no certainty that a warning would have prevented persons from acting in a criminal way. Accordingly the Court of Appeal concluded that the trial judge was right in finding that Jovanovski had failed to establish that the negligence was a necessary condition of the occurrence of the harm.

Where injuries are a result of the criminal acts of others, the Courts will be loath to find that the criminal activity would have been prevented by a mere warning. The case serves as a reminder that it is not as simple as pointing to negligence to succeed in a claim, it is still necessary that the negligence be a necessary condition of the occurrence of harm. It is not enough to show that particular conduct might have deterred or prevented the harm.

Proportionate Liability And Consent Judgements

In NSW proportionate liability applies to claims for property damage and economic loss. The effect of proportionate liability is that a defendant to a claim can only be liable for their proportionate share of liability. This can be contrasted to personal injury claims where, even if a party is only 10% liable, a claimant can enforce the entirety of the judgment against that party and recover 100% of the damages.

Section 35 of the *Civil Liability Act 2002* provides that:

> *(1) In any proceedings involving an apportionable claim:*
>
> *(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and*
>
> *(b the court may give judgment against the defendant for not more than that amount.*

Section 36 of the Civil Liability Act 2002 deals with concurrent wrongdoers and provides that:

> *"A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:*
>
> *(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and*
>
> *(b) cannot be required to indemnify any such wrongdoer."*

In a recent Supreme Court decision of *The Owners of Strata Plan No: 62660 v Jacksons Landing Development Pty Limited*, Justice Ball of the Supreme Court considered the question of whether or not Section 36 bars a claim for contribution where there has been a Consent Judgment entered into rather than a determination by the Court.

The plaintiff in those proceedings, the Owners Corporation for the Regatta Wharf Strata Scheme ("The Owners Corporation"), had sued a number of parties in relation to the defective design and construction of the sewage system of Regatta Wharf. Three companies in the Lend Lease Group were sued as developer and promoter of Regatta Wharf. The Owners Corporation alleged that each entity had breached the duty of care owed to it by negligently specifying the construction of the sewage system. Harris Page was the engineer engaged by Bovis Lend Lease Pty Limited, one of the three Lend Lease Group companies, to design the Regatta Wharf hydraulic systems including the hydraulic components of the sewage system. The Owners Corporation also alleged Harris Page breached the duty of care it owed by negligently designing or specifying the sewage system.

On 13 November 2008 the Court entered a consent judgment against the three Lend Lease Group companies in favour of The Owners Corporation for $750,000. On 23 February 2011 the Court entered a Consent Judgment against Harris Page in favour of The Owners Corporation for the sum of $350,000. Harris Page contended that as a consequence of those two judgments and the operation of Section 36 of the Civil Liability Act 2002, the claim for contribution brought by the Lend Lease Group of Companies is not maintainable.

The case involved a summary application by Harris Page to dismiss claims for contribution that were brought against it by Lend Lease. Harris Page contended that the Consent Judgments were judgments for the purpose of Section 36 of the Civil *Liability Act 2002.*

Justice Ball, in the decision indicated that in order for Section 36 to have effect three conditions must be satisfied:

- the claim for contribution must be a claim against "a defendant against whom judgment is given";
- the judgment must be "given under this Part (that is Part 4 of the *Civil Liability Act 2002*) as a concurrent wrongdoer";
- the judgment must be given in relation to an apportionable claim.

In Justice Ball's opinion the first requirement was satisfied, as was the third. The second limb was more problematic.

Justice Ball, in his judgment stated:

> *"It seems to me clear that a person will be a "concurrent wrongdoer" only if the Court makes findings about the existence of "loss or damage" and about which acts or omissions "cause" the loss or damage. It is only when those findings are made that it is possible to identify, as contemplated by Section 34(2), each person whose act or omissions, as found, "cause" the "loss or damage", as found. At that point, and not before, a person could be seen to be a "concurrent wrongdoer…*
>
> *In my opinion, it is reasonably arguable that the judgment obtained against Harris Page was not a judgment "given under this Part" and that it was not obtained against Harris Page as a "concurrent wrongdoer."*

Justice Ball continued:

> *"It follows that iissue estoppel arising from a consent judgment cannot operate to bind those who are not a party to the consent judgment. Consequently, although it is true that, as between the Owners Corporation and Harris Page, iissue estoppel operates in relation to the question of whether Harris Page breached a duty of care owed by it in relation to the construction of the sewage system, and the amount that the Owners Corporation should recover in respect of that*

breach, and although the same can be said of the judgment obtained against the Lend Lease Group companies, it does not follow from that that the issue estoppel operates in relation to those matters as between Harris Page and the Lend Lease Group companies. It is therefore at least reasonably arguable that the question of whether Harris Page and the Lend Lease Group companies are concurrent wrongdoers is an open one. The Court should not attempt to resolve that question on an application for summary dismissal of the claim."

It is possible that when the matter proceeds to a full hearing the Court may come to a different view. Justice Ball specifically commented that the question should not be decided on a summary dismissal application.

Nevertheless, there is a risk for defendants that if a claim is resolved with a plaintiff on the basis of a consent judgment then that it is not in itself sufficient to prevent a claim for apportionment being made and it is possible that a defendant may be joined to a proceedings by way of cross claim. It will be interesting to see what the Court determines when this issue is determined at the Hearing. Given that the proportionate liability regime has been in effect since 2004 there are surprisingly few decisions and a number of issues, including the issue of consent judgments, which remain to be determined by the Court.

Professional Privilege & Investigator's Reports

When an insurer receives a claim it may need to investigate the circumstances relating to the claim for the purposes of determining indemnity and/or assessing an insured's ultimate liability for the claim. Investigators and experts may be appointed to conduct factual investigations.

If a claim proceeds to litigation it is usual for an insurer to receive a Subpoena to produce documents contained in the claim file. That claim file may contain an investigator's report or an expert's report.

Access to documents obtained by the insurer may help a claimant. Legal privilege protects documents from production. If a document is obtained for the dominant purpose of obtaining legal advice, it is protected from production pursuant to legal privilege. So what can an insurer do?

Some insurers will make arrangements with lawyers to act as a post box to engage investigators and then claim legal privilege to resist an order that the document be produced. In these situations the investigator's report is often passed on to the insurer without the provision of legal advice. In other cases the insurers will engage investigators direct for the purposes of gathering information to obtain legal advice.

What is protected by legal privilege? Must a lawyer be involved from the start? What is subject to legal privilege and what is not?

The recent Victorian Supreme Court decision in *Samenic Limited v APM Group (Aust) Pty Limited* provides guidance on the Court's approach to legal advice privilege. As the Court noted, there are two forms of legal privilege; legal advice privilege and privilege that arises as a consequence of litigation.

The facts in this case were straightforward. There was a fire in a cinema complex on 3 November 2004.

A claim was made on Samenic's insurance policy and the insurer appointed an Australian loss adjustor that contacted a forensic consultant and told him about the fire and requested his attendance at the scene of the fire to investigate the cause. The loss adjustor advised the claims administrators for the insurer that their forensic consultant had attended the site the previous day. The adjustor was told that lawyers would be retained to advise in relation to potential liability and any claims that might be brought in relation to the fire. The adjustor was advised that the lawyers would formally retain the expert and would request reports from the expert for the purpose of providing their advice. The next day a lawyer was appointed to "*provide advice in relation to the claims and circumstances and to advise on any potential liabilities and claims that might be made*". The lawyers subsequently asked for reports from the forensic consultant. The report supplied by the consultant was expressed to be prepared for the underwriters, care of their lawyers.

Samenic Limited (formerly Hoyts Cinemas) commenced proceedings claiming damages for a loss suffered as a result of a fire at the Melbourne Central Cinema Complex whilst it was under construction. The construction contractors and managers were sued.

A defendant, a contractor carrying out the electrical installation work issued a Subpoena for Production to Samenic seeking

the production of documents, and in the forensic consultants report. . A defendant, the project manager on the site, objected to the Subpoena.

The Court noted that it is not uncommon in litigation where insurers are involved for a litigant to try to get hold of an investigator's report after an insured incident has occurred. The question for the Court was:

> *"whether or not the disclosure of the contents of the confidential document prepared by another person for the purpose of the lawyer providing legal advice to the client is protected from production by legal advice privilege".*

The Evidence Act in the various States and Territories in Australia provide for legal advice privilege.

The Court noted, the onus is on the party claiming the privilege to demonstrate the document was obtained for the dominant purpose of legal advice. The Court noted in this case it was not argued that "*lawyers were involved as a perfunctory step to attract the privilege by design, with no real intention to seek or gain legal advice*".

Investigator's reports are often required, not only for legal advice but for the insurer's own ordinary business purposes of assessing a claim. The law protects documents from production where they are prepared for the dominant purpose of the lawyer providing legal advice which includes what a party should do in a legal context.

Here the expert had been retained before the lawyers were retained. The adjustor and the expert were already on the scene before the lawyers became involved. Evidence was provided by the lawyers and the adjustors and the expert to confirm this sequence of events. The Court noted that:

> *"Within two days lawyers were engaged as advisors for an event that was of a scale that would call for legal advice and guidance about potential liabilities. Just because the expert was retained originally to investigate before the insurer retained its legal advisor, it should not matter if the expert report was to enable the giving of legal advice or conceiving of matters on which advice would be sought. To be preoccupied with the timing would place form ahead of substance. If it was necessary for the insurer to have the best available evidence to assist it to obtain or formulate a precise request for legal advice, or to see where potential problems might lie, then the rationale for the principle of solicitor / client privilege was activated and it should apply".*

It was argued that it was unclear what advice would be sought at the time the consultant was engaged. It was also argued that the documents would have come into existence in the ordinary course of an insurer's business investigating the cause of the fire.

The Court noted the principles underlying a claim for legal privilege were:

> *"(a) The doctrine of legal professional privilege has to be adapted to ensure that the rationale or policy underlying the doctrine is not sabotaged by rigid adherence to form that does not reflect the practical realities surrounding the application of privilege. The complexity of present day commerce means that it is increasingly necessary for a client to have the assistance of experts, in formulating a request for legal advice and in providing legal advisers with sufficient understanding of the facts to enable that advice to be given.*
>
> *(b) The concept of legal advice is fairly wide. It is understood in a pragmatic sense, and not confined to telling the client the law. It includes advising the client what should be done prudently and sensibly in a relevant legal context.*
>
> *(c) The existence of legal professional privilege is not established merely by the use of verbal formula or by mere conclusionary assertion that the privilege applies. Such assertions can make it unclear what advice was really being sought or the topics to which the instructions or advice were directed. In the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstances, proof of those facts alone will provide a basis for concluding that legal advice was being sought.*
>
> *(d) In its ordinary meaning dominant means the purpose which was the ruling, prevailing or most influential purpose. An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence. This is a question of fact, to be determined objectively.*
>
> *(e) A claim for privilege will not succeed if all that emerges is that the document is a commercial document or has been brought into existence in the ordinary course of business. In the insurance context, there is no privilege if the document was to allow an insurer to make a decision in the ordinary course of its insurance business as to whether or not to grant indemnity."*

The Court noted:

> *"it is enough that reports are commissioned or steps are taken because of established corporate or bureaucratic procedures and the report is made as a result of instructions being followed. What the Court is particularly alert to is whether a solicitor has been retained as a device to be interposed between the insurer and the loss adjuster and expert to present an appearance in form of a relationship of privilege, but in substance using the solicitor as nothing more than as a conduit for information":*

To attract privilege there must be more than that, the documents must be obtained for the dominant purpose of the provision of the legal advice.

The Court in this case was satisfied that privilege attached. The magnitude and the nature of the loss were factors which inevitably would lead to the appointment of loss adjustors, investigators and then lawyers.

Interestingly, the Court commented that:

> *"It would arouse suspicion, for present purposes, if after notification of the fire the first step was to ring the lawyer as if to artificially or shrewdly create the conditions for privilege."*

The Court accepted that lawyers were engaged generally and not as a device and although there was not a legal problem, it was necessary for the insurer to have the best evidence available in order to assist it to obtain or formulate a request for legal advice.

Whilst the documents may not have been brought into existence for the sole purpose of legal advice, that is not the test. The law looks at the dominant purpose and not the sole purpose. Accordingly, the Court upheld the objection to the Subpoena and the documents were protected by legal privilege.

The case serves as a reminder to insurers that to ensure legal privilege applies documents must be obtained for the dominant purpose of the provision of legal advice. It is not enough to use lawyers as a device to engage experts and investigators. If there is no real role for the lawyer to play, the documents produced at the request of the lawyer will not be subject to legal privilege simply because they were requested by the lawyer. However, the good news is that the retention of experts by a loss adjustor or a claims administrator will not invalidate a claim for legal privilege where the documents are produced for the dominant purpose of seeking legal advice.

The Liability Of Drivers Of Vehicles That Harass Bicycle Riders

A drive-by shooting is not a motor accident. However, the Courts continue to surprise with their findings about circumstances that can give rise to a motor accident and compensation under the *Motor Accidents Compensation Act 1999("MAC Act").* You might be surprised at the reach of the *MAC Ac*t.

The New South Wales *MAC Act* governs claims for damages for personal injury for motor accidents. A finding that an accident is a motor accident is a finding that the injury was caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle if the injury is a result of and is caused during the driving of the vehicle. The Courts are continually called on to consider whether or not an accident gives rise to a motor accident and is therefore regulated by the *MAC Act*.

As a consequence of the decision of the New South Wales Court of Appeal in Hawkins v Nominal Defendant, there appears to be a great deal of elasticity when it comes to stretching the circumstances of an accident to fall within the ambit of the *MAC Act.*

Hawkins was a bicycle rider cycling on the footpath along the Pacific Highway, St Leonards, having moved from the road to avoid the intimidating driving and boisterous passenger conduct of an approaching vehicle. The vehicle and its occupants were yelling, beeping and playing loud music. Hawkins was struck by an object thrown from the vehicle and the vehicle accelerated away. Before he could regain control of his bicycle, he collided with a piece of metal lying half way across the footpath which blew out his front tyre causing him to strike a telegraph pole and sustain injuries.

The car and the driver could not be identified.

The *MAC Act* has a regime which permits claims for damages for injuries sustained in motor accidents to be made against a Nominal Defendant which assumes liability for the actions of an unidentified driver of an unidentified vehicle.

At first blush, it would appear that it would be difficult to construe the circumstances of the accident as arising as a consequence of fault of the driver of the vehicle in the use or operation of the vehicle during the driving of the vehicle. A claim for damages was brought by Hawkins against the Nominal Defendant and a District Court Judge determined that the incident was a motor accident and the injury was caused during the driving of the vehicle and damages of $310,000 were awarded. An appeal followed.

The Nominal Defendant argued that throwing an object at Mr Hawkins was a criminal act of a very different nature from the unruly behaviour of which the driver must have been aware. However, the Court of Appeal noted that an available inference was that the driver drove in a way in order to facilitate something being thrown at Hawkins, this being an act that the driver was aware was intentionally committed by a passenger.

When considering the definition of injury in the *MAC Act*, the Court is required to look at the immediate or proximate cause of the injury and it was argued by the Nominal Defendant that the non-driving conduct was the proximate cause of the injury.

Hodgson JA, in the leading judgment, noted that:

> *"An injury caused by a drive-by shooting would not fall to be a motor accident. However, it was argued that the throwing of the object was so connected with the manner of driving in order to harass and intimidate Hawkins that it would be unrealistic to treat the throwing as an independent act, distinct from the harassing and intimidating driving".*

This argument found favour with the Court of Appeal.

The Court of Appeal concluded that it was not necessary for there to be only one cause and it was sufficient that the predominant or immediate or proximate cause of injury was the driving of the vehicle. The Court of Appeal concluded that the fault in driving in this case was the harassment of Hawkins. Hodgson JA with the rest of the Court agreeing concluded with some hesitation that the throwing of the object could be properly considered as part of or incidental to the harassing driving. Accordingly, the Trial Judge's findings were upheld and the appeal was dismissed.

Sackville J also concluded that the throwing of the object was correctly seen as an integral part of the driver's course of conduct in controlling the vehicle in a manner designed to intimidate and harass Hawkins and, accordingly, the incident was a motor accident.

So as the law stands, a drive-by shooting is not a motor accident but a person injured by a passenger who throws something out of the vehicle at a pedestrian whilst the vehicle is deliberately harassing the pedestrian is a motor accident.

The result is a surprising one. Here a person injured through no fault of their own now receives compensation under the *MAC Act* even though the persons responsible for the incident cannot be found. The blame lies with the consequences of the harassment of bicycle riders by passengers in a motor vehicle but everyone's CTP insurance premiums pay for the claim.

Asbestos Litigation – Assessing Damages a Second Time

Exposure to asbestos can result in various asbestos related conditions. Those conditions include asbestos related pleural disease (ARPD) and Mesothelioma. It is not unusual to find that a claim is made for one asbestos condition which is resolved by settlement or judgment and compensation is sought for a different asbestos related condition that arises in the future.

Assessing damages for the two conditions can be difficult where there has been a previous judgment and it is important to ensure that a subsequent award does not result in double compensation. The recent NSW Court of Appeal decision in *Allianz Australia Insurance Limited v McGrath* provides guidance on the approach to the assessment of damages the second time around.

McGrath suffered ARPD as a result of exposure to asbestos. A claim was brought in respect to this condition which resulted in a judgment in an amount of $140,000 inclusive of costs on a provisional basis. The consent orders expressly reserved McGrath's rights in respect of other asbestos related conditions which might arise in the future, including Mesothelioma. McGrath subsequently developed Mesothelioma and sought further damages. The only matter requiring determination by the

Dust Diseases Tribunal was the amount of damages which were assessed by the Dust Disease Tribunal in the amount of $215,000. An appeal followed. The issues for determination on appeal were:

- whether the subsequent award of general damages should have been reduced by the allowance for general damages contained in the first award; or
- whether the subsequent award of general damages should have been increased by excluding from consideration any provision made for general damages in the first award.

The Court of Appeal noted that a basic principle of common law is that:

> *"Damages for one cause of action must be recovered once and for ever, and in the absence of any statutory exception, must be awarded as a lump sum; the Court cannot order a defendant to make periodic payments to the plaintiff. It follows that the Court assessing damages must take into account events which may occur in the future, which may have the effect of either increasing or decreasing the loss suffered by the plaintiff."*

However, the Courts have accepted that a fixed and unreviewable assessment of future loss would be wrong in Dust Diseases claims and the Dust Diseases Tribunal Act permits an award of damages to be assessed on the assumption that an injured person will not develop another dust related condition and then award further damages at a future date if the injured person does develop another dust related condition.

In this case the first award of damages did not identify a component of the award for general damages, however it was agreed that of the total award $91,000 amounted to damages and $20,000 of that was attributable to domestic care, leaving an initial allowance of $71,000 for general damages for pain and suffering.

It was argued before the Court of Appeal that the correct approach was to assess damages in totality at the second trial and then deduct the amount previously allowed in the first award. The Court of Appeal disagreed and concluded that:

> *"In order to avoid double compensation, it was necessary for the Tribunal to determine, as best it could, whether any amount had been allowed in the first award for future pain and suffering and how allowance should be made for that amount in assessing pain and suffering resulting from the subsequent condition."*

The Court of Appeal agreed that the second award should not be made in total disregard of the first award as split awards are intended to avoid the inevitable overrun of compensation in circumstances where other conditions can develop. The Court of Appeal noted that whilst the second award must have regard to the first award of damages, it does not follow that there must be a reassessment of the whole of the dust related loss.

When the trial judge awarded compensation the second time he noted that in assessing damages the principle that he applied was to identify those disabilities which flowed from the ARPD and putting them to one side, as it is the consequences of the malignant Mesothelioma that was being assessed in the second award. The trial judge noted in his assessment:

> *"As best I can, I will determine an amount to compensate the plaintiff for Mesothelioma excluding those matters which, as best I can determine them, have been compensated by the award of ARPD."*

The Court of Appeal did not haggle with the trial judge's approach. There did not need to be a mathematical approach to the situation. It was not necessary to assess damages at large for both conditions and then deduct the first award. The Court of Appeal determined it was appropriate to approach the second assessment as the trial judge did. The Court of Appeal noted:

> *"The second award was not, therefore to be made in total disregard of what happened before. However, it does not follow that there must be a reassessment of the whole of the dust related loss suffered. In some cases, (of which the present is one) the judge making the second award can reduce general damages otherwise available for the second condition by the amount of the first award attributable to the period of overlap."*

At the end of the day the assessment of the second award of damages must compensate the claimant for the pain and suffering caused by the subsequent condition. The task for the Courts is not an easy one, however the principles are clear and the Courts must ensure that there is not double compensation where there are two awards, however there is no mathematical approach and the first award, as a matter of course, does not need to be deducted from a subsequent award of damages.

OH&S Roundup

NSW Work Health & Safety Changes Passed

On 6 May 2011 the NSW Work Health & Safety Act was passed by Parliament and will come into effect from 1 January 2012. The Act introduces the Federal Government's National OH&S regime. However, there are a few surprises in the legislation.

The NSW Labour Government had campaigned hard to retain the position in NSW which permitted Unions to prosecute employers for breaches of the OH&S Act. The original Bill prepared by the O'Farrell Government adopted the Federal Government's regime which did not include a right for Unions to prosecute businesses for offences. However as the O'Farrell Government does not control the Legislative Council, the original Bill has been amended and those amendments have now been passed and as a consequence Unions will continue to enjoy the right to bring prosecutions against businesses. However that right is not an unfettered right.

Unions will only be able to prosecute businesses for category one or category two offences and only where WorkCover have failed to bring prosecutions and have also failed to follow the advice of the Director of Public Prosecutions to commence proceedings. In addition if a union does bring a prosecution it will no longer receive a portion of the penalty which is imposed. Previously if a union successfully prosecuted a business it would receive a portion of the penalty (usually half) as well as payment of its costs by the defendant.

The opportunity for Unions to bring prosecutions will be very limited and will provide no financial return for Unions. No doubt the Unions will see their opportunities to bring prosecutions as extremely limited and constrained by the legislation.

A further amendment imposed on the legislation by the Legislative Council was the retention of a role for the Industrial Court in hearing prosecutions. Whilst category one and category two offences will be heard by the District Court, category three offences will be heard by either the Local Court or the Industrial Court and appeals from the Local Court on category three offences will proceed to the Industrial Court. The jurisdiction was to be taken away from the Industrial Court and given to the Criminal Courts however it will be the more serious offences which will be heard by the District Court in its criminal jurisdiction.

Category one offences attract a maximum penalty of $3 million for a body corporate and $600,000 for individuals and five years jail for company officers. Category one offences are committed if there is a health and safety duty which is breached and the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness and the person is reckless as to the risk to an individual of death or serious injury or illness.

A person commits a category two offence if the person has a health and safety duty and fails to comply with that duty and the failure exposes an individual to a risk of death or serious injury or illness. The maximum penalties are $300,000 for an individual and $1.5 million for a body corporate.

A category three offence is committed if there is a health and safety duty and the person fails to comply with that duty. There is no need that there is a risk to an individual of death or serious injury or illness. The maximum penalty is $100,000 for an individual and $500,000 for a corporation.

A prosecutor will be entitled to elect whether or not to prosecute a business for a category one, two or three offence. Category two and three offences require proof that there was a risk of serious injury or death.

Serious injury is defined as an injury that requires immediate treatment as an in-patient in hospital or immediate treatment for amputations, serious head injuries, serious eye injuries, de-gloving injury or scalping injury, a spinal injury, loss of bodily function or serious lacerations or medical treatment within 48 hours of exposure to a substance.

So the Federal Government's National OH&S Scheme is a fact of life in NSW with the one difference in NSW being the retention of a limited right for the Unions to prosecute businesses. This new regime commences on 1 January 2012.

In addition the changes to the Occupational Health & Safety Act which introduced the concept of reasonable practicability which we referred to in our previous newsletter, have also passed. Those changes commenced on 7 June 2011. Accordingly, duties that used to exist in NSW are now qualified so that there is a duty to ensure so far as is reasonably practicable the safety, health and welfare of persons. The old OH&S Act has a few months to live but its impact will be reduced by the "reasonable practicability qualification" that alters the so called "strict liability" of the duty.

Challenging Prosecutions for Failure to Particularise the Essential Ingredients of a Charge - The Arguments Continue

The NSW Court of Appeal has recently handed down a decision in *GPI (General) Pty Limited v Industrial Court of NSW* which is likely to throw the spanner in the works for those defendants who have sought to argue that proceedings commenced by WorkCover for breaches of the Occupational Health and Safety Act should be dismissed if the charges laid failed to identify the essential ingredients of the offence.

The High Court gave its decision in *Kirk v Industrial Relations Commission of NSW* in February 2010 and set the cat amongst the pigeons when the Court effectively determined that the Industrial Commission should not have determined a prosecution on a charge which failed to set out the essential ingredients of the offence. Kirk's decision led to a flurry of activity with prosecutors seeking to amend charges to incorporate details of the measures which should have been taken by a defendant as Kirk's case confirmed it was necessary for a prosecutor to provide details. Defendants also sought to challenge and dismiss prosecutions for failing to identify the essential ingredients of the offence. In NSW there is a two year period in which to commence prosecutions and it is not uncommon to see those proceedings commenced very close to the end of that period. Therefore if charges were dismissed and the limitation period has passed, fresh proceedings could not be commenced. This provided an incentive for defendants to challenge the charges.

Following the *Kirk* decision, the Industrial Court and the Court of Appeal have determined that if a charge fails to identify the essential ingredients, particulars can be provided, for example by way of a letter, that identify the essential ingredients and will permit the Court to proceed to hear a prosecution, although adequate particulars must have been supplied before proceeding to hearing.

Whilst a conviction can be challenged in *GPI (General) Pty Limited v Industrial Court of NSW*, the NSW Court of Appeal refused to overturn the decisions of the Industrial Relations Commission where a company and its director had been prosecuted successfully on charges which were argued to be invalid as the charges did not properly particularise the offence.

Essentially, the Court of Appeal determined that whilst it is appropriate or necessary in some circumstances to entertain an attack on the form of a charge, the criminal procedure laws in NSW permit amendments to charges and a later opportunity to give particulars will ensure that charges can be heard by the Court even where the charges are initially deficient (as they fail to identify all the essential ingredients) provided particulars are provided before conviction.

Baston J A, in his judgment, noted that:

> *"The High Court decision in* Kirk *does establish that it is necessary that a statement of the offence identify the act or omission of the defendant said to constitute the offence, and that in the case of omission this requires identification of the measures that should have been taken to address the relevant risks. …….*
>
> *The High Court did not rule that this particularisation had to occur at the time the charge was first brought, but based its decision on the point that the matter should not have proceeded without further particularisation. .....*
>
> *Accordingly, in the present case, if the particulars of the charges as given in the original charges were deficient, particulars could be provided in other ways.*
>
> *Further, in this case there is an outstanding application to amend the charges. It seems clear that such an amendment can be granted, at least unless it were to substantially change the nature of the charge."*

It must be remembered that the question in relation to any amendment will be whether additional particulars provided substantially amend the charge, or whether they do no more than provide particulars.

The Court of Appeal in this case rejected the arguments that the Industrial Relations Commission should not have proceeded to conviction on the original charges that were brought as the defendant was aware of the prosecutor's case.

It must be remembered that whilst a charge void of some particulars can be challenged, it does not follow that the charge cannot be rectified. Defendants have incurred considerable expense in recent times arguing that charges must not be heard as they fail to disclose an essential ingredient of the offence, however the Courts will look at substance rather than form. An error in the initial charge will not necessarily be fatal. Particulars can be provided subsequent to the initial charge which cures the apparent deficiency.

Since *Kirk's* case the form of charges laid by WorkCover have changed. The charges are more detailed and are quite prescriptive in identifying the measures which the defendant did not undertake. There is no doubt that *Kirk's* case has led to a substantial change in the way that charges are formulated in NSW and to much activity by defendants seeking to challenge charges and in some cases seeking to overturn convictions as is seen in the following article.

The Courts still continue to see challenges to charges, particularly in relation to prosecutions brought by WorkCover before the decision in *Kirk's* case. However, challenges to charges laid after Kirk's case are rare as prosecutors have taken heed of the need to ensure that the initial charges include the essential ingredients of the offences which include the steps which should have been taken by a defendant.

Specific Steps to be Taken Must be Identified in a Charge

The Full Court of the Industrial Court of NSW in Western Freight Management Pty Limited v Inspector Patton has recently overturned a conviction of a freight company that challenged its conviction on the basis that the original charge which was laid did not particularise the essential ingredients of the offence including the steps which should have been taken by the defendant. The essential ingredients of the offence had not been identified before the trial or during the trial and therefore the conviction was flawed.

The High Court decision in Kirk v Industrial Court of NSW has confirmed that in order to proceed to conviction it is necessary for the essential ingredients of an offence to be identified.

In Western Freight's case the trial judge had identified the specific risk proven by the prosecution being a risk that an employee would be struck by a prime mover with trailer attached as it reversed into position in front of a loading dock. The trial judge identified various measures that should have been taken and convicted the defendant but whether the defendant was on notice of the steps that should have been taken was a different issue and an appeal followed.

The Full Court noted that the statement of offence must identify the act or omission said to constitute a contravention and the relevant act or omission which gives rise to the offence.

Where the legal elements of the charge are found but there are defects in a statement of offence in that it fails to state essential factual elements, it can be overcome by further particularisation. However, the charge in this case did not specify the measures which should have been taken. The term "*traffic and pedestrian management*" was used and the Court noted that this is not a term of art or law and is simply a global term which potentially contains several unspecified measures as to what should have been done. The Court noted that the concept of "a traffic and pedestrian management system" does not in itself envisage any particular measures that could or should be taken and by simply making reference to an adequate traffic and pedestrian management system, a prosecutor does not identify the specific measures that should have been taken and therefore does not provide particulars of the essential factual ingredients of the charge.

The Full Court held that it was not possible in this case to detect the required measures by implication or inferences drawn from a consideration of the statement of the offence. It was not enough to allege that there was a failure to ensure a safe system of work in relation to traffic and pedestrian management or that risk assessments in relation to traffic and pedestrian management were required. The charge needed to identify the risks and the measures which should have been taken. As the charge did not do so and particulars which clearly identified the steps that should have been taken were not provided at any time before the conviction, the conviction could not stand.

The Full Court quashed the conviction.

The Full Court noted:

> *"A defendant must be fairly informed of the charge it has to meet. Further, the structure of the Act requires that a defendant knows what measures it is alleged it did not take so it could properly address available defences.*
>
> *In this matter however we have found no acts or omissions or said facts or omissions necessary to specify the requisite contravention were identified to (the defendant) at any point in the proceedings, up to the conviction judgment. This should result in the appeal being upheld and the convictions of (the defendant) quashed."*

The Court also concluded there should not be a retrial despite the fact that the offence resulted in a fatality.

Specificity is required when a charge is brought and proper particulars must be supplied by the prosecution otherwise a defendant is not afforded with procedural fairness and a conviction that arises where a defendant has not been provided with procedural fairness cannot stand.

Workers Compensation Roundup

The Binding Effect Of Medical Panel Certificates In Employer Negligence Claims – The High Court Has Spoken

Negligence actions against employers are governed by Workers Compensation Legislation in each State and Territory in Australia. Workers Compensation Legislation in those States and Territories have introduced caps on the damages that may be awarded and thresholds which must be met to trigger an entitlement to bring a claim against the employer.
Thresholds are based on the extent of medical impairment. Medical panels are utilised to determine the extent of impairment and generally the legislation provides the Panel's finding are conclusive evidence on the issues determined by the Medical Panel. But how binding are the Panel findings?

The Victorian Workers Compensation Legislation provides in section 104B(9) that the Victorian WorkCover Authority must:

> *"within 14 days of being advised by the worker that the worker disputes the (Authority's) determinations of impairment or total loss in respect of the injury or injuries claimed" refer questions "to a Medical Panel for its opinion".*

Section 67 of the Act provides that the function of the Panel is to give its opinion on any medical question in respect of injuries arising out of or in the course of or due to the nature of employment. Section 68 of the Act provides that :

> *"for the purpose of determining any question or matter, the opinion of the Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any Court, body or person and must be accepted as final and conclusive by any Court, body or person irrespective of who referred the medical question to the Medical Panel or when the medical question was referred."*

The mechanics appear to be relatively straightforward. A worker makes a claim for damages against his employer. WorkCover is required to determine whether or not the threshold is satisfied. If WorkCover determines the threshold is not satisfied and the worker disputes that determination, the worker is referred to the Medical Panel for medical assessment and opinions on questions referred to the Panel designed to address the threshold issues are answered. The Panel provides its opinion and that opinion is to be applied by the Court and section 68 has effect, or does it?

The High Court in *Maurice Blackburn Cashman v Fiona Brown* was called on to determine the effect of the Medical Panel Certificate. Brown was a salaried partner employed by Maurice Blackburn Cashman. She commenced proceedings in the County Court of Victoria claiming damages for personal injuries allegedly suffered as a result of her employer's negligence. She alleged that she had been systematically undermined, harassed and humiliated by fellow employees despite complaints to the employer's Managing Partner and as a result she had suffered injury including psychiatric injury.

The *Accident Compensation Act 1985 (Victoria)* provides for payments for non economic loss based on a permanent impairment assessment based on the degree of impairment determined under the American Medical Association Guide of Evaluation of Permanent Impairment (the AMA Guide) as modified by the Act. In the case of psychiatric impairment the Guides are modified to some extent.

That Act also provides that in order to trigger an entitlement to damages the worker must have suffered a serious injury. No damages for non-economic loss are payable for a psychiatric injury where there was less than a 30% whole person impairment.
The Authority accepted the plaintiff had a psychological injury arising out of her employment with the employer. WorkCover was ultimately required to refer the worker to a Medical Panel and asked two questions which were:

- What is the degree of impairment resulting from the accepted injuries, assessed consequent with section 91 and is the impairment permanent?
- Does the plaintiff have an accepted injury which has resulted in a total loss injury mentioned in the Table in section 98(e)(1) of the Act?

The Panel provided its opinion that there was a 30% psychiatric impairment when assessed in accordance with the Act. The degree of impairment was permanent and the injuries did not fall within the section 98(e)(1) (which provides that psychiatric

injuries which cause an impairment of less than 30% do not give rise to an entitlement to non-economic loss).

The case then proceeded to the County Court. Before the jury was empanelled counsel for the plaintiff informed the Trial Judge that he would object to the employer cross examining the plaintiff or the witness in a way which suggested the plaintiff suffered no injury or no serious injury and that the plaintiff would also object to the employer calling evidence to that effect. Before the Trial commenced that issue was referred to the Court of Appeal of Victoria.

The Court of Appeal determined that the defendant was prohibited from making any assertion, whether by pleading, submission or otherwise and leading or illiciting evidence whether in evidence-in-chief, cross examination or re-examination which was inconsistent with the opinion of the Medical Panel.

The Court of Appeal provided two reasons for holding the opinion which was final and conclusive. First, section 68 operated in a way to ensure the opinion was final and conclusive and secondly, section 104 also contained a provision that provides that no appeal lies to any court or tribunal from a determination or opinion as to the degree of impairment of the worker resulting from an injury.

The matter did not rest there. An appeal to the High Court followed. Interestingly the High Court determined the Medical Panel Certificate was not so conclusive.

The High Court in a unanimous judgment determined that section 68 is in terms of very general application but should not be given a literal interpretation and should be read in a the context that it is applied for the purposes of a determining any question or matter “arising under or for the purposes of the Act”. The High Court noted that once that step is taken it is clear that section 68(4) does not speak to all litigation of questions or to matters that are not questions or matters arising under or for the purposes of the Act. More particularly, section 68(4) does not speak at all of an action for damages brought by a worker against an employer.

The High Court noted that an action that a worker brings against an employer in negligence is not one created by the Act. Each cause of action is either a common law cause or has its origin in a statute other than the Act. The relevant causes of action are not created by the Act and no question or matter arises in the action, to which the opinion of the Medical Panel could be said to relate, that can be described as a question or matter arising under or for the purposes of the Act.
The High Court also concluded that determination by a Medical Panel does not give rise to an issue of estoppel in those circumstances.

Accordingly the Court of Appeal determined that a Court was not obliged to accept as final and conclusive in any trial the opinions of the Medical Panel.

The case will now be determined in accordance with the High Court’s findings and the employer will be entitled to lead evidence on the issues of the cause and extent of the injury and to challenge the findings of the Medical Panel.

The Medical Panel’s findings are not conclusive when it comes to an action in negligence against an employer.

New South Wales has similar provisions in the Workplace Injury Management and Workers Compensation Act 1998(WIM Act). Section 134 of the Act provides that any certificate issued by the Medical Panel is conclusive evidence as to the matters certified except as to a number of issues such as fitness for work and some specified impairments. Section 326 of the WIM Act which applies to medical impairment assessments for work injury damages claims provides that a Medical Assessment Certificate is conclusively presumed to be correct as to the following matters:

(a) Degree of permanent impairment of the worker as a result of an injury;

(b) Whether any proportion permanent impairment is due to any previous injury or pre-existing condition or abnormality;

(c)…

(d) Whether impairment is permanent;

(e) Whether the degree of impairment is fully ascertainable.

As a work injury damages claim is still grounded in the common law and the workers compensation legislation in NSW merely implements a regime to regulate such actions the conclusiveness of a Medical Panel’s findings will also be called into question

for the reasons outlined by the High Court in *Maurice Blackburn Cashman* v Brown.

The High Court's judgment will have far reaching effects. Worker's lawyers are likely to revisit claims where Medical Panels have determined that a worker's medical impairment did not satisfy the requisite threshold for work injury damages.

No doubt some claims will now be commenced despite adverse threshold findings from Medical Panels. Although we will have to wait and see whether this becomes the norm rather than the exception, as it is still necessary for a worker to demonstrate that their impairment is such that the threshold is satisfied to give rise to a claim. The Medical Panel finding is no longer a knockout blow when it comes to determining thresholds for work injury damage claims.

Workers Compensation Commission 2010 Annual Review

The Workers Compensation Commission has recently published its Annual Review for the calendar year ended 2010. The report provides data in relation to the disputes in the Commission and also details of the structural changes introduced in the Commission in 2010. Part of these changes was the implementation of full time Arbitrators. The Commission had previously identified an opportunity to enhance the durability of its decisions by the appointment of suitably qualified and experienced practitioners in a full time role. In July 2010 the Commission appointed 14 full time Arbitrators and 4 part time Arbitrators for a term of three years. A number of the "sessional" Arbitrators remain principally to handle cases in regional areas and to assist with any peaks in metropolitan case demand.

A further change was the introduction of three Senior Arbitrators to assist with the induction, mentoring and training of the Arbitrators. His Honour Judge Greg Keating, the President of the Workers Compensation Commission has commented that there has been appreciable increase in the number of matters resolved at conciliation and a corresponding reduction in the number of appeals from the decisions of Arbitrators. A further review of the appointments will take place in late 2011.

The amount of applications in the Workers Compensation Commission has stabilised at around 11,500 matters. This represents a slight increase of 1% from 2009. Whilst the Commission continues to experience seasonal variations, the applications tend to average around 750 per month. Also remaining consistent is the finalisation of 70% of matters without the need for a written determination. Only 28% of applications required a decision by formal determination. Nevertheless it should be remembered that of the 28% determined by a formal decision, more than 80% of those determinations only involved a medical certificate of determination issued by the Registrar to finalise a section 66 (lump sum compensation) claim. Less than 500 claims were finalised by written determination issued by an Arbitrator. Of these 500 decisions, around 130 were dealt with by an ex tempore (at the time) the decision of the Arbitrator. As can be noted, very few matters proceed to a full judgment with published reasons.

Possibly reflecting the requirements in securing approval from WorkCover for Commutation settlements, the amount of commutations registered in the Workers Compensation Commission fell by approximately 15% in 2010. Although there was a significant increase in matters from 2008 to 2009 this trend has not continued. We suggest the decline is due to a combination of the lowly cost provisions for Commutation settlements, the need for WorkCover approval and the attraction of a work injury damages claim as an alternative. Both work injury damages claims and Commutation settlements have a 15% whole person impairment threshold.

Contrasting with the decline in Commutation settlements is the significant increase in work injury damages claims in the Workers Compensation Commission. Part of the alternative dispute resolution process is the requirement for the majority of these matters to be subject to mediation in the Workers Compensation Commission. Approximately 850 mediations were held in the Workers Compensation Commission in 2010 which represents a 21% increase from 2009 and accumulative increase of over 80% in three years. Additional mediators have been appointed by the Commission to deal with these matters as expeditiously as possible.

63% of all applications to mediate resulted in a settlement. Nevertheless it should be remembered where the employer wholly denies liability or the matter is discontinued or struck out, the matter does not proceed to mediation. If those matters are excluded from the data the proportion of matters settled at mediation during 2010 is 75%. This represents an increase of 8% from 2009 levels.

Matters referred to the Commission for workplace injury management disputes (disputes over worker's capacity) and medical appeals (from Approved Medical Specialist decisions) both experienced a slight increase in 2010. Applications for costs and expedited assessments both decreased. There was also a 25% decrease in the amount of matters being subject to an appeal

from an Arbitrator. This decrease is possibly due to the appointment of full time Arbitrators and a corresponding consistency of decisions without the need for further appeal.

44% of all dispute applications were resolved within three months and a total of 92% were resolved within six months. Even when appeals are included, almost 99% of matters are resolved within twelve months of filing. On average its takes 102 days for the Commission to resolve a dispute application, 112 days to resolve an Arbitral appeal and 100 days to finalise a medical appeal.

Although it was discussed in 2009 the possible reintroduction of a "circuit" Arbitration process to handle groups of matters in country geographical regions, this has not progressed. The significant conclusion of matters at the conciliation stage and the concentration of matters in the Sydney region will probably negate any further steps to introduce the circuit concept.

The Commission has now been in operation for nine years and continues to evolve. The aim to resolve matters in an expeditious way continues to be achieved. Although the appointment of full time Arbitrators is a new change, the early results suggest both consistencies in decisions and poorly prepared matters on the part of the worker are now discontinued earlier through the intervention of the experienced Arbitrators rather than at the end of process. Whilst we expect WorkCover will introduce either regulatory or practice direction changes with the Scheme Agents to deal with the increase in work injury damages claims, we do not expect there will be any amendment to the procedures the way these claims are dealt with once filed in the Commission.

In Which State Is Compensation Payable

The recent decision of *Klemke v Grenfell Commodities Pty Limited [2011] NSW WCCPD 27*, examined whether a worker who sustained injury during a probationary period in Western Australia was entitled to compensation under the provisions of the New South Wales workers compensation legislation.

The worker, who was a resident of New South Wales, applied for a position with the employer as a site manager for their grain export and transport premises at Kwinana Beach, Western Australia. The employment contract was entered into in NSW and was a verbal contract with a probationary period of three weeks. The worker commenced his employment on 24 November 2009 and he was under the supervision of a NSW director of the employer. On or about 10 December 2009, the worker stepped on a piece of timber which caused him to twist his ankle. He continued his normal duties until 16 December 2009 when he returned to New South Wales for the Christmas break.

In the initial arbitration, Arbitrator Phillips rejected the worker's submission that the short period of employment in Western Australia was a temporary arrangement which by virtue of Section 9AA(6) should have been disregarded for the purpose of determining where the worker usually worked. The Arbitrator concluded that the contract was not a temporary arrangement of the kind envisaged by the sub-section and he found that all of the work to be performed under the contract was to be undertaken in Western Australia and not New South Wales. Consequently, he entered an award for the respondent. The worker appealed.

Section 9AA of the 1987 relevantly states:

> *"9AA Liability for compensation*
>
> *Subsection (1) Compensation under this Act is only payable in respect of employment that is connected with the State.*
>
> *(2) The fact that a worker is outside the State when an injury happens does not prevent compensation being payable under this Act in respect of employment that is connected with this State.*
>
> *(3) A worker's employment is connected with:*
>
> *(a) The State in which the worker usually works in that employment, or*
>
> *(b) if no State or no one State is identified by paragraph (a), the State in which the worker is usually based for the purposes of that employment, or*
>
> *(c) if no State or no one State is identified by paragraph (a) or (b), the State in which the employer's principle place of business in Australia is located*
>
> *(5) If no State is identified by subsection (3) or (if applicable) (4), the worker's employment is connected with this State if:*
>
> *(a) the worker is in this State when the injury happens and*

(b) there is no place outside Australia under the legislation of which the worker maybe entitled to compensation for the same matter.

(6) In deciding whether a worker usually works in a State, regard must be had to the worker's work history with the employer and the intention of the worker and employer. However, regard must not be had to any temporary arrangement under which the worker works in a State for a period of not longer than six months."

President Keating indicated that subsection (3) provides for a series of cascading tests for determining the State to which the worker's employment is connected. If that test provided no answer then it was necessary to consider the "usually based" test identified in subsection (3)(b). If neither of those tests identifies the state in which the employer's principle place of business was located it will be the state of connection with employment.

President Keating indicated that in deciding where a worker usually works, Section 9AA(6) provides that regard must be had to the intentions of the worker and the employer. The worker argued on appeal that it was a fundamental clause of the contract of employment that he would work on a three week trial basis in Western Australia, at the end of which either party could elect to pursue a continuing contract of employment for an indefinite period. He therefore sought to argue that the three week trial was a separate contract of employment and sought to categorise it as a "temporary arrangement".

The President accepted that whether an arrangement is a temporary arrangement would depend on the parties' intent to be ascertained by looking at the worker's work history and the terms of the contract. The President approved Deputy President Roche's decision in Martin that a short term contract of less than six months that is not part of a longer or indefinite period of employment will not usually be a "temporary arrangement". The President accepted that there was no suggestion that the parties ever intended that the worker would work anywhere other than in the State of Western Australia.

The President agreed with the Arbitrator's statement that the purpose of Section 9AA(6) was to cover an employee who is normally based in one State and who, on a temporary basis, no longer than six months, is required to work in another State. In the alternative it was found that the evidence favoured the conclusion that the worker and the employer made a contract of indefinite duration that included a probationary period of three weeks, during which either party could terminate the agreement without penalty. That term did not make the contract a "temporary arrangement" within the meaning of Section 9AA(6) such that a second contract would be entered into at the end of the probationary period.

Viewed objectively, the President found that the parties did not intend the contract to be a short term or temporary arrangement. The President commented that the purpose of Section 9AA(6) to is to cover an employee who is normally based in one state and who, on a temporary basis, no longer than six months, is required to work in another state. Consequently, the worker "usually worked" in the State of Western Australia.

The President commented that even if he was wrong in implying the "usually worked" test, the "usually based" test would apply next, which would unequivocally establish that "for the purpose of" workers employment (whether it was temporary or long term), the worker was "usually based" in Western Australia. Consequently, since there was no connection with the State of New South Wales the appeal failed.

Section 9AA is rarely examined in the Commission and a decision by the President gives some clarity to the section. Whilst all working arrangements need to be examined on their own facts, a short probationary period of working in another state does not constitute a temporary working arrangement and thereby offer the worker the protection of the NSW legislation. A clear intent by both parties to work in another state is a strong indication that the employment is connected to that state and compensation will be payable under that state's jurisdiction.

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