GD News

Gillis Delaney Lawyers

July 2013 Issue

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Insurance Contracts Act Amended

On 20 June 2013 legislation was passed by the Federal Government which will change the landscape for insurers in the Australian insurance market. The commencement date for the legislation is yet to be announced but will not be far away. However whilst there will be a phasing in period for some of the provisions insurers will need to embrace the new concepts immediately.

The changes will:

- remove impediments to the use of electronic communication for statutory notices and documents;
- impose more onerous obligations on insurers requiring them to remind a prospective insured that their duty of disclosure continues until the policy commences and prohibit the use of 'catch all' questions by insurers in connection with applications for 'eligible' contracts of insurance. It is intended to make the duty of disclosure easier for consumers to understand and comply with, especially at renewal of household/domestic insurance contracts;
- ensure that a failure to comply with the duty of utmost good faith is a breach of the Insurance Contracts Act;
- permit ASIC to take action against an insurer and impose conditions on its licence where the insurer has breached its duty of utmost good faith;
- extend the duty of utmost good faith to third-party beneficiaries;
- clarify the rights and obligations of those who are entitled to cover under a contract of insurance whilst not being a named insured;
- provide ASIC with the power to commence representative proceedings for breaches by insurers of the duty of utmost good faith, where there is a public interest in doing so.

It will take 30 months for all of the changes to come into effect however the changes do not at this stage incorporate the Government's proposed introduction of unfair contract term laws for insurance contracts and we will have to wait and see if that reform proceeds after the Federal election take place in August.

You can review our detailed analysis of the changes in our January Newsletter.

Medical Negligence- High Court Rules On Duty To Warn And Causation

The High Court has delivered its judgment in *Wallace v Kam*, a medical negligence case that examined the duty owed by doctors to warn of risks that may arise during surgery and the consequences of the materialisation of a risk that would have been assumed by a patient had even if they had been warned of the risk. Medical practitioners are not necessarily liable for the materialisation of a risk merely because they failed to warn a patient about the risk.

Mr Wallace sought medical assistance in relation to a condition of his lumbar spine. Dr Kam, a neurosurgeon, performed a surgical procedure on him. The surgical procedure had inherent risks. One risk was of temporary local damage to nerves within his thighs, described as "bilateral femoral neurapraxia", resulting from lying face down on the operating table for an extended

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period. Another, distinct risk was a one-in-twenty chance of permanent and catastrophic paralysis resulting from damage to his spinal nerves. The surgical procedure was unsuccessful: the condition of Mr Wallace's lumbar spine did not improve. The first risk materialised: Mr Wallace sustained neurapraxia which left him in severe pain for some time. The second risk did not.

Mr Wallace claimed damages from Dr Kam for the neurapraxia he sustained. Mr Wallace's claim in the Supreme Court of New South Wales was that Dr Kam negligently failed to warn him of risks including the risk of neurapraxia and the risk of paralysis and that, had he been warned of either risk, he would have chosen not to undergo the surgical procedure and would therefore not have sustained the neurapraxia.

The claim was dismissed at trial. Harrison J found that Dr Kam negligently failed to warn Mr Wallace of the risk of neurapraxia. But His Honour also found that Mr Wallace would have chosen to undergo the surgical procedure even if warned of the risk of neurapraxia. Harrison J concluded, for that reason, that Dr Kam's negligent failure to warn Mr Wallace of the risk of neurapraxia was not a necessary condition of the occurrence of the neurapraxia. He declined to make any finding about whether Dr Kam negligently failed to warn Mr Wallace of the risk of paralysis, and about what Mr Wallace would have done if warned of the risk of paralysis, on the basis that the "legal cause" of the neurapraxia "could never be the failure to warn of some other risk that did not materialize".

Mr Wallace appealed to the Court of Appeal of the Supreme Court of New South Wales and in a two to one majority the Court of Appeal upheld the rejection of the claim. An appeal to the High Court followed.

In a unanimous Judgment the High Court described the duty of care owed by a medical practitioner in the following terms:

> *"The common law duty of a medical practitioner to a patient is a single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment. A component of that single comprehensive duty is ordinarily to warn the patient of "material risks" of physical injury inherent in a proposed treatment. A risk of physical injury inherent in a proposed treatment is material if it is a risk to which a reasonable person in the position of the patient would be likely to attach significance, or if it is a risk to which the medical practitioner knows or ought reasonably to know the particular patient would be likely to attach significance in choosing whether or not to undergo a proposed treatment.*
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> *The component of the duty of a medical practitioner that ordinarily requires the medical practitioner to inform the patient of material risks of physical injury inherent in a proposed treatment is founded on the underlying common law right of the patient to choose whether or not to undergo a proposed treatment. In imposing that component of the duty, the common law recognises not only the right of the patient to choose but the need for the patient to be adequately informed in order to be able to make that choice rationally.*
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> *The policy underlying the imposition of that component of the duty is to equip the patient with information relevant to the choice that is the patient's to make. The duty to inform the patient of inherent material risks is imposed to enable the patient to choose whether or not to run those inherent risks and thereby "to avoid the occurrence of the particular physical injury the risk of which [the] patient is not prepared to accept".*
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> *The common law duty of a medical practitioner is therefore ordinarily breached where the medical practitioner fails to exercise reasonable care and skill to warn a patient of any material risk of physical injury inherent in a proposed treatment. However, consistent with the underlying purpose of the imposition of the duty to warn, the damage suffered by the patient that the common law makes compensable is not impairment of the patient's right to choose. Nor is the compensable damage exposure of the patient to an undisclosed risk. The compensable damage is, rather, limited to the occurrence and consequences of physical injury sustained by the patient as a result of the medical treatment that is carried out following the making by the patient of a choice to undergo the treatment".*

Once the duty is understood it is necessary to consider whether the failure to warn caused the injury. In NSW the test of factual causation is found in Section 5D of the *Civil Liability Act 2002*. In considering the approach that must be adopted under section 5D of the *Civil Liability Act* 2002 when determining factual causation the High Court concluded:

> *"The determination of factual causation in accordance with s 5D(1)(a) involves nothing more or less than the application of a "but for" test of causation. That is to say, a determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence.*
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> *In a case where a medical practitioner fails to exercise reasonable care and skill to warn a patient of one or more material risks inherent in a proposed treatment, factual causation is established if the patient proves, on the balance of probabilities, that the patient has sustained, as a consequence of having chosen to undergo the medical treatment, physical injury which the patient would not have sustained if warned of all material risks. Because that determination of factual causation*

necessarily turns on a determination of what the patient would have chosen to do if the medical practitioner had warned of all material risks, the determination of factual causation is governed by s 5D(3). What the patient would have done if warned is to be determined subjectively in the light of all relevant circumstances in accordance with s 5D(3)(a), but evidence by the patient about what he or she would have done is made inadmissible for that purpose by s 5D(3)(b), except to the extent that the evidence is against the interest of the patient."

The High Court went on to note:

"Section 5D guides but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled.

In a novel case, however, s 5D(4) makes it incumbent on a court answering the normative question posed by s 5D(1)(b) explicitly to consider and to explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party. What is required in such a case is the identification and articulation of an evaluative judgment by reference to "the purposes and policy of the relevant part of the law". Language of "directness", "reality", "effectiveness" or "proximity" will rarely be adequate to that task. Resort to "common sense" will ordinarily be of limited utility unless the perceptions or experience informing the sense that is common can be unpacked and explained.

A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid. Thus, liability for breach of a duty to exercise reasonable care and skill to avoid foreseeable harm does not extend beyond harm that was foreseeable at the time of breach]. In a similar way, "a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action" but "only for the consequences of the information being wrong".

A useful example, often repeated, is that of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche. His injury is a "foreseeable consequence of mountaineering but has nothing to do with his knee'".

Here factual causation had not been established. The High Court confirmed:

"a medical practitioner is not liable to a patient for physical injury that represents the materialisation of a risk about which it is beyond the duty of the medical practitioner to warn".

Dr Kam was not liable for the injury Wallace suffered. At the end of the day:

"The duty of a medical practitioner to warn the patient of material risks inherent in a proposed treatment is imposed by reference to the underlying common law right of the patient to choose whether or not to undergo a proposed treatment. However, the policy that underlies requiring the exercise of reasonable care and skill in the giving of that warning is neither to protect that right to choose nor to protect the patient from exposure to all unacceptable risks. The underlying policy is rather to protect the patient from the occurrence of physical injury the risk of which is unacceptable to the patient. It is appropriate that the scope of liability for breach of the duty reflect that underlying policy."

Court of Appeal Affirms Bullying Breach By School

Schools, teachers and educational institutions can look forward to a sharp increase in claims for psychological injury as a result of bullying.

This newsletter discusses elsewhere the implication of the proposed anti-bullying legislation. This article comments on a recent Court of Appeal decision (*Oyston v St Patrick's School [2013] NSWCA 135*) which discusses the principles surrounding the relevant duty of care and what might constitute a breach of it.

Background

The plaintiff was a student at a Sydney high school from 2002 to February 2005. In 2007, she brought a claim in negligence alleging that she had suffered psychological harm as a result of bullying by other students at the school.

The plaintiff argued that the school's breaches of its duty of care included:

- failure to devise, implement and maintain an adequate anti-bullying program;

- failure to act upon the plaintiff's complaints of bullying; and
- failure to adequately investigate and prevent the bullying of which the plaintiff complained, by supervising, disciplining and counselling the perpetrators.

Evidence was given of particular complaints made by the plaintiff in respect of bullying, the response of the school, and her referrals for counselling. In addition, the plaintiff alleged that there was a “culture of bullying” at the school during her years of attendance.

The nature and content of the duty owed to the plaintiff was not in issue at the trial. Thus, it was not in issue that the school owed the plaintiff a duty of care, or that the risk of harm resulting from bullying was of such significance that it required the School to take active steps to protect its students from bullying.

The duty did not require the School to ensure that its students were protected from bullying but only to take reasonable steps to that end.

At trial, there was an issue over the adequacy of the School's policies in relation to bullying and, in particular, the effectiveness of their implementation. Furthermore, the School contested whether the plaintiff suffered a psychological illness and, if she did, whether it resulted from the bullying which she claimed to have experienced at the School. The School also argued that the plaintiff was guilty of contributory negligence.

The findings of the trial judge are important, because they were upheld on appeal. In summary, the trial judge found that:

- the plaintiff had been the subject of ongoing bullying, and that the bullying came to the School's attention in 2004 (although it may have been difficult to confirm the fact at first);
- the School's responses to bullying of the plaintiff and the implementation of the School's own policies were inadequate.
- the School failed to respond adequately, or in some instances at all, to complaints of bullying relating to the plaintiff.
- the School failed adequately to document complaints and the School's responses as was envisaged by its own protocols;
- the School failed adequately to follow up or monitor the plaintiff to ensure that she did not continue to be subjected to bullying.
- the School had failed to take steps necessary to bring that bullying to an end despite the fact that it was apparent that the plaintiff was not only at risk of harm but also was suffering from an injury.

In reaching her conclusion, the judge took into account that schools are under an obligation not merely to meet their legal duty of care, but also to educate and support students during their adolescence. Whilst acknowledging the difficulty of the task which the School faced, Her Honour took the view that it had failed to achieve the right balance. An overemphasis on supporting certain students who engaged in misbehaviour came at the cost of failing to ensure that the plaintiff, as the victim of that behaviour, was protected from harm caused by bullying. Mere counselling of a victim dealing with the consequences of bullying will not be sufficient for a school to meet its duty of care. Rather, where bullying does not cease upon a school's insisting that it do so, the school must take steps designed to ensure that it ceases.

"Firm intervention" was required, but was not forthcoming. The burden of taking the steps required by the School's policy and good practice, by comparison to the harm to which the plaintiff was exposed, clearly required that active steps be taken. Her Honour did not specify the precise actions which should have been taken, but found that the School failed to implement its published bullying policy or to take other adequate steps to bring the ongoing bullying directed at the plaintiff under control.

Ultimately, Her Honour found that, given the School's knowledge of the plaintiff's mental and physical state, its treatment of the conduct complained of as 'alleged inappropriate behaviour' and its failure to deal with known bullies constituted a breach of its duty of care to the plaintiff. The signs suggestive of psychiatric illness in the plaintiff's case clearly reached the level where it was necessary for the School to intervene. Active investigation of the complaints made was required, as well as monitoring of whether any bullying had been brought to a halt.

The School was well aware that there was a problem with persistent bullying amongst its students, including in Year 9, and that the plaintiff was a particularly vulnerable student who was a victim of ongoing bullying. It did not take the steps reasonably necessary to bring that bullying under control.

The Supreme Court gave judgment for the plaintiff awarding damages in the sum of $116,296.60, plus interest. The plaintiff appealed against the adequacy of the award, and the school appealed against the findings of liability.

Court of Appeal

The appeal has been split – the Court determining first the issues surrounding breach of duty, and the aspects dealing with the primary judge's findings on causation, damages and costs, adjourned to a later date.

The findings of the trial judge relating to breach of duty were essentially upheld.

The Court of Appeal rejected an argument, amongst others. that the trial judge was in error in finding first, without sufficient reasons, that the steps taken to respond to complaints of bullying were inadequate and, secondly, that "good practice" required that other steps be taken without identifying what was "good practice".

Tobias AJA, giving the judgment of the Court said:

> *"In my view, the steps, such as they were, taken by [the Year Coordinator] ..., did not provide a reasonable response to the not insignificant risk of harm to students such as the appellant if the bullying of them continued. In accordance with the College's own policies, it was insufficient merely to request teachers to keep an eye out for bullying; once a complaint of bullying was received, it required investigation and, if substantiated, action against the perpetrator. .... Reasonable steps should have been taken by [the Year Coordinator] to carefully investigate the appellant's allegations and to act on them if she was satisfied that they were justified.*
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> *In August 2004, [student] was required to enter into a behaviour contract and was threatened with expulsion by the Principal if she reoffended. She did, but nothing was done about it. There could be no doubt, ... that the failure to take action in accordance with the College's policies against known perpetrators would send the wrong message to others who might be considering similar behaviour. Steps ought to have been taken which would have brought home to perpetrators ...the unacceptability of their conduct. If that required the threat of expulsion to be carried out, so be it."*

On the issue of the plaintiff's vulnerability, the Court was of the view that the School was aware that the appellant was vulnerable in that she suffered from anxiety and panic attacks. Whether or not those attacks were brought on in whole or in part by bullying, it should have been clear to the School that the appellant was likely to be susceptible to psychological harm caused by such conduct.

The risk of psychological harm to the student was both foreseeable and not insignificant within the meaning of s 5B of the Civil Liability Act 2005. The School was clearly required to take such active steps as were reasonable in order to prevent that risk from eventuating. Those steps were recorded in its own policies.

Having affirmed the finding of breach of duty, the next step will be for the Court of Appeal to determine the causation and damages issues.

What is abundantly clear, however, is that bullying is something that is common in schools. The facts of this case are by no means unique.

Educators and their insurers must devise and implement protocols which address bullying. When alarm bells ring – such as when it is clear a student is suffering illness from bullying incidents – steps must be taken to bring the bullying to an end.

Chickenpox & Birth Defects- No Negligence for Failing to Vaccinate a Mother Whilst Pregnant

The NSW Court of Appeal in *King v Western Sydney Local Health Network* was recently called on to consider a tragic claim brought by Tamara King against Blacktown Hospital and its medical staff arising from an alleged failure to vaccinate a pregnant mother for Chickenpox where the mother ultimately contracted Chickenpox and Tamara was born with Foetal Chickenpox Syndrome("FVS") which causes severe physical and intellectual disabilities.

Tamara alleged that those who treated her mother had been negligent in failing to advise her mother that she should be vaccinated for Chickenpox even though she was already pregnant and that the vaccination could reduce the risk of birth defects.

Unfortunately for Tamara her claim failed. Tamara claim failed to demonstrate that the failure to vaccinate was the cause of her condition even though Tamara established that the hospital and its medical staff had breached a duty of care which was owed.

Tamara's mother contracted Chickenpox early in the second trimester of her pregnancy. The source of her mother's exposure was Tamara's older sister.

Once Tamara's parents realised the sister may have Chickenpox the mother sought advice from a doctor at Blacktown Hospital and told the doctor that she herself had not suffered from Chickenpox. In accordance with standard medical practice at that time (2002) Tamara's mother should have been offered an intramuscular dose of Varicella-Zoster Immunoglobulin ("VZIG") to boost her defences to the virus. The mother was not offered such treatment and contracted Chickenpox. It was not in dispute that Tamara's condition was a result of the mother's infection.

At trial the judge found that the legal duty of care owed by a medical practitioner to his or her patient extended to offering the mother the vaccination. He also found that the mother would have accepted the treatment if offered and concluded that the treatment was not offered.

However, the trial judge concluded that the risk of harm was the risk of Tamara being born with FVS and there was a significant risk of FVS in children born of mothers who are exposed during pregnancy to Chickenpox (1-2%) and the hospital and its medical staff ought to have known of that risk. The medical experts in the case all agreed that Tamara's mother ought to have been advised of the risk to her and of Tamara of developing Chickenpox or FVS as a result of the mothers exposure to the older sister's infection. The experts also agreed that the mother ought to have been advised of the possibility of treatment with the VZIG and it would not have accorded with reasonable professional practice to have failed to administer VZIG to a pregnant woman where exposure had occurred within a 96 hour period following any exposure to chickenpox.

However, in order for an injured person to succeed in a claim for negligence, they must establish that the negligence was a necessary condition of the occurrence of the harm. The trial judge concluded that the evidence did not establish that if the vaccination had been administered, her mother would probably have avoided developing Chickenpox. The expert evidence fell short on that issue.

Tamara appealed.

The only issue for the Court of Appeal was whether or not causation had been established. Unfortunately for Tamara, two of the Court of Appeal judges agreed with the trial judge whilst Basten JA disagreed.

There were six experts who gave evidence including joint evidence during the trial. There was also significant literature available in 2002 which considered the effects of a vaccination delivered whilst the mother was pregnant. The plurality of the Court of Appeal confirmed the evidence did not establish a causal link between the hospital's omission to offer VZIG and the mother's development of Chickenpox. The expert evidence demonstrated that there was less than a 50% probability of non infection to Chickenpox had the vaccination been administered.

General statistical information revealed that there were possible benefits of the vaccination but at best there was a 50% probability but more likely something significantly below that. In this case there was a lack of evidence as to when the mother was exposed to Chickenpox and whether she had sought advice within 96 hours (the period after initial exposure to Chickenpox where a vaccination should be administered to achieve maximum benefits). In this case despite the fact that all of the experts conceded they would have administered the vaccination it did not follow that if the vaccination was administered the mother would not contract Chickenpox.

Hoeben JA noted:

> *"All of the experts would have recommended the administration of VZIG to the appellant (Mrs King) does not advance the issue of causation. It does not follow that the experts agreed that if administered VZIG was likely to have been effective in preventing the contraction of Varicella (Chickenpox). What it indicates is recognition by the experts that the contraction of Varicella by a pregnant woman can have serious consequence for both herself and her child so that where there was a chance that the risk could be avoided by the administration of VZIG that chance should be taken. Given the potentially serious consequences of the development of Varicella in those circumstances, it would be unethical not to administer VZIG*

when there was a chance of those consequences being avoided. This does not establish that those consequences were likely to have been avoided. As the primary judge appreciated, this was a public health issue, not one related to causation."

The test in this case was not whether or not administration of VZIG to the mother would have prevented her developing Chickenpox after exposure but whether or not the failure to offer or recommend the vaccination to the mother materially contributed to or caused the occurrence of FVS. The evidence did not stack up according to the plurality.

As Ward JA noted:

"There was a very small percentage chance that the VZIG vaccine at the relevant time would have prevented the appellant (Tamara) from being afflicted or seriously affected by FVS. Given the very small size of the percentage in this case, no greater inference should be drawn than that the vaccine might have done something (being either to attenuate or prevent FVS)."

In particular Ward JA noted there was :

"A small reduction in the risk to the foetus of contracting FVS in absolute terms, from 1-2% to somewhere below 1%."

Essentially the statistical evidence demonstrated that with the administration of vaccinations there was a 1-2% reduction in the risk of contracting Chickenpox for 39-48% of those vaccinated (according to scientific data). Those numbers were not enough to establish that the failure to administer the vaccine caused or materially contributed to the harm.

We will have to wait and see whether that is the end of the story for Tamara. Her tragic circumstances and severity of her injuries will no doubt motivate her lawyers to consider a further appeal.

We speculate that this is a case that will proceed to the High Court. The case involved a balancing between the loss of a chance of a better outcome albeit a small loss and the question of causation with the need to establish that but for the failure to provide treatment, the risk of injury would not have resulted.

If the matter does proceed on appeal the High Court will need to grapple with the balance between the need to establish that a negligent act caused a risk to eventuate against the background that treatment may have provided a chance of a better outcome.

No doubt some comfort will be found from Basten JA's judgment which concluded that the expert evidence did stack up and causation had been established.

Children Suing Parents & Grandparents for Injuries – What Next?

One question that has always troubled the Court is whether or not parents and other close relatives have a legal duty to exercise reasonable care when they undertake physical actions involving their children. The question which is often asked is whether or not a parent or grandparent or other relative caring for a child has a duty to take reasonable care to protect the child against foreseeable dangers whilst they are under the family members care and control. Generally the Courts have been reluctant to find that a duty of care is owed to a child as a consequence of a blood relationship, however, there have been circumstances where the Court has found that a parent or close relative owed a duty of care to protect a child against a risk of injury.

In 2006 the High Court noted in Harrington v Stephens:

"It is not unknown in Australia for children to sue their parents in tort. Australian law does not recognise any principle of parental immunity in tort. Thus, actions against parents by their children are not uncommon in the context of a motor vehicle accident. It has been held that children even enjoy right of action against their mothers in respect of pre-natal injuries sustained as a result of the mother's negligent driving."

From time to time the Courts also consider claims brought against parents and relatives by defendants who seek to blame the relatives for failing to take care of children under their charge and have therefore contributed to an accident.

So far Australian Courts have resisted imposing a duty of care on a parent or a relative based on the contention that a blood relationship is enough to ground a duty of care. Each case is considered on its own facts and even then judges will differ in

their approach to these claims.

A recent decision of the NSW Court of Appeal in *Hoffman v Boland* serves as a reminder of the struggle that confront Judges when called on to determine a personal injury claim brought against a family member.

Molly Boland was less than six months of age when she suffered serious and permanent injuries when her grandmother fell down a staircase whilst carrying Molly. The accident occurred at a home owned by Molly's great uncle. Molly was in the care of her grandmother, Reverend Hoffman.

Molly, through her father, sued Reverend Hoffman for injuries she sustained, alleging that Reverend Hoffman breached a duty of care which she owed to Molly. Reverend Hoffman cross claimed against several defendants including the person who designed the staircase and the builder that constructed it. Molly ultimately joined the stair designer and builder as defendants.

The major criticism of the stairs was that it incorporated winders that had the effect of turning the staircase 90 degrees at the first level with the winders being triangular in shape and there were no hand rails, poor illumination at night and the steps lacked anti-skid or anti-slip finishings and obvious nosings.

The Building Code of Australia permits the use of winders in staircases but notes that there must not be three winders in lieu of each quarter landing or six winders in lieu of each half landing. The BCA does not require hand rails to be installed.

When Molly's claim came before the NSW Supreme Court Justice Hulme determined that Reverend Hoffman owed a duty of care and had breached that duty of care and was liable to compensate Molly. The claims against the stair designer and the builder failed. Justice Hulme noted that:

> *"The risk of injury to someone using or being carried on a staircase with winders was foreseeable. The risk was neither far fetched nor fanciful. However, the probability of injury was low, as indicated by the prevalence of winders in domestic premises."*

Justice Hulme concluded that the designer of the stairs and the builder were not guilty of failing to take care reasonable care in designing or building the stairs as they did or in failing to propose an alternative staircase. However, Justice Hulme concluded that Reverend Hoffman was primarily responsible for Molly's injury and whilst there were difficulties in bringing the law of negligence "well into the parent/child relationship Reverend Hoffman should be held accountable". Justice Hulme was critical of Reverend Hoffman's decision to carry Molly without the lights being turned on and failing to take reasonable care whilst negotiating the stairs. Justice Hulme did not accept that parents and close relatives do not have a legal duty to exercise reasonable care when they undertake physical actions involving their children.

Accordingly, Reverend Hoffman was found liable for Molly's injuries. An appeal to the NSW Court of Appeal followed.

The Court of Appeal was unanimous in its determination that the finding of negligence against Reverend Hoffman should not stand however each of the judges arrived at that conclusion for different reasons. Basten JA concluded that Reverend Hoffman did not owe a duty of care in the circumstances.

Basten JA noted that:

> *"The mother owed no duty enforceable by an action in tort in respect of her ordinary day to day care of her baby, the grandmother was in a similar position and it follows that the child's claim against her should have failed on the basis that she owed no duty of care enforceable on tort".*

Sackville AJA concluded that the grandmother did owe a duty of care but had not breached that duty.

Barrett JA whilst agreeing with Sackville AJA that there was no breach of any duty that the grandmother may have owed, declined to answer the question whether the grandmother owed a duty of care. Barrett JA noted there was no need to offer an answer to the question whether the grandmother owed a duty of care where any duty could not have been breached but did comment:

> *"I merely say that there is, in my opinion, much to be said for the view that Courts should be slow to characterise as negligent gratuitous care bestowed on a child by a person exercising parental functions in a family or domestic setting, whether or not the person is a biological parent".*

In the various judgments of the Court of Appeal reference was made to various cases which have considered claims by children against their parents and relatives.

Basten JA noted it is not readily apparent how issues are to be resolved in claims in tort by a child against either or both of its parents. Basten JA commented:

> *"On the one hand, it may be thought to be supportive of such legal principles to allow a child to enforce parental obligations. On the other hand it might be thought that to allow a child to bring proceedings in tort against a parent might be destructive of the underlying relationship which the law recognises, supports and seeks to maintain".*

The High Court in *Han v Connolly* concluded that:

> *"The moral duties of conscientious parenthood do not as such provide the child with any cause of action when they are not, or are badly performed or neglected."*

In that case the High Court accepted that there was a duty on a carer to take reasonable care to protect the child against foreseeable damage but there was no general duty of care imposed by the law upon a parent simply because of the blood relationship. It was noted that parents, like strangers, may become liable to a child if the child is led into danger by their actions.

In the South Australian case of *Tout v Adler*, the Court considered a claim by a six year old girl who climbed on top of a double bunk bed next to a window and fell out of the window. The accident occurred at a holiday rental and Tout sued the landlord who sought contribution from her father for leaving the window open. The landlord's claim was dismissed on the basis the father owed his child no legally enforceable duty of care.

However, the majority of cases concerning liability of parents and carers have involved motor vehicle accidents and it is often not the child who has brought proceedings rather the driver of the vehicle seeks contribution from the parent.

In 2007 in *St Mark's Orthodox Coptic College v Abraham*, Ipp JA considered a third party claim for contribution against a parent where a nine year old boy had been injured whilst playing at school prior to the time at which teachers became available to supervise children. Ipp JA concluded that a parent may owe a duty to a child to take reasonable care in not exposing the child to foreseeable harm but the duty arises out of the particular situation and not the mere fact of the parent/child relationship. The duty is said to "arise from the control that the parent exercises over the child and the dependence of the child on the parent, the vulnerability of the child, the foreseeability of harm and other factors relevant to the modern law of negligence." However, in this case Ipp JA concluded that the father had not been negligent.

In the case of *Tweed Shire Council v Horworth*, the Court considered a claim where a two year old had fallen into an unprotected stormwater drain running into a pond where the drain and pond were on Council land. That land adjoined a property owned by the young girl's father. The young girl wandered off whilst her father was laying turf in his front yard and fell into the stormwater drain, suffering catastrophic injuries including brain damage. A claim was brought against the Council and the Council cross claimed against the father. In that case the Court of Appeal held that there was no principle of parental immunity in tort and a cross claim of that nature could be pursued, however, the Court of Appeal was only called on to determine whether or not such a claim could be pursued. It was not called on to determine the merits of that claim.

Basten JA, in this case, concluded that the law ought not to impose a duty of care on a mother who slips and falls carrying a child and that if the mother would not have owed a duty of care, it would be improper to impose a duty of care on a grandparent. Basten JA noted that was not to say that a mother or relative cannot owe a duty of care and commented that:

> *"the conclusion that no duty of care was owed in the present circumstances says nothing about the circumstances where a child is subjected to domestic violence or even gross and continuing negligence of the kind which might put the child at risk of significant harm, nor does it say anything about the provision of professional carers providing services for reward ... the conclusion is limited to the position that a grandmother assisting the child's mother by looking after her in the home, whilst the mother rested, owed no greater duty of care to the child than did the mother. The mother owed no duty enforceable by an action in tort in respect of her ordinary day to day care of her baby, the grandmother was in a similar position and it follows that the claim against her should have failed on the basis that she owed no duty of care enforceable in tort".*

A different conclusion was reached by Sackville JA, who after reviewing the Authorities concluded:

> *"There is nothing particularly noble in holding that a parent or grandparent, in a situation similar to that of Reverend Hoffman owes a duty of care to the infant in his or her physical care and custody. Each case must of course depend upon*

its own circumstances. But in St Mark's v Abraham the Court held that the father owed a duty of care to the son when leaving the boy unattended at school, but decided that the father had not breached his duty. Other cases where a parent was held to be under a duty of care include Anderson v Smith (a grandmother held liable for failing to shut a security door and thus allowing a child to gain access to a swimming pool, and McCallion v Dodd (a father having the care and control of a child at night while walking along a road owed a duty of care to the child)".

Sackville AJA concluded that Reverend Hoffman owed a duty to take reasonable care to protect her from the foreseeable risk of injury arising while she was in Reverend Hoffman's physical care and control. That duty extended to a duty to take reasonable care not to trip or fall on the staircase so as to create a risk of injury to Molly. Sackville AJA noted that the fall occurred as Reverend Hoffman put her feet on the narrowest part of the winders. She did so as she was navigating the stairs holding onto the balustrade and taking care whilst descending the stairs. Sackville AJA was of the view that Reverend Hoffman took appropriate precautions to guard against the risk of fall. Whilst it may have been better for Reverend Hoffman to turn on the light switch, she still appreciated there was sufficient light to see the outline of the steps and a reasonable response to Reverend Hoffman's situation did not require the stair lights to be illuminated. Sackville AJA commented that:

"an attempt to establish negligence amounted to a search for measures that in retrospect might have avoided a particular accident. Accordingly, the finding of negligence could not stand."

As can be seen from this case, Courts will be reluctant to impose a duty of care on a parent or carer.

Cases have succeeded where parents have been sued for damages for injuries sustained by their children and it has been found that parents and relatives can owe a duty to take reasonable care for the safety of children under their charge.

We are not at the stage where a parent needs to call an insurance broker from a birthing suite to arrange insurance to cover for claims which could be pursued by the children however parents can be held liable for the injuries their children suffer when the parent fails to take reasonable care.

Each case will turn on its own circumstances. In many cases claims will be brought against parents by other defendants rather than the child who was injured.

There is no secret recipe or formula which will govern the Court's approach to a claim by an injured child against a parent. Rather, the Court will take a careful look at the circumstances to ascertain whether or not a parent or relative in the particular circumstances should be held accountable for a failure to respond reasonably to the risk of harm to the child.

Insurers Should Be Wary Of Businesses That Use Labour Hire

The recent decision of the NSW Court of Appeal *in P & M Quality Smallgoods Pty Limited v Leap Seng* demonstrates the real risks that come home to a business that utilises labour hire where workers lent on hire are injured as those businesses will be predominantly liable for injuries sustained. If the worker was an employee of the host any damages claim would fall for cover under the workers compensation legislation with the consequence of significant workers compensation premiums. Where the host does not employ the worker the damages claim will fall for cover under the business' liability policy and the premium impact is considerably less than the impact on workers compensation premiums.

In Seng's case liability was apportioned 90% to the host and 10% to the labour hire company. Whilst the question of apportionment is always determined on the facts of each case an apportionment of liability to a labourer hire company is generally in the range of 15-25%. There is little doubt that this decision will be rolled out in the future by workers compensation insurers who will seek to limit apportionment of liability to the employer of the labour hire employee to 10%.

Leap Seng was a process worker. She was working in a smallgoods factory at Chullora. She was struck from behind by a heavy trolley, some two metres high, laden with thick frankfurt sausages which was being moved by another worker at the site. She was standing still when she was struck. Seng was employed by Kaybron No. 24 Pty Limited, (one of 45 companies that made up what the judge called the Kaybron Group of Companies). Kaybron No. 24 was said to be a labour hire company that deployed the plaintiff's labour to the premises of P & M Quality Smallgoods Pty Limited ("Primo").

In the course of the trial it became clear that the 40 Kaybron companies had been formed in order to reduce the quantum of the group's compensation insurance premiums and Primo had the control of the workplace.

Primo was found by the trial judge to be the employer of the person moving the trolley. The trial judge relying on the finding that Primo had been the employer of the person that pushed the trolley, determined that there was no liability on the part of the labour hire company. The trial judge also determined that in the event that his determination that the employer had not been negligent was incorrect an apportionment of 10% on the part of the employer would have followed. Seng appealed the decision.

The Court of Appeal concluded that the trial judge was wrong when it determined that the person who pushed the trolley was employed by Primo. The employer was Kaybron No. 24. As Kaybron No. 24 was the employer of both workers, it was then necessary to re-determine liability and apportionment.

Barrett JA, in the majority judgment concluded that there was a risk of harm to factory workers by being struck by moving trolleys. That risk was foreseeable and not insignificant. Barrett JA was of the view that a reasonable person in the position of both Primo and Kaybron No. 24 would have taken precautions against the risk of injury over and above the system that was in place, namely an ad hoc and apparently informal practice of calling "trolley" from time to time. Lower trolleys could have been used, allowing persons pushing them to see over the top of the load. It was clear there was negligence on the part of both Primo and Kaybron No. 24. However, the determination of apportionment was the real issue.

The Court of Appeal confirmed that where an employer trusts an employee to a host, he remains liable for any breach by the host of the employer's continuing non delegable quality of the duty.

Barrett JA commented:

> *"The duty of Kaybron No. 24 as the plaintiff's employer, was thus not attenuated or abolished by the circumstance that Kaybron No. 24 caused the plaintiff to work in a situation wholly arranged and controlled by others, even though those others may have been competent.*
>
> *The continuing existence and non delegable quality of the duty of Kaybron No. 24 meant that Kaybron No. 24 is liable for any breach, regardless of who it was that was retained or allowed by Kaybron No. 24 to perform the duty."*

There was evidence during the trial that Kaybron No. 24 was unable to devise, implement or control the system of work or to require that Primo arrange work practices in any particular way. That finding had an impact on the determination of apportionment.

Barrett JA noted this was not a case where the principles regarding apportionment needed to be considered in detail. A trial judge's assessment of degrees of culpability in apportionment involves a clear and broad discretion that will not be altered on appeal unless the discretion has obviously miscarried. In this case Barrett JA noted that the trial judge had determined apportionment at 10% on the part of the employer in the event that his determination that the employer had not been negligent was incorrect. The finding on negligence was not correct and accordingly the finding of 10% liability on the part of the employer would apply if the finding of negligence was overturned, as in this case it was.

Barrett JA commented as follows:

> *"In the present case, where Kaybron No. 24 had no ability at all to control or influence relevant activities or the way in which they were performed, the primary judge was, in my opinion, correct to regard its degree of culpability as very low. His Honour regarded the appropriate range as 5% to 15% and chose 10% as the appropriate level of contribution. That discretionary decision demonstrates no error."*

Here, Primo had embarked on a business structure creating companies which were described as labour hire companies employing all workers who carried out activities for Primo. Primo had the control of the system and the way the work was carried out. The labour hire company played no role in the design of the system of work and could not alter the way in which Primo required tasks to be performed. Barrett JA and the plurality of the Court of Appeal concluded that a range of 5-15% and an ultimate finding of 10% liability on the part of the employer should not be disturbed.

This is one of a long line of Authorities dealing with the appropriate apportionment between a host employer and employer for injuries sustained by labour hire employees. Businesses that use labour hire are always exposed to claims arising from injuries sustained by labour hire employees. Those claims are assessed under the Civil Liability Act 2002 and not the workers compensation legislation. The damages recoverable by labour hire employees in those circumstances will be significantly more than they would recover under the relevant workers compensation regime. The damages recoverable will be potentially

more now that there have been reforms to the workers compensation regime in NSW.

There is little doubt that we will see an upswing in claims against host employers brought by labour hire employees who are injured during the course of their work. We are also likely to see increased premiums for liability insurance and specific excesses for claims involving injuries to labour hire employees. In this case a business structure which isolated employees to one company providing services to another has largely ensured the business escaped a significant adjustment in workers compensation premiums.

A Defendant Is Entitled To Arrange An MRI Scan to Investigate a Plaintiff's Injury

The NSW Court of Appeal in *Boral Transport Pty Limited v Gulic* has recently confirmed that the Rule 23.4 of the Uniform Civil Procedure Rules 2005 permit the Court to make an order that a plaintiff submit himself for an MRI examination required by a defendant to facilitate the investigation of the plaintiff's injuries.

Rule 23.4 provides that a Court may make orders for medical examination, including an order that a person concerned submit to examination by a specified medical expert at a specified time and place.

Where the Court orders that the person concerned submit to an examination by a medial expert, the person must do all things reasonably requested and answer all questions reasonably asked by the medical expert for the purpose of the examination.

In claims where an injured person has a prior injury or pre-existing medical condition it is not always possible to secure the radiological evidence that may have existed.

In some cases a prior injury to an area of the body which was not injured in a subsequent accident will have an impact on a claimant's capacity to earn.

In Gulic's case the Court of Appeal confirmed that MRI scans fall within the ambit of examinations that the Court is prepared to order to allow a defendant to investigate the claim.

Gulic suffered an injury in February 2010 whilst lifting a gate onto his truck. He brought proceedings for damages for injuries sustained against Boral Transport Pty Limited ("Boral"). There was a substantial claim for economic loss and domestic assistance. Gilic suffered injuries to his shoulders, head and cervical spine and thoracic spine but not his lumbar spine. Gulic had suffered an injury to his lumbar spine in 1997.

In order to determine the extent of disability and diminished earning capacity and need for care which flowed from the 2010 injury, Boral sought to assess the current condition of the lumbar spine and asked Gulic to attend a medical practitioner for an MRI scan of Gulic. Gulic refused the request and Boral sought an order under Rule 23.4 of the UCPR that Gulic submit to an MRI examination at a specified place within a specified period.

Gulic's application was heard by a trial judge who rejected the application. The trial judge noted that to order Gulic to undergo tests, those tests must be relevant to Gulic's physical and mental condition where that is an issue in the proceedings. The trial judge commented that the Rule could not be used for a collateral purpose such as testing a party's credibility. The trial judge in his reasoning noted that an MRI scan could well be used to bolster an attack on Mr Gulic's credit in relation to his back condition and capacity for work, if only unintentionally. For that reason the MRI could not be required.

Prior to Gugic's case the Court of Appeal had noted that Rule 24.2 cannot be used for a collateral purpose such as testing a party's credibility. Tthere is a distinction between tests that went directly to the medical condition of a party compared to tests that merely went to the reliability of others tests.

Boral appealed and the Court of Appeal concluded that this was an appropriate case for an order to be made requiring the plaintiff to undergo an MRI scan.

The Court of Appeal noted that the application for the order involved a measure of practice and procedure which would not normally come before the Court of Appeal and the Court of Appeal would not usually intervene. However, in this case the trial judge's decision was erroneous.

The Court of Appeal noted that a report obtained by Boral from Dr Machart said that a "lumbar spine MRI may be useful in

assessing the current lumbar spine condition". Whilst Dr Machart did not stipulate there was a need for an MRI scan, the Court of Appeal noted it should infer that the proposed MRI scan was relevant to the assessment of Gulic's current and possible future incapacity, resulting from the 1997 injury and was likely to be of material assistance.

Gulic had resisted the order arguing that he bore the onus of proof of establishing the effect of his injuries and the injury in 2010 and therefore an order for the examination should not be made. The Court of Appeal noted that the fact that a plaintiff may fail on a particular point in the absence of sufficient supporting evidence does not mean a defendant cannot obtain an order for a medical examination to uncover the truth of the medical condition. The Court of Appeal noted the suggestion actually demonstrated that the issue is material and in dispute and that such an examination is relevant to resolving the dispute.

Gulic also argued that whilst Boral bore an evidentiary burden to demonstrate that Gulic's current disabilities were partly due to a pre-existing condition, once it did the onus then shifted to Gugic to establish the degree of disability caused by the 2010 injury. It was argued that this was a further reason why the order should not be made. The Court of Appeal disagreed. The Court of Appeal noted:

> *"The fact that a defendant has material available to it to support its case does not, in the absence of a concession or capitulation, demonstrate that there is not still a live issue. If there is a live issue as to the physical and mental condition of the plaintiff, to which a medical examination will be relevant, the Rule is engaged."*

The Court of Appeal noted that evidentiary material may often have more than one use in a trial and so long as its overriding purpose is seeking an examination to assist in determining an aspect of the plaintiff's physical or mental condition, it will satisfy Rule 23.4.

MRI scans fall within the province of orders under Rule 23.4 of the UCPR. A defendant can obtain an order from the Court requiring a plaintiff to undergo an MRI scan for the purpose of investigating a medical condition. A medical report confirming the MRI scan will assist in investigations will generally be necessary.

If x-rays, CT scans and MRI scans are required to assist in determining a medical condition a Court will be inclined to order a claimant to attend an examination where they refuse a request from a defendant to undergo the tests. However more invasive tests will present a different issue particularly if they come with health risks for a claimant as a Court will be reluctant to order an examination that exposes a claimant to health risks.

Gulic's decision to refuse to attend an MRI was a costly one for him as he was ordered to pay the costs of the Boral's original application to the Court and the costs of the Court of Appeal proceedings.

Claims for Gratuitous Assistance Provided to Dependents -Defendants Do Have a Liability

The NSW Court of Appeal in *State of NSW v Peres* was recently called on to determine the application of Section 15B of the *Civil Liability Act 2002* which provides that damages may be awarded to a claimant for loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependents.

These damages can only be awarded if the Court is satisfied that the services were provided to a dependent as defined in the legislation. Dependants include a husband or wife, a de-facto partner, and a child, grandchild, sibling, uncle, aunt, niece, nephew, parent or grandparent of the claimant.

It is also necessary to establish that the claimant's dependents were not capable of performing the services themselves by reason of their age or physical or mental capacity and that there was a reasonable expectation that but for the injuries the service would have been provided to the claimant. No award is made unless the services are provided for at least six hours per week and for a period of at least six consecutive months. There must also be a need for the services to be provided for those hours and the need must be reasonable in all the circumstances.

Mr Peres ceased work in 1990 and provided some domestic services to his wife and when they arrived, his grandchildren, before he was diagnosed with Mesothelioma.

Peres brought a claim for damages arising in connection with his contraction of his disease and in the claim sought compensation based upon his inability to provide the services to his wife and two grandchildren.

Peres had grandchildren of tender years, two daughters of Peres' daughter. The grandchildren stayed with Peres and his wife three days a week before he contracted Mesothelioma. Mr Peres would transport the older girl to school and extra curricular activities. He would also assist with homework.

Mr Peres also assisted the grandchildren of his son's family and would attend his son's home three days each week to care for the children between 8.00 am and 5.00 pm. Sometimes the grandchildren would be brought to Mr Peres' home.

The trial judge noted that Mr Peres' daughter's children continued to stay with Mr and Mrs Peres despite Mr Peres' injury and Mrs Peres attended to their needs.

The Dust Diseases Tribunal awarded damages calculated on 60 hours of domestic services per week of caring for the daughter's grandchildren. A little less than $1million was awarded for this aspect of the claim.

An appeal followed.

The Court of Appeal disagreed with the Tribunal's approach to the calculation of the damages but not that Peres was entitled to be compensated for his inability to provide services to his wife of grandchildren.

The Court of Appeal noted it is first necessary to determine whether or not there is a need and then determine whether or not the need is reasonable in all the circumstances.

When determining whether or not there is a need and there is more than one dependent it is a mistake to assess the need in some abstract sense and consideration must be given to the possibility that the grandchildren could be cared for together.

The Court of Appeal confirmed that:

> *"the fact that a need is satisfied by others after an injury is irrelevant. In fact, evidence that the need is satisfied by someone else after an accident may demonstrate the need is genuine. "*

The Court of Appeal noted that in some circumstances why a claimant was providing the services can be relevant, however, in other cases it will not. The Court of Appeal provided the following example:

> *"where grandparents are providing services because the parents, far from acting reasonably, have been delinquent, this is not a disqualifying factor for a claim."*

The Court of Appeal noted the entitlement to an award depends on the existence of a relationship of dependency, as a matter of fact rather than a legal and moral duty. The Court of Appeal confirmed:

> *"The preconditions of recovery are that domestic services have been provided gratuitously in the context of such a relationship, together with ongoing needs and expectations."*

The Court of Appeal noted in this case Mr Peres assisted the older girl with her homework and drove her to various activities as well as driving both children to school and that demonstrated that some provision should be made for the inability to provide those services. The Court of Appeal noted that whilst the children may have had reasons which could reasonably require two carers, it was implausible that two carers were needed throughout the 60 hours that the grandparents cared for them (they were at school 12 hours during the 72 hour period they were with Mr Peres and his wife) and the conclusion that Mr Peres undertook all of the tasks could not stand.

The Court of Appeal confirmed that Mr Peres was entitled to compensation on an hourly basis for the time he was no longer able to spend providing services to his grandchildren.

The Court of Appeal also confirmed that an assessment of these services requires assessment of the time that would have been spent providing services to all of the claimant's dependents. For example, if there was babysitting of four children over three hours, this requires the provision of services to each child over three hours and not the provision of three hours to each grandchild.

The Court of Appeal was unable to determine the hours which should be allowed as the trial judges findings were insufficient to permit a reassessment of the claim. The matter was therefore remitted to the Tribunal for reassessment.

Claims involving a claim for loss of services to dependents will always be difficult to assess, and a careful analysis of the services that were provided prior to an injury will be required. In the case of grandparents caring for their grandchildren whilst the grandchildren's parents are working it will be necessary to analyse the actual services that were provided before the accident. Where 2 grandparents help out together to provide the services it is not appropriate to attribute the provision of all of the service to 1 grandparent.

Where a claimant is no longer able to assist a dependant because of their injuries they are entitled to compensation calculated at an hourly rate for the services they can no longer provide provided there was a need for the service and it is reasonable in all the circumstances.

Section 15B of the Civil Liability Act appears to be Pandora's Box when it comes to claims by grandparents. There may be a prize of a generous damages award when a grandparent can no longer look after the grandchildren. However a balance must be brought to an assessment of damages. Whilst assessing the compensation to be provided one must look at the actual services that were provided not merely the time that has been spent with the grandchildren caring for them.

Work Visa Risk For Employers

Changes to the Federal Migration Act 1958 to be implemented in September 2013 expose employers to serious risk of civil penalties.

Broadly, the amendments seek to ensure that foreign workers are only employed in accordance with immigration requirements. The legislation includes new non-fault civil penalties for employers, expands the liability of executive officers involved in employing illegal workers, and gives wider investigative powers to the Department of Immigration and Citizenship.

"Illegal workers" can refer to foreign nationals without any visa permission to reside in Australia, as well as those who have visa permission to reside here, but who are working in contravention of their visa conditions.

Visa conditions can include:

- no work;
- work for a limited number of hours only; or
- work limited to a particular role and/or employer.

Surprisingly, a significant proportion of illegal workers have been in Australia 15 years or more. The largest overstayers are US and British nationals.

The civil penalty regime to be introduced creates a "no fault" offence of employing a worker in breach of immigration permission. The state of mind of the employer is immaterial – it does not matter that the breach may have been quite innocent.

In addition, directors and other officers of corporate bodies can also be liable for a breach committed by a corporation. Again, it is not necessary for there to be any intention to breach visa restrictions.

Liability can be avoided, however, if an employer can establish that it took all "reasonable steps at reasonable times" to verify that the worker held a valid visa, and was working in accordance with the visa conditions.

As a result, Australian employers now bear the risk of sanction unless they are proactive in checking the immigration status and work rights of all employees.

What are "reasonable steps" an employer of a foreign worker could take? The most obvious include requiring a prospective employee to provide evidence of Australian citizenship or status as a permanent residence. If these cannot be provided, prior to the start of employment, employers should check the government website Visa Entitlement Verification Online.

The burden, as usual, is on the employer to establish that it took reasonable steps.

Another legislative burden for employers - but with the risk of penalties of imprisonment for knowingly or recklessly committing a breach, one that employers cannot ignore.

Employers should review and amend their hiring protocols now to ensure that appropriate steps are taken to determine visa permission status of all employees.

Workers Compensation Roundup

Compensation For Injuries Overseas – The Decisions Continue

The Workers Compensation Commission and the NSW Court of Appeal have previously examined two matters involving Qantas employees injured whilst on "slip time" or a "layover" overseas. In Watson the worker was unsuccessful in his claim for compensation in circumstances where he had been injured in a motor vehicle accident in Los Angeles whilst returning to the hotel after visiting an acquaintance located 90 mins from Los Angeles. In contrast, in *Da Ros*, the worker was successful in his claim when he was injured in Los Angeles whilst maintaining his fitness on a bicycle supplied by Qantas.

President Keating of the Workers Compensation Commission (WCC) recently determined another layover case involving a Qantas employee in *Qantas Airways Limited v Arnott* (2013). Mr Arnott was employed by Qantas as a long haul flight attendant. He was scheduled to work an eight day flight pattern from Sydney to Dallas and return. He arrived in Dallas on 8 October 2011 at 2.00 pm. He was scheduled to remain in Dallas until the return flight at 10.00 pm on 12 October 2011.

During the interval between the flights (referred to as slip time or a layover) he met a number of Qantas colleagues at 7.00 pm in the lobby of his Qantas supplied hotel and they walked to a nearby restaurant. At around 9.30 to 10.00 pm on that evening, Mr Arnott and his colleagues again walked a short distance from the restaurant to a bar in Sundance Square to listen to live music. Mr Arnott remained at the bar for approximately 30 minutes after his colleagues had left to return to the hotel. Between 2.00 am and 2.30 am on 9 October 2011 whilst walking alone from the bar back to the hotel he was assaulted. He suffered a number of injuries and was admitted to the local hospital where his blood alcohol concentration was recorded at .261. Arbitrator Robinson heard the matter initially and determined that Mr Arnott was injured during an interval or interlude in an overall period of work and was engaged in an activity which the employer had expressly or implicitly encouraged or induced him to engage in at the time of the assault. Arbitrator Robinson also determined that Mr Arnott's employment was a substantial contributing factor to the injury. Qantas appealed this decision.

President Keating noted that there was no dispute that for the period from when Mr Arnott left Australia to when he returned he was within an overall period of employment. On the basis that the injury occurred within the overall period of employment, it then needed to be determined whether the injury occurred within the course of employment. President Keating relied upon the decision of the High Court in *Hatzimanolis v ANI Corporation* (1992). In Hatzimanolis the High Court commented that in determining whether an injury occurred in the course of employment, regard must be always be had to the general nature, terms and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the worker has arisen. The High Court applied a disjunctive test, namely, did the employer induce or encourage the worker to spend the interval or interlude at a particular place or in a particular way?

President Keating highlighted that encouragement was not to be construed in a narrow way and limited to some positive action in specific terms which might lead the worker to undertake a particular activity or attend at a particular place. It was relevant Qantas had adopted a procedure in selecting slip hotels by reference, not only to the facilities of the hotel itself but also the external amenities. The Qantas "Onboard Manager Brief" for Dallas, which was provided to staff, made specific reference to the hotel as providing direct and easy access to Sundance Square and its facilities including its restaurants and bars. The bar in which the claimant was drinking was located within Sundance Square.

Qantas focused their appeal on the basis that Mr Arnott was not induced or encouraged to stay at the bar and drink excessive quantities of alcohol. President Keating commented Mr Arnott was provided with a meal allowance which he was free to spend at his discretion, either within the hotel or elsewhere. It was the unchallenged evidence of Mr Arnott and another worker that Qantas encouraged its crew members to engage in social and recreational activities away from the slip hotel.

President Keating determined that it was noteworthy that a number of Qantas staff, not just Mr Arnott, visited restaurants and bars at Sundance Square during that particular slip period. For those reasons it was not incorrect for Arbitrator Robinsons to conclude when Mr Arnott and other members of the crew visited that area, it was with the encouragement of Qantas.

Ultimately, once it was accepted Mr Arnott was at a particular place with the encouragement of his employer, during an interval within an overall period of employment and he was injured, unless he was guilty of gross misconduct, he was entitled to succeed.

President Keating also pointed out the facts in Mr Arnott's case were distinguishable from the earlier decision of Watson because the worker had hired a car and travelled for 90 minutes outside of Los Angeles to visit friends. When he was injured, Mr Watson was not in a particular place where the employer encouraged or induced him to spend his slip time.

The consumption of alcohol whilst remaining at the bar after his colleagues had left was neither gross misconduct or Mr Arnott engaging on a frolic of his own. There was no evidence that his intoxication was a direct cause of him being assaulted. It appeared the assault was a random act of robbery without Mr Arnott's actions contributing to the assault. Interestingly, President Keating was prepared to place some boundaries on situations whereby a worker would be entitled to compensation. This included situations whereby the level of intoxication contributed to the injury. These situations included injuries caused by intoxication such as stepping off a kerb into the path of an oncoming car or fall down a flight of stairs.

President Keating highlighted the following factual circumstances that brought Mr Arnott's injury within the course of his employment:

- the crew were paid a daily allowance in cash on arrival at the hotel;
- Qantas accepted the crew would venture away from the slip hotel for the purpose of eating, shopping and recreation;
- there were no curfews;
- there was no prohibition or limitation on the consumption of alcohol;
- the injury was sustained whilst Mr Arnott was at a location with the encouragement of his employer;
- Mr Arnott had not been notified that he was required for further work before his scheduled return flight four days later; and
- he was the victim of an unprovoked assault.

Finally, as to whether Mr Arnott's employment was a substantial contributing factor to the injury as required by Section 9A of the Workers Compensation Act 1987. President Keating commented that connection between the injury and employment was "real and of substance". Mr Arnott's unprovoked assault occurred within the course of his employment and it was an incident to which he would not have otherwise been exposed had he not been in an area where he was encouraged by his employer to visit. In those circumstances and in the absence of any other submissions by Qantas to the contrary, the only finding open to the President was that Section 9A was established.

Once again, the Commission has demonstrated its intention to beneficially interpret the workers compensation legislation in favour of workers. Provided there is no serious or wilful misconduct or an intentionally self inflicted injury, the prospects of defeating a claim for compensation when the worker is injured whilst they are on a business trip seem remote. Even the excessive consumption of alcohol by a worker would appear to have little impact on the Commission's approach unless it can be shown that the excessive consumption of alcohol amounted to gross misconduct and it was causative of the worker's injury. One wonders whether Qantas will now tighten its policies for flight crew on layovers, including curfews and alcohol restrictions, in an attempt to limit their workers compensation exposure.

Journey Claims- Serious and Wilful Misconduct

Section 10(1) of the *Workers Compensation Act 1987* (the 1987 Act) provides that a personal injury received by a worker on any journey is, for the purposes of the Act, an injury arising out of or in the course of employment, and compensation is payable.

However no compensation is payable if the personal injury "is attributable to the serious and wilful misconduct of the worker".

But serious and wilful misconduct is more than negligence as was seen in the recent decision of Deputy President Roche of the NSW Workers Compensation Commission in *Karim v Poche Engineering Services Pty Ltd*.

On 24 May 2008, the worker, Angel Amado, was riding his Suzuki GSX R1000 motor bike from his place of employment to his home. As a provisional licence-holder, he was not licensed to ride a bike of that engine capacity. After he crested a hill in Stennett Road, Ingelburn (a suburban road with a speed limit of 60 km per hour) at a speed found to be between 120 and 130 km per hour, he collided with a Holden Commodore that was making a legal U-turn in Stennett Road.

Mr Amado died from his injuries and his de facto partner, Joanne Karim claimed death benefits compensation on behalf of herself and their daughter.

In an arbitration it was determined that the deceased caused the accident by virtue of his excessive speed on a motor bike that he was too inexperienced to ride and which he was prohibited from riding because of the status of his licence. The Arbitrator was satisfied that the high speed at which the deceased rode his bike "was of such a character as to place the deceased well within the exception to liability – in this case, the category of serious and wilful misconduct".

An appeal followed.

Deputy President Roche noted:

> *"First, the employer carries the onus of proof of establishing serious and wilful misconduct*
>
> *Second, the phrase "serious and wilful misconduct" comprehends more than negligence, carelessness, or the mere disregard of orders .*
>
> *Breach of a traffic regulation may or may not be sufficient: a carrier who was injured while alighting from his truck, while it was double-parked on a public street, was found not guilty of serious and wilful misconduct , but a worker who, having the opportunity to stop, deliberately drove through a red traffic light at high speed was.*
>
> *Third, ….not every violation by a worker of a rule would be regarded as necessarily amounting to serious misconduct. For "serious" to have any force, it must mean:*
>
> *"at least that where the risk of loss or injury resulting to any person or thing from the doing of any particular act is very remote, or where that loss or injury, even if probable, would be trivial in its nature and character, the doing of that act, however wilful, would not amount to 'serious misconduct' within the meaning of this statute, unless indeed the indirect influence of the act done on the discipline of the factory is to make every transgression serious."*
>
> *Fourth, the word "wilful" imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment , or something done "with the intention of being guilty of misconduct. The worker must have had knowledge of the risk of injury and, in light of that knowledge, proceeded without regard to the risk.*
>
> *Fifth, the gravity of the conduct is not to be judged from the consequences of the act."*

Deputy Roche noted that the approach to determining serious and willful misconduct is best described as follows :

> *"Serious and wilful misconduct is conduct beyond negligence, even beyond culpable or gross negligence. In order to establish serious and wilful misconduct, it must be demonstrated that the person performing an act or suffering an omission knows it will cause risk of injury, or acts in disregard of consideration whether it will cause injury. The word 'wilful' connotes that the applicant must have acted deliberately. As it seems to me, in order to establish serious and wilful misconduct, a person accused of it must be shown to have knowledge of the risk of injury and, in the light of that knowledge, proceeded without regard to the risk."*

Roche DP concluded that based on the evidence which the Arbitrator accepted, it was open to him to find that it was the deceased's actions (in riding at high speed), not the driver performing the U-turn that caused the accident. Even if that driver contributed to the accident, that would not prevent a finding that the personal injury (that caused the death) was attributable to the deceased's serious and wilful misconduct. That is because section 10(1A) does not require that the injury is "solely attributable" to the worker's serious and wilful misconduct and an accident can be attributable to more than one cause.

As Roche DP noted:

> *"The conduct was wilful in that the deceased deliberately rode at high speed in circumstances where he was riding home via his usual route and was therefore familiar with the road and the speed limit. It follows that it was unlikely in the extreme that he had inadvertently or accidently exceeded the speed limit. The compelling inference is that he deliberately and knowingly road his bike at high speed in circumstances where the "clear inference" was that he was well aware of the risks involved, but chose to ignore those risks."*

Roche DP concluded the death was attributable to the deceased's serious and wilful misconduct in riding his bike at about double the speed limit in a suburban area.

Six Month Time Limit to Make a Claim for Workers Compensation

Although it has been present in the NSW Workers Compensation legislation for 15 years, the six month time limit to make a claim for compensation specified in Section 261 of the Workplace Injury Management and Workers Compensation Act 1998 ("WIM Act") is rarely relied upon by employers and scheme agents. In April 2013 two decisions were handed down by the

Workers Compensation Commission in relation to Section 261.

Firstly, in *Mezrani v Idameneo (No 789) Limited (2013)*, Deputy President Kevin O'Grady examined the scope of Section 261 in the context of a hearing loss claim.

Mr Mezrani alleged that due to his employment as a delivery driver between 1984 and 1997 he had been exposed to aircraft noise on a regular basis whilst performing his duties at Sydney Airport. In early 2010 he underwent a hearing test. He was advised he had a significant hearing loss, much of which was due to exposure to noise. The audiologist who conducted the hearing test advised Mr Mezrani that he may have a claim for workers compensation benefits given his exposure to noise during his employment. Mr Mezrani claimed this was the first time he was aware he may have workers compensation entitlements for hearing loss. Despite being advised by the audiologist of the potential claim, he did not make a claim against the employer until April 2011.

Section 261 of the WIM Act prevents compensation from being recovered from the employer unless a claim for compensation has been made within six months after the injury or accident. Despite this limitation, Section 261 has two "escape clauses" in Section 261(4) which a worker can rely upon. Firstly, the worker is able to make a claim if they can show that the "failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause and the claim is made within three years after the injury or accident happened". Secondly, even if the claim is not made within three years, the claim is valid with respect of an "injury resulting in death or serious permanent disablement".

Mr Mezrani submitted he would rely upon the excuse of ignorance as he was unaware until he was advised by the audiologist that he could make a claim for compensation as a result of his hearing loss. Deputy President O'Grady noted that Mr Mezrani became aware of his rights once he was advised by the audiologist and once he became aware he was required to make a claim within six months unless he was able to establish an excuse not to have done so. The claim was made in April 2011 and there was no evidence as to mistake or other reasonable cause for a failure to make the claim within the six months of becoming aware of the injury. Accordingly, he did not satisfy the onus that the delay in submitting the claim was due to ignorance, mistake or other reasonable cause and he failed in his claim for compensation.

Although it is not a Presidential Decision, Arbitrator Faye Robinson delivered a judgment in *Edmond Joseph v Catalyst Recruitment Systems Pty Limited* on 29 April 2013 which also dealt with Section 261.

Mr Joseph commenced employment in 2000 for Catalyst Recruitment and he noted symptoms in his left hand. He had suffered an injury in his previous employment and a claim for physiotherapy treatment had been accepted by his previous employer. He ceased work with Catalyst Recruitment on 5 August 2001 and had not worked since that time.

He made a claim on Catalyst Recruitment on 12 August 2010 for weekly compensation and medical expenses. Nevertheless, he had served a Notice of Injury on Catalyst Recruitment on 9 November 2006 but this was still over five years after the date of injury. Because the claim was made more than three years outside the time for which a claim for compensation must be made, the exception of ignorance, mistake etc contained in Section 261(4) of the WIM act did not apply. Mr Joseph would then need to rely upon a contention that he was suffering from serious and permanent disablement in order to succeed.

Unfortunately for Mr Joseph he did not adduce sufficient evidence to demonstrate serious and permanent disablement and he failed in his claim for compensation. He could also not claim ignorance of his rights to claim given he had previously made a claim against his former employer in 2001 for which he received compensation and medical treatment.

These two decisions demonstrate that whilst each case is determined on its own facts, a late claim can be defeated. The time limit to bring a claim specified in Section 261 of the WIM Act has consequences. The onus of proof rests on a worker to provide evidence demonstrating ignorance, mistake, absence from the State or other reasonable cause to ground an entitlement to bring a late claim. Whilst ignorance may be easy to demonstrate and will permit a late claim to be pursued if the claim is pursued more than three years after the injury the worker will also need to prove the injury resulted in the death or serious and permanent disablement of the worker. Where there is a late claim scheme agents should consider raising Section 261 in a Section 74 declinature Notice, especially in minor or nuisance claims. Scheme Agents must also remember that where a claim is made more than 3 years after the injury they must seek approval from WorkCover to accept the claim.

CTP Roundup

Blameless Accidents-100% Contributory Negligence

Davis v Swift is the first post-*Axiak* decision in a blameless accident case involving an adult and it was necessary to consider contributory negligence and in the end there was a finding of 100% contributory negligence.

Davis alleged that she had stepped onto Vincent Street between two parked vehicles. She alleged that Swift (who was parked to her right) pulled out of a parking space and in so doing, the front right hand tyre caught Davis' shoe and tripped her.

Davis' Statement of Claim pleaded breach of duty of care and "blameless accident" in the alternative.

Witness evidence indicated that Davis walked to the middle of the traffic lane whilst searching for the pedestrian crossing. Traffic was approaching, and Davis "ran" or "hurried" backwards to get out of its way. In doing so, she ran into Swift's vehicle. In cross examination, Davis conceded that she had not noticed whether there was anyone in Swift's vehicle and had not heard the engine start. She agreed that she had not seen Swift's car indicate or start to move before the collision. Swift conceded that she had not seen Davis prior to the collision.

Gibson DCJ rejected Davis' version. She found that the evidence pointed to: a pedestrian unfamiliar with the road, looking for a shop on the other side of the street and not attentive to the busy state of the road; going to the middle of the road before realising she was in danger; hesitating momentarily and then running or stepping back very quickly without looking.

Gibson DCJ accepted that there was nothing Swift could have done to avoid the collision.

Gibson noted while the law requires a driver to pay reasonable attention to all that is happening on or near the roadway that might present a source of danger, the touchstone remains 'what is reasonable'.

Gibson DCJ relied on *Ma v Keane, Albert v The Nominal Defendant* and *Tsugi v Metromix Pty Limited* and confirmed that the driver of a vehicle in a busy street is entitled to act on the assumption that pedestrians whom he is approaching, and who have the appearance of normal adults, will take normal precautions for their own safety unless there is something to indicate the contrary: *Trompp v Liddle*.

Gibson DCJ determined that Davis had exhibited no conduct to put Swift on notice. Swift was entitled to assume that Davis would not act recklessly. There was no breach of duty of care.

In the event that Her Honour had erred in making that finding, Gibson DCJ found that contributory negligence should be assessed at 100% (for the reasons discussed below).

Having found no breach, Gibson DCJ went on to discuss "blameless accident" pursuant to Section 7B.

Gibson DCJ referred to *Axiak v Ingram* and confirmed that contributory negligence in blameless accident cases is to be assessed by enquiring how far the plaintiff had departed from the standard of care they were required to observe in the interests of their own safety.

Gibson DCJ found that Davis' departure from the standard of care was such as to warrant a finding of 100% contributory negligence. Factors which influenced the decision included: Davis entered the roadway quickly and with the obvious intention to cross; she took no account of the traffic coming the other way although it must have been visible to a prudent pedestrian; she did not bother to look whether Swift was in her vehicle, whether the engine was running, whether the indicator was on, whether other vehicles had stopped to allow Swift to leave the kerb (all signs of Swift's proposed conduct); she moved quickly onto the road and then quickly stepped or ran backwards without looking or tuning; she stepped into the side of the Swift's car, with her foot making first contact when Swift's car was barely moving.

Judgment was entered for the defendant, Swift.

The reasoning adopted by Gibson DCJ has been anticipated since Axiak. The decision offers relief to insurers from the effects of *Axiak*.

Prior to *Axiak* judges had expressed extreme reluctance to award 100% contributory negligence (despite the terms of Section 5S of the *Civil Liability Act 2002*). That reluctance (as articulated by the Court of Appeal in *Mackenzie v Nominal Defendant*) arose in the context of a traditional apportionment of culpability for contributory negligence purposes. The *Axiak* formulation introduced a new approach to contributory negligence apportionment. That approach is more conducive to 100% contributory negligence findings. Such a finding is logically more likely in circumstances where the claimant is (by definition) the sole cause of the accident.

Liability for Medical Expenses Before Lifetime Care & Support

The Lifetime Care and Support Scheme ("LTCS") established provides treatment, rehabilitation and attendant care services to people severely injured in a motor accident in NSW regardless of who was at fault in the accident. Those who are eligible for the Scheme include persons who have a spinal cord injury, moderate to severe brain damage, amputations, severe burns or would be blind as a result of the accident.

The Scheme began for children under the age of 16 years injured in motor accidents, from 1 October 2006 and began for adults from 1 October 2007.

Even where fault is established an injured person can still participate in the Scheme, however, in a damages claim a Court may not award compensation for the treatment and care needs of the participant in the Scheme.

However, to become a participant in the Scheme, an injured person must apply to participate. Medical and care expenses will usually be incurred before an injured person becomes a participant in the Scheme. Some of those injured persons will have the medical and treatment expenses paid by a workers' compensation insurer where the motor accident occurred on a journey to and from work or during the course of employment.

The District Court of NSW was recently called on to determine whether or not compensation could be allowed for medical expenses incurred by an injured person before they became a participant in the Scheme. Not surprisingly District Court Judge Murrell in *Wood v McKenzie* determined that the medical expenses incurred by a severely injured person before they became a participant in the Scheme are compensable and a workers' compensation insurer is entitled to recover payments for those expenses.

Wood was a front seat passenger in a vehicle that was travelling on a work related journey. There was a heavy impact to the passenger side of the vehicle and as a result Wood sustained a severe traumatic brain injury. The accident occurred on 4 September 2009 although he did not become an interim participant in the Scheme until 25 June 2012. From the date of the accident until 25 June 2012 Woods' employer's workers compensation insurer met out of pocket expenses totalling $189,726. At the relevant time an injured person who applied to the Scheme became an interim participant in the Scheme once accepted in writing by the Scheme and Section 130A of the Motor Accidents Compensation Act 1999 provided:

> *"No damages may be awarded to a person who is a participant in the Scheme under the Motor Accidents (Lifetime Care and Support) Act 2006 for economic loss in respect of treatment and care needs (within the meaning of that Act) of the participant that relate to the motor accident injury in respect of which a person is a participant in that Scheme and that are provided for or are to be provided for while the person is a participant in that Scheme."*

The CTP insurer argued that the fact that Wood was a participant in the Scheme precluded any award for compensation for treatment or attendant care. Murrell DCJ disagreed. Section 130A has a number of conditions which must be met to exclude an award of damages for treatment and care needs. The most significant is that the award of damages cannot be made for treatment and care that are provided for or are to be provided for, whilst the person was a participant in the Scheme.

The Scheme does not provide a regime to compensate injured persons for expenses incurred before they are a participant in the Scheme. The LTCS looks after the treatment and attendant care needs of an injured person through the development of a care plan with treatment delivered through approved providers. The Scheme has no control over expenses incurred by a claimant in the past.

Murrell DCJ has confirmed that compensation is payable in a damages claim for the treatment and attendant care services delivered prior to participation in the Scheme.

In this case the out of pocket expenses paid by the workers compensation insurer were recoverable as damages. An award

was entered in favour of Wood, allowing compensation for those expenses and Wood must account to the workers compensation insurer and refund those expenses.

Timing is everything. Where there is an at fault accident the sooner that a severely injured person applies to become a participant in the Scheme, the better for a CTP insurer as the ongoing costs of the claim will reduce once an injured person is a participant in the Scheme where the injured person will not recover compensation for treatment and attendant care costs from the time they become a participant in the Scheme.

Challenging Findings of Contributory Negligence

The apportionment of a trial judge for contributory negligence can be successfully challenged when the apportionment is outside the range reasonably open on the facts as was seen in the recent decision of the NSW Court of *Appeal in Kucera v Lemalu [2013] NSWCA 127*.

Mrs Fiapaipai Lemalu (Lemalu) rushed out of St James Station in the Sydney CBD and began to traverse the intersection of Elizabeth and Market Streets after the pedestrian lights had started to flash red. During her rapid run across the road she lost one of her shoes near the middle of Elizabeth Street. She returned to collect the shoe and as she attempted to cross back toward St James Station when she was hit by a motorcycle ridden by Mr Kucera.

Acting District Court Judge Hungerford found in favour of Lemalu, and reduced her damages by 20% for contributory negligence.

The insurer appealed contending that contributory negligence ought to have been not less than 60%, although did not challenge the finding that Mr Kucera breached his duty of care to Lemalu.

The insurer relied on the case of Fox v Percy (2003) 214 CLR 118 to argue that the primary judge erred in making findings of fact that were glaringly improbable. In this case, the insurer argued there were errors as follows:

- The trial judge wrongly concluded that pedestrian lights facing Lemalu did not begin to flash red until the respondent stepped from the eastern kerb of Elizabeth Street onto the pedestrian crossing.
- The trial judge wrongly accepted that it took Lemalu 20 seconds to reach the centre of Elizabeth Street, despite also finding that she moved rapidly after stepping off the kerb, then ran after picking up her shoe, while the distance from the kerb to the accident location was only 9 metres.
- The trial judge erroneously agreed with Lemalu's evidence that at time she picked up her shoe, while noticing that the pedestrian sign was solid red, the safest thing for her to do was return to the St James side of the road and wait for the next pedestrian lights to come on.

Basten JA in a unanimous judgement of the Court of Appeal concluded that it was improbable that the pedestrian lights were green when Lemalu left the footpath and that they had been flashing red for at least three or four seconds by the time she started to run across the road conscious that she needed to hurry.

Basten JA concluded that the fact that Lemalu was hurrying and lost her shoe in the process, in itself constituted an element of lack of care for her own safety.

The fact that the pedestrian probably panicked at the point when she retrieved her shoe was understandable, however it was a consequence of her irresponsibility.

Lemalu had available to her a pedestrian strip upon which she could have sought refuge had she been exercising reasonable care.

Basten JA held that there was a manifest error in the approach adopted by the trial judge in calculating contributory negligence and held that a finding of 20% was outside the range reasonably open in all the circumstances.

Accordingly, Basten JA allowed the appeal and increased the element of contributory negligence to 40%.

This case serves as an example of circumstances where a primary judge failed to take into account relevant evidence that had a material impact on the determination of the relative culpabilities of the parties giving rise to an opportunity for the contributory

negligence apportionment to be challenged.

Findings of contributory negligence must be supported by facts determined on the balance of probabilities, weighing each of the respective party's expected actions in all the circumstances and taking into account the 'holistic environment' surrounding a collision.

Decisions On Employee Entitlement Provisions

Under sections 433 and 561 of the Corporations Act 2001 (Cth) ("the Act") the entitlements of employees are given priority to debts owed to secured creditors and general unsecured creditors by an insolvent employer company.

Under section 433 of the Act, receivers are obliged to pay entitlements of employees from proceeds they realise from the sale of assets subject to a circulating security interest, in priority to paying the secured creditor. A "circulating security interest" is the term used under the Personal Property Securities Act 2009 (Cth) ("PPSA") to describe assets although secured, the insolvent company is authorised to deal with in the ordinary course of its business (i.e. typically accounts receivable and inventory). The equivalent provision with respect to liquidators is section 561 of the Act which obliges liquidators to make the same priority payments but only to the extent that the company's unsecured assets are insufficient to cover employee entitlements.

In *Vickers & Anor. v Challenge Australian Dairy Pty Ltd & Ors [2011] 190 FCR 569* ("Vickers"), the Federal Court adopted a narrow interpretation of employee entitlements holding that entitlements which were accrued but not yet payable at the time of the appointment of the receiver do not benefit from the priority under section 433. The Federal Court was required to consider whether accrued annual and long service leave would obtain priority over the claims of a secured creditor under section 433 when section 556(1)(g) of the Act appears to provide priority to these entitlements only if they had fallen due on or before the date of appointment of receivers.

In this case amounts due to employees by way of retrenchment payments were correctly paid in priority by the receivers under section 433. This was because the definition of retrenchment payment under section 556(2) of the Act expressly provides that these amounts are payable regardless of whether they had fallen due and payable before or after the date of the receivers. In relation to accrued annual and long service leave, the issue was whether entitlements had crystallised upon termination of employment. General employment case law provides that a contract of employment is not terminated by the private appointment of a receiver, however, where a company has been wound up, there is a possibility under section 588 of the Act that the employment contract is terminated upon the appointment of receivers for the purpose of calculating priority payments.

Section 558(1) provides that where a contract of employment with a company "being wound up" was enforced immediately before the relevant date, then the employee is entitled to payment under section 556 as if their services had been terminated by the company on the relevant date. The relevant date in the context of liquidation is that on which the winding up is deemed to begin or in the context of receivership is that of the appointment. There were opposing judicial interpretations of termination prior to the *Vickers* case however the Court in *Vickers* followed the view that s 588(1) does not apply to receiverships and therefore employees accrued leave entitlements were not given priority. The Vickers' decision has been criticised by treating the priority of employees of insolvent companies in a different manner depending on the different insolvency administration. The differentiation is considered artificial where in a practical sense employees are generally not better off in one form of insolvency administration than another.

In *Cook v Italiano Family Fruit Co Pty Ltd (in liquidation) (2010) 190 FCR 474* ("Italiano") the liquidators realised assets subject to the secured creditors and circulating security interest and then paid certain employee entitlements from the proceeds under 561 of the Act.

The liquidators then recovered further funds, some 12 months later, by way of unfair preference payments. The liquidators sought directions as to whether the secured creditor ranked pari passu with unsecured creditors or did it have priority in respect of the preference recoveries. Had preferences been recovered prior to payments being made under section 561, funds would have been applied to employee entitlements and therefore the secured creditor would have received a larger portion in repayment of its debt from receipts from circulating asset recoveries.

The Federal Court held that it was premature of the liquidators to distribute payments under section 561 of the Act and that the decision to make those payments should only be considered when the liquidator has considered all actual and potential realisations. The Court further determined per Finkelstien J that when circulating assets were sold by a liquidator, a trust is

deemed to come into existence in favour of the secured creditor and employees as contingent beneficiaries over the proceeds. The entitlement of those beneficiaries depends on whether the company has sufficient unsecured assets available with which to pay employee entitlements.

As the liquidators had made payments under section 561 before they could make a determination as to whether free funds were available for employee entitlements, they were found to have committed a breach of trust which entitled the secured creditor to be subrogated to the extent of its loss to the rights of employees with respect to free assets.

Italiano has been criticised on two limbs, firstly the finding that a secured creditor is entitled to preference recoveries is inconsistent with established case law which generally held that recoveries are the benefit of a general body of creditors as opposed to secured creditors. The rationale for this standing has traditionally been that only the liquidator has a standing with the preference claim which is not exercisable by the company generally and therefore the company cannot secure or encumber its cause of action in favour of a secured creditor. The second criticism is that the decision has led to liquidators deferring making employee entitlements until they have made recoveries under preferences.

The final decision has somewhat ameliorated the employees' position following the Vickers' decision but the amelioration is limited in scope where administrators are appointed prior to the appointment of receivers and any distribution under section 433. In *Great Southern Ltd (Receivers and Managers Appointed) (in liquidation), ex parte Thacray [2012] WA SC59* ("Great Southern"), the Master of the Supreme Court of Western Australia held that where an administrator was appointed prior to the appointment of a receiver and the receiver making any distribution under section 433, a receiver was obliged to meet debts or claims under section 433 in accordance with the Vickers' decision. In anticipation of section 561 then being engaged, the receiver must hold on trust further funds realised from circulating assets to discharge broader entitlements that are payable under section 561 including payments for accrued leave, which because of the Vickers' decision, will not initially be payable under section 433. The decision in Great Southern appears to acknowledge that it is desirable to have employees awarded their full entitlements.

Despite the decision, there is still uncertainty remaining as a result of the decisions in *Italiano* and *Vickers*' and it would appear that parliamentary reform is necessary, at least on one view, to restore the benefit intended to be conferred on employees of an insolvent company and reduce the potential for delays.

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