GD News

Gillis Delaney Lawyers

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

Landmark Change To The Law In New South Wales- Gratuitous Care

In NSW people who are injured are entitled to be compensated for gratuitous assistance provided as a consequence of needs which have been created by their injuries and disabilities. This means that compensation is payable for domestic care provided by family members after a person is injured.

Legislation in New South Wales which includes the *Motor Accidents Compensation Act* and the *Civil Liabilities Act*, provides thresholds which must be satisfied before an injured person can receive such compensation. These thresholds included a requirement that

- the domestic assistance must have been provided for 6 months; and
- the domestic assistance must have been provided for at least 6 hours a week.

For some time the Courts had interpreted these thresholds as preventing claims for domestic assistance where both thresholds were not satisfied. In addition, if the 6 hours a week threshold was not satisfied on an ongoing basis Courts would not allow an injured person damages for gratuitous domestic assistance in periods where the assistance fell below 6 hours a week.

But that approach will change from 29 May 2008 as a consequence of a decision of NSW Court of Appeal in Harrison -v- Melham which was handed down on 29 May 2008.

Five judges of the Court of Appeal including the President of the Court of Appeal who retires on 30 May 2008 delivered a judgement that determines that the thresholds specified in NSW legislation concerning gratuitous domestic assistance claims are not cumulative pre requisites.

The Court of Appeal concluded that if an injured person overcomes one of the two thresholds "by showing either that the gratuitous services are provided for a long period (that is more than 6 months) or that the services are provided for a significant period of time (that is more than 6 hours per week)" then a Court must award damages for gratuitous domestic assistance. Effectively injured persons can now recover compensation for gratuitous domestic assistance where that assistance is for only provided 1 hour a week if the initial 6 month threshold is satisfied.

President Mason noted the 6 month threshold was a single period requirement and periods could not be aggregated to satisfy the requirement.

President Mason found that:

> *"If either threshold is met, then the plaintiff can recover the whole of the gratuitous services provided, or to be provided, subject to compliance with other provisions in the legislation"*

The other provisions include that: such as satisfying the court that:

- there is a reasonable need for the services to be provided
- the need has arisen solely because of the injury to which the damages relate; and

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
David Collinge dec@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
Michael Hayter mkh@gdlaw.com.au

June 2008 Issue

Inside

Gillis Delaney Lawyers
Level 11,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

- the services would not be provided to the claimant but for the injuries.

Nevertheless a cap on the award of damages at 40 hours per week still remains.

The judgment will open up Pandora's box with substantial claims for domestic assistance which insurers would have in the past argued could not be maintained as the domestic assistance was not provided for 6 hours per week.

The position is now that in order to succeed in a claim for the provision of domestic assistance to which section 15(3) of the Civil Liability Act 2002 applies, it is only necessary to meet one of the thresholds, namely.. the services need be provided for more than six months or to be for more than 6 hours a week

Practical examples of the new approach are as follows:

- 6 hours a week for 3 months is compensable
- 1 hour a week for 6 months is compensable

The NSW Government will almost certainly make a move to amend section 15(3) of the Civil Liability Act to reverse the impact of the judgement in Harrison v Melhem as soon as possible, but in the meantime Harrison v Melhem should be applied when assessing damages for gratuitous domestic assistance.

Fire Claims and Double Insurance

What is dual (or double) insurance? When does it apply? It is a well settled principle that for dual insurance to apply each insurer must be liable under its policy to indemnify the insured against the happening which has given rise to the insured's loss or liability. Perhaps the most common and easiest example of dual insurance is when someone sustains injury in a motor vehicle accident during the course of their employment and the motor vehicle is registered and owned by the same entity that employs the claimant. Where both the worker's compensation policy and CTP policy respond to the claim there will be double insurance and the two insurers will share the cost of a claim.

There are many circumstances where double insurance may arise. For example landlords and tenants may arrange separate insurances for a property and this could give rise to double insurance if the same risk is covered. However the question of double insurance is not that simple as is seen in the recent decision of the NSW Court of Appeal in *John Collyear acting on behalf of Euclidian Underwriting Limited and Lloyds Synidcates v CGU Insurance Limited* where the Court determined that dual insurance did not apply where two policies were in place that could respond to a claim in respect to damage to a property arising from a fire.

Prior to 9 January 2001, Emibarb Pty Limited ("Emibarb") conducted the Lagoon restaurant pursuant to a lease dated 21 March 1997 from the Stuart Park Reserve Trust ("the Trustee") which was managed by Wollongong City Council. On 9 January 2001 the premises of the Lagoon restaurant were destroyed by fire. On 11 January 2001 the Council, in accordance with Clause 8.2.4 of the lease, notified Emibarb that the Council required the damage to the premises to be repaired.

The relevant lease contained the following term:

> *"If the property or the building of which part is damaged (a term which includes destroyed)….*
>
> *8.2.4 If the landlord notifies the tenant in writing that the landlord requires the damage to be repaired, the tenant must repair the damage within a reasonable time after that request."*

There were two relevant insurance policies which could potentially respond to claims arising from the fire, one taken out by Emibarb with Lloyds, and one taken out by the Council with CGU. The issue for the Court of Appeal was whether or not dual insurance applied.

The policy with Lloyds relevantly identified the property insured as extending to "property belonging to the Insured or for Damage to which property the Insured is legally responsible or for which the Insured has assumed responsibility to insure…" The policy also contained the following indemnity provision: "In the event of any physical loss, destruction or damage… the Underwriters will… indemnify the Insured in accordance with the applicable basis of settlement" (in this case the relevant basis of settlement was the cost of reinstatement). In addition the Lloyds policy had a term concerning interests of other parties, "The insurable interest only of those lessors…specifically noted in the records of the Insured shall be automatically

included…." There was no issue that this provision had the effect of including in the insurance the insurable interests of the Trustee.

The CGU policy that had been taken out by Wollongong Council explicitly extended to the premises. The CGU policy did not insure Emibarb's interests, or its obligation to reinstate. The CGU policy also contained a term "Difference of Conditions" which provided that if the property is subject to a guarantee, warranty or maintenance agreement in respect of the damage, then the CGU policy will apply only to the extent that the guarantee, warranty or maintenance agreement does not meet the extent of the loss which would be covered by the policy.

Emibarb claimed under the Lloyds policy and received $3,750,000.00 in full settlement. Lloyds then claimed contribution from CGU arguing that dual insurance applied.

The Court of Appeal found that dual insurance did not apply. The Court determined that although each policy covered the same risk to the Trustee, the Lloyds policy also covered the different risk to Emibarb, that is, the risk that Emibarb would be required to reinstate the premises under the lease and the payment that was actually made by Lloyds was in respect of that different risk.

Justice Hodgson stated:

> *"It is true that immediately after the fire, the Trustee had suffered a loss; but the Trustee (through the Council) required Emibarb to reinstate the premises pursuant to clause 8.2.4 and that was done. So by about July 2004, the Trustee's loss had been eliminated, not by any payment under the Lloyds' policy but by Emibarb's compliance with its obligation under clause 8.2.4.*
>
> *Accordingly, in terms of the judgment of Barwick CJ, McTiernan and Menzies JJ in Albion, although each policy did cover the same risk to the Trustee, the Lloyds policy in addition covered a different risk to Emibarb, namely the risk that Emibarb would be required to reinstate the premises under clause 8.2.4; and the payment actually made by Lloyds was in respect of that different risk. In terms of the judgment of Kitto J in that case, although both policies did cover identical losses of identical insureds (the Trustee), the Trustee did not receive any indemnity against that loss from the insurer."*

An expensive decision for Lloyds who are unable to obtain contribution from CGU. The decision again demonstrates how important it is to closely consider the policies of insurance and the factual circumstances of each case to determine if dual insurance will have application. The question will be do the policies cover the same risk? In this case they did not.

Defective Goods - A Supplier Of Services Is Not The Manufacturer

You buy goods and cut your hand on a sharp edge. Do you have any rights? Can you pursue the manufacturer for damages? What happens if the goods were modified to change their appearance before they were sold to you?

Section 75AD of the Trade Practices provides that:

> *"If*
>
> *(a) a Corporation, in trade or commerce, supplies goods manufactured by it; and*
>
> *(b) they have a defect; and*
>
> *(c) because of the defect an individual suffers injuries;*
>
> *then:*
>
> *(d) the Corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and*
>
> *(e) the individual may recover that amount by action against the Corporation.*

When a consumer purchases a product that is defective a number of parties may have been involved, leading up to the supply of the goods.

Quite often goods which are imported into Australia are modified and sometimes questions will arise as to whether or not persons carrying out those modifications are manufacturers and are caught by the "manufacturer" provisions in the *Trade Practices Act.*

The NSW Court of Appeal has recently confirmed that a person carrying out modifications to goods is not necessarily the manufacturer of the goods and is not caught by the "manufacturer" provisions in the Trade Practices Act.
In *James Spittles - v - Michael's Appliance Services Pty Limited & Ors*, the NSW Court of Appeal was called on to consider a claim by James Spittles against Michael's Appliances arising from injuries sustained by Spittles when he injured his hand on razor sharp metal protruding from stainless steel panels on the door of a refrigerator. The refrigerator had been imported but the panels had been fitted by Michael's Appliances in Australia.

The refrigerators were originally black and to improve their marketability in Australia, the doors were covered in stainless steel cladding. The stainless steel panels were sold to Maytag Australia and delivered to its warehouse and then Michael's Appliances were engaged, pursuant to a contract, to affix the panels.

The Court of Appeal noted that Michael's Appliances did not acquire title to the refrigerators or the panels.

The Court of Appeal noted that the Trade Practices Act does not require the manufacturer to supply the goods directly to the plaintiff. Supply to any person in the contractual chain will suffice but the section does not apply to every manufacturer. It only applies for a manufacturer who supplied the goods.

In this case Michael's Appliances supplied services under its contract for work and labour and the Court of Appeal noted that whilst there was a supply of services by Michael's Appliances, there was no supply of goods as required by the Trade Practices Act.

The Court of Appeal confirmed that Section 75AD of the Trade Practices Act does not apply to persons who work on goods under contract without ever acquiring title to, or possession of the goods.

In this case, even though Michael's Appliances worked on the goods, they did not become the manufacturer of the goods, they were simply providing services.

What Must a Claimant Prove to Show Negligence?

How far does an injured person need to go to prove their case? Does an injured person need to know what caused their injury and demonstrate to the Court exactly went wrong? Is it enough for a claimant to demonstrate that something was wrong and argue that the injury must have been caused by the deficiency or problem?

All the pieces of a jigsaw are required to complete a picture and the Courts require a claimant to prove all the facts necessary to complete the story that will demonstrate negligence through some act or omission. Claimants bear the onus of proof in their case. But often, when a person is injured they cannot point to the precise cause of their injury and in those circumstances it may be necessary for a Court to draw inferences about what went wrong if the claimant is to succeed. The question is usually what inference should or can be drawn from the facts known.

The NSW Court of Appeal has recently handed down another judgment that demonstrates it is not enough for a claimant to have simply had a fall to succeed in their claim - more is necessary (Wolfenden v International Theme Park Pty Ltd (trading as Wonderland) & Anor).

Simone Wolfenden was a year 10 student who had been attending dance class for a number of years. On 25 October 2003, when Wolfenden had just turned 16, she was performing a dance piece with other students from her school during a "Performing Arts Challenge" held at Australia's Wonderland Theme Park. During the course of the performance Wolfenden fell and suffered injury to her left knee. Wolfenden sued Australia's Wonderland and the Trustees of the Roman Catholic Church for the Diocese of Parramatta who were responsible for her school.

The dance was performed on a raised stage with an area of astro turf matting in front and below the stage which covered a concrete slab. Shortly before the performance it began to rain and the stage, which was not under cover, became slippery. The performances were therefore moved to the matting in front of the stage. Black electrical tape was used to mark out the area on the matting on which the dances were to be performed. Shortly before the performance the MC told the performers to dance within the black taped area and to be careful as the area was wet.

The issue in the case was whether or not Wolfenden had slipped on the matting or on the black tape or had slipped during a dance move. Expert's reports had been prepared on behalf of the parties and both Wolfenden's expert and the expert for the defendant's agreed that the matting presented a low risk of slipping even when it was wet. The plaintiff's expert however

demonstrated that the black tape was not of an adequate slip resistance and the trial judge accepted that "if the plaintiff placed her foot up on the black tape, this may well have initiated a slip and subsequent fall" either because of the slipperiness of the tape or because of the difference in slipperiness between the matting and the tape or a dance move. Significantly though the trial judge found that there was no evidence that the plaintiff slipped on the black tape and in these circumstances Wolfenden's claim could not succeed.

Wolfenden appealed. There was no direct evidence before the trial judge that Wolfenden had slipped on the black tape and the question was whether it could be inferred that Wolfenden had slipped on the tape. The Court of Appeal found that it could not. Justice Giles who delivered the leading judgment stated:

> *"The question is a narrow one. In summary, on the appellant's case negligent dancing was excluded and the choice became a fall unconnected with slipping (in the sense of slipperiness) and, when the appellant was close to the black tape marking the extremity, a fall because she stepped on the slippery black tape; the latter was more than conjecture or surmise, and was a reasonable and definite inference. On the respondent's case, in that choice a fall because the appellant stepped on the black tape did not rise above equal probability with falling because in executing an inherently risky high kick or because the appellant simply lost her footing on the matting.*
>
> *The appellant has the burden of proof. I find it a difficult decision, upon closely balanced considerations. Executing a high kick places the dancer at risk of a fall, even on a suitable surface, if the manoeuvre is not well executed, and the appellant's evidence left that as the explanation for her fall. I am not persuaded that she fell because of the black tape."*

It was however a close call for the defendants with a two judge to one victory as Justice Hodgson who dissented was of the opinion that there was sufficient evidence available to support an inference that Wolfenden did slip on the black tape.

The case again demonstrates that the simple fact a plaintiff has fallen - and one of the possible causes is as a consequence of negligence - is not enough. There must be more. Nevertheless the fact that there was not a unanimous decision in this case demonstrates that there will be circumstances where one judge would be prepared to draw an inference where another may not.

A Deed Of Settlement Does Not Always Dispose Of Workers Compensation Rights

In NSW when a worker is injured in a motor vehicle accident they potentially have rights to workers compensation payments under the *Workers Compensation Act, 1987* and a claim for damages pursuant to the *Motor Accidents Compensation Act.*

In most situations a claim is made against the *Motor Accidents Act* insurer and a settlement of that claim would ordinarily disentitle the worker to future benefits of workers compensation payments as the *Workers Compensation Act, 1987* provides that if the worker first recovers damages the worker is not entitled to recover compensation under the *Workers Compensation Act, 1987.*

Sometimes when a claim is made under the *Motor Accidents Compensation Act, 1999* it is determined that the worker's rights pursuant to the *Workers Compensation Act, 1987* are more valuable. In those circumstances the *Motor Accidents Compensation Act, 1999* claim is discontinued. The *Motor Accidents Compensation Act, 1999* insurer may seek to close their file by offering to pay the claimant's costs of bringing the Motor Accidents Act claim. In such situations claimants are often required to sign a release and indemnity releasing the motor accident's insurer from any further claim.

Technically it can be argued that the signing of release and indemnity is a settlement of a claim for damages under the *Motor Accidents Act* and would bring an end to any entitlement to workers compensation payments. But what if the payment can be truly characterised as a payment for legal expenses only and not damages?

In *Newman - v - NSW Fire Brigades*, the Court of Appeal has confirmed the decision of the Deputy President in the Workers Compensation Commission that found that a release and indemnity for payment of costs in a Motor Accidents Act claim only did not prevent a claimant from pursuing workers compensation payments in respect to the injury.

Deputy President Roche had determined that as a matter of construction a release and indemnity signed by Newman related to a payment for costs only and did not amount to a payment for damages. Accordingly, the worker was still entitled to bring a workers compensation claim. The Deputy President took into account evidence of the surrounding circumstances leading up to the execution of the release, including correspondence which indicated that the payment was for costs. The Deputy

President concluded that the document was intended to provide the insurer with a release from its potential liability in return for payment of her legal fees.

The Court of Appeal noted that the *Workers Compensation Act*, and in particular, Section 151Z, is concerned with the avoidance of double compensation. Section 151Z contains reference to the words "damages". The ordinary meaning of "damages" is a sum of money paid to compensate a successful plaintiff in an action in tort or contract and the payment for costs was not a monetary compensation in respect or Mrs Newman's injury.

At the end of the day Mrs Newman was entitled to proceed with her workers compensation claim notwithstanding the fact that she signed a deed of release for the *Motor Accidents Compensation Act* insurer, agreeing to release the *Motor Accidents Compensation Act* insurer for any liability for the motor accident claim in exchange for payment of the sum of $1,500.00 which represented payment of legal costs incurred by her in bringing the *Motor Accidents Compensation Act* claim.

A deed of release for a motor accident claim in this case did not limit the worker's ongoing entitlement to compensation under the *Workers Compensation Act, 1987*.

Watch Out Owner/Builders

Owner builders can be held liable by purchasers of property for damages suffered as a consequence of negligence in the construction of a dwelling. That liability can extend to all prospective purchasers not only the first purchaser that acquires the property from the owner builder.

The NSW Court of Appeal has recently considered a claim for damages arising from alleged negligence of a previous owner/builder of the premises where the property was owned by the owner/builder and his wife. A claim was brought against both owners of the property despite the husband being the sole person noted on the owner builders permit.

The question considered by the Court was whether or not a passive co-owner who was not really involved in the construction works could be held liable in negligence arising out of the construction work.

John Eastgate and his wife owned a block of land and obtained development consent and a building approval to construct a residence on the land. John Eastgate applied for, and obtained, an owner/builder permit in his name. His wife was not a joint applicant in the owner builder permit and did not otherwise apply for or obtain a permit. The house was constructed pursuant to John Eastgate's permit and later sold to a purchaser, who on-sold the property to Neil Gibson.

Gibson suffered economic loss as a result of a latent defect in the foundations. Following a long period of heavy rain the house suffered structural damage when a boulder, which had been supporting a brick pier on its north eastern corner shifted. Gibson sued Eastgate and his wife for damages for negligence and was successful against John Eastgate but failed in the claim against his wife. Gibson appealed.

The Court of Appeal ultimately dismissed the appeal, finding that Eastgate's wife did not owe a duty of care to Gibson.

The Court of Appeal confirmed that owner/builders owe a duty of care to prospective purchasers, however it is only the builder of the premises that owes that duty of care. A passive owner cannot be held to owe a duty of care for the building works.

In this case the builder was the husband and he owed the duty of care. Gibson succeeded in his claim against the builder in the District Court but failed in the claim against the builders wife. The claim against the builder's wife, who was also an owner also failed in the Court of Appeal, as the wife had not engaged in the building work and had not applied for the owner/builder's permit and took no part in the building work.

The Court of Appeal held

> *"there was no basis for imputing any assumption of responsibility by her and even less for imputing known reliance by Gibson on her role as a passive co-owner."*

Ultimately the claim against Mrs Eastgate was dismissed. We speculate that the claim against the wife was pursued due to difficulties recovering the damages payable by the husband.

So who will be the applicant for an owner builders permit if your family is building a house- make sure the owner builder is insured.

OH&S Roundup

Head Contractor Most Culpable

GRD Minproc Limited were recently convicted for a breach of Section 8(2) of the Occupational Health & Safety Act and fined $90,000 arising out of an incident on 12 July 2004 when a worker fell through coverings on penetrations in a fan room.

The NSW Industrial Relations Commission had previously fined Process Engineering Group Pty Limited $50,000.00 and the sole director and employee of that company the sum of $20,000.00 following the incident where persons were placed at risk when a penetration on a construction site was inadequately secured and guarded. Mark Griffith was a sole director and employee of a company, Process Engineering Group Pty Limited. Mr Griffith was engaged as a construction manager on a construction site through his service company Process Engineering Group Pty Limited which was retained by GD Minproc.

Access Roofing the employer of the apprentice was also convicted of an offence under the OH&S Act arising from the same incident and was fined $60,000.00 in relation to the offence, effectively for failing to warn its employees and secure the penetration.

GD Minproc entered into a contract with a roofing contractor as a sub-contractor to install and erect wall and roof cladding at the site. Griffith, being the construction manager, had overall responsibility to implement the health, safety and environment plan of the main contractor. A first-year roof apprentice plumber was on site. The apprentice was working on the ground floor area which had an underground room below it and there were a number of penetrations in the floor. The apprentice fell through a penetration which had been covered by reinforcing bars tied at right-angles into a mesh configuration. The mesh cover had been moved. The Court ultimately concluded it was reasonable to weld the mesh bars as covers even though the covers had to be open for safety purposes. The Court held that the system of covering the penetrations was not safe and led to the known risk namely of a fall through penetrations and it was the responsibility of Griffith as the construction manager on site to ensure safety by properly securing the penetrations, and to properly inspect the covers to identify the ongoing risk and he was liable to warn of the ongoing risk posed by the penetrations.

The penetration covers had apparently been tied by wires, or loosely tied. It was argued that the wires had been cut. That did not trouble the Court, as the Court concluded that on the day of the incident the penetration was not properly guarded.

GD Minproc had appointed a construction manager; it had a systematic and comprehensive site safety system in place prior to the incident; it had a particular site safety plan; it required its contractors to comply with its safety plan; it required daily inspections of the contractors work areas; such inspections were in fact conducted; it had identified the hazard posed by the penetrations in the fan room; its site safety committee met regularly; the safety committee designed safety measures and ensured they were followed up, its employees and the site safety committee were satisfied the penetration cover secured the penetrations in the fan room; and inspections by its officers and its sub-contractors were satisfied the work area was safe; and its officers on site, namely its safety officer, its mechanical supervisor and its civil engineer supervisor were active on site.

The Court noted that in this case the system for inspecting the penetration covers was not sufficiently rigorous to discover the ongoing risk to safety and there was also no warning issued to the employees of sub-contractors regarding the ongoing risk. Whilst the Court noted that the contribution by third parties to the identified risk to safety was a relevant consideration, most importantly, the Court noted that the culpability of the principal contractor was greater than that of the other offenders prosecuted for breaches under the Act.

The head contractor was responsible for the overall design, operation and implementation of all occupational health and safety systems at its place of work and it was noted the mesh coverings chosen under the defendant's plan failed to remove the risk to safety and inspections by its officers, who, while concerned with safety, failed to ensure an employee of a sub-contractor could work with safety at its work site. Accordingly, the head contractor had greater culpability under the Act. Accordingly a fine of $90,000 was imposed.

Fatality - $275,000 Fine

A statutory corporation has recently pleaded guilty to a breach of Section 8 of the Occupational Health & Safety Act following a fatality when an employee undertaking demolition of a timber overbridge and construction of a concrete overbridge, was electrocuted when the jib of a crane came into contact with a high voltage aerial. The Court noted there was a known risk as the corporation had identified the high voltage wires as a hazard and it was noted the risk to safety was not only obvious, it

was foreseen as one of the witnesses recalled saying, "We are working with the crane under the wires today. We all must be careful to stay clear of the overhead wires. The crane must stay at least three metres away from the wires."

The driver of the crane was an experienced crane driver. It was noted after the incident the corporation put in place safety measures at the site including a procedure for isolating the electrical power when operating machinery in or near electrical power services. Another measure implemented was the utilisation of an additional crane crew member as an observer. The Court noted these measures highlighted the deficiency in the system of work prior to the offence.

Balancing the factors and the previous conviction record the Court imposed a fine of $275,000.

$215,000 Fine For Company

Girotto Pre-Cast Pty Limited ("Girotto Pre-Cast") were recently fined $215,000 for a breach of the Occupational Health & Safety Act as a consequence of an incident during the supply and construction of pre-cast wall panels at the Rose Bay Residential Development.

WorkCover alleged that Girotto Pre-Cast failed to ensure that persons not in its employment, in particular employees of High Rise Erections Pty Limited ("High Rise") were not exposed to risks to their health and safety arising from the conduct of the company's undertakings. High Rise were engaged by Girotto Pre-Cast to erect the floor panels and the floor planks.

High Rise were working with two erection crews and Brendan Brown was in charge of an erection crew working on levels two and three. Four planks were being laid prior to the erection taking place and employees had installed temporary support to the pre-cast walls, being supports supplied by Girotto Pre-Cast, using Z-brackets and timbers. During the course of this work Mr Brown and another employee saw the eastern Z-bracket was askew and steps were taken to obtain a prop to provide support to the bracket.

Prior to this occurring, a floor plank had not been able to be fitted and while arrangements were being made to cut it to size it had been placed over one or more of the already installed floor panels, as was normal with this type of construction. Whilst Mr Brown was under the installed floor panels, those panels came away and fell. As a result Mr Brown was fatally injured and three other workers received injuries through falling whilst working on the floor panels that fell.

The company entered a guilty plea to a charge that particularised a number of failures: a failure to provide an adequate safe work method for the erection of the identified floor planks; a failure to require the use of measures to ensure that the identified floor planks did not fall (such as, catch structures); a failure to identity the size of the timber supports to be used for supporting identified floor planks; a failure to identify the extent to which timber should overhang the Z bracket; a failure to ensure that the design plans were in accordance with the applicable Australian Standards; a failure to ensure that the design plans were followed and that the floor planks were built to applicable engineering requirements; and, a failure to ensure that the floor planks were adequate to carry the construction loads, especially given the small bearing area of the southern end. A plea of guilty to those particulars indicated a breach at a number of levels in the work process involved in the undertaking.

The Court noted

> *"it is readily concluded that this was a very serious breach of the Act. As pointed out by the prosecutor, the steps required to address the risks to safety were relatively straightforward. While readily accepting responsibility for this breach, the defendants placed this particular accident in the context of a company having an established record of excellence for its product and paying close attention to safety, both in its manufacturing and construction phases. Girotto Precast had appointed very experienced people as state managers and safety officers and had introduced co-ordinators who together assisted in developing, promulgating and enforcing the company's system of safety. While the evidence supports that submission in a general sense, the circumstances surrounding this accident demonstrated a far reaching failure in the defendant's system of safety. Girotto Precast had determined to undertake this extensive task by use of sub-contractors who were to be involved in not only placing the wall panels of which Girotto Precast had wide experience, but also to place the floor panels which was an area in which Girotto was not engaged as part of its normal business. The defendants' obligations in those circumstances was, if anything, heightened. While the defendants point to the fact that there were many others involved at the site, including Baseline and Rescrete, and there was in that sense no lack of supervision available, the defendants had their own responsibilities for ensuring safety in the work being performed by Hi-Rise. Indeed, the defendants' safety system concentrated upon the role of sub-contractors to ensure that its safety methods and systems were being followed."*

The ultimate penalty was $ 215,000 however the director escaped a fine due to the long history of the Directors involvement in the Company and his reduced role in the Company in recent times, the good previous industrial record and the psychiatric impact of the event on the Director.

$150,000 Fine For Company And $12,000 Fines For Three Directors - Owners of Premises Do Have A Real Exposure

Salamander Shores Hotel Pty Ltd was a company that operated a hotel/motel employing approximately 50 staff including 6 full-time maintenance personnel. The hotel/motel was located on 3 acres of land and a swimming pool was attached to the motel. Child proof gates secured access to the pool.

A 13 year old was swimming with a friend in the pool. He was not a hotel guest. He lived locally and had not obtained permission from hotel staff to use the pool. The motel's general manager was not aware that the boy occasionally swam in the pool or that the boy had been swimming on that day. Some of the motel's maintenance staff were aware that he had occasionally used the pool and on occasions had been asked to leave the pool.

The young boy was fatally injured when he was electrocuted. He had gained access to a semi-enclosed area which contained a conduit pipe. He had gone to the area to retrieve a tennis ball. Whilst attempting to return to the pool he was climbing on the retaining wall and the pool fence and stood on the pipe and sustained an electric shock.

An RCD had not been fitted to the main switchboard which would have isolated supply to protected circuits, sockets and outlets or equipment in the event of a current flow to earth which exceeded a pre-determined value. At the coronial inquest it was noted that the collapse of the pipe that the boy stood on exposed an active wire which came into contact with the metal pipe and when the boy stood on the pipe and touched the fence this effectively grounded the circuit.

The company pleaded guilty to an offence under the Occupational Health & Safety Act however the three directors were also prosecuted and pleaded not guilty. The thrust of the prosecution was that the company had failed to ensure that the electrical cable was installed and maintained so as to ensure it could not come into contact with the live electrical current and that an RCD was not fitted.

The Court noted there was a very serious risk to safety posed by the electrical cabling housed inside the corroded pipe which was a direct result of the company's failures to ensure maintenance of the cabling, to have fitted an RCD and to ensure that an adequate risk assessment was conducted of the cabling.

By virtue of the company's conviction the directors were deemed to have committed the same offence. However there are defences available to directors if they can establish that they were not in a position to influence the conduct of the corporation in relation to its contravention or being in such a position they used all due diligence to prevent the contravention by the corporation.

The Court noted that the fact that a person is a director is enough subject to the defences to establish liability for a corporate defendant's contravention. This conclusion is based on the responsibilities and duties of the director of a corporation and the clear words of the Occupational Health & Safety Act. The other category of persons who may also attract liability under these deeming provisions are persons concerned in the management of the corporation. A manager of a mine has been held to fall within this category because of the position that a mine manager carried.

A director by reason of his or her position with the corporate structure sits at the top of the corporate hierarchy with the authority of making decisions on matters of operations, policy and management.

The Court noted that directors must exercise "due diligence" and not "supine indifference".

The directors argued because they lacked experience and expertise in specific areas of electrical cabling they were not in a position to influence the conduct of the corporation. The Court held this argument was flawed. The directors were entitled to rely on others who possess relevant experience and expertise but only if they satisfy themselves that those persons to whom the vital functions of detecting and obviating the risks to safety had been delegated, could discharge and were discharging the functions. An occasional site inspection and otherwise passive role adopted by the directors in relation to safety issues did not amount to reliance on others for the purposes of successfully establishing a defence to prosecution.

The directors in the case conceded they had authority to make decisions about all matters of safety which affected the corporation. They argued that they had exercised all due diligence.

The Court highlighted that “all due diligence” requires the taking of appropriate precautions aimed at preventing the conduct of the corporation which led to a contravention. Although “all due diligence” depends on the circumstances of the case it “contemplates a mind concentrated on the likely risks.”

The Court held that all due diligence requires as a minimum or threshold requirement that directors have played a significant and hands on role in the corporate defendants operations or that they have responsibility for day to day decision making. Liability will be attracted where directors play a limited direct role in the operation of the business, preferring to leave the decision making, relevantly in relation to safety matters, to the management team but without at the same time making consistent and ongoing enquiries aimed at ensuring that management was both capable and competent of discharging the corporations obligations as to safety.

The defendants had argued the corporate defendant operated at an overall loss of $199,547 for the financial year ending 30 June 2006, and a loss of $153,071 for the financial year ending 30 June 2007 and the corporate defendant was a corporation without large operating profits and that the burden of paying the penalty imposed would fall on the directors. An examination of financial records revealed that the corporate defendant had indeed incurred losses for the financial years ending 30 June 2006 and 2007 but that it had substantial assets worth several millions of dollars. Given these financial circumstances it was clear that the corporate defendant had the capacity to pay any penalty that may be imposed against it and the fines should not be restricted by the financial circumstances. A fine of $150,000 was imposed on the company and $12,000 on each Director.

Diseases Can Be Injuries That Trigger Workers Compensation Benefits

In NSW a worker who suffers injury arising out of or in the course of their employment is entitled to workers compensation benefits. "Injury" is defined in the *Workers Compensation Act 1987* (the "Act") to include personal injuries as well as a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, and the aggravation, acceleration, exacerbation or deterioration of any disease.

Entitlements to compensation and claims experience that impacts on the premium paid by employers turn on the date that an injury occurs. So when is the deemed date of injury for a disease?

This issue was considered in the recent Workers Compensation Commission decision of *Whitehead -v- Kassagrove Pty Limited t/as Moorebank Hotel*.

Whitehead had worked with his employer as a bottle shop assistant, commencing in 1996 working 6-12 hour shifts standing on a cement floor. In 1999 she noticed a burning sensation in the soles of her feet, which was subsequently diagnosed as bilateral plantar fasciitis due to the nature of her work. In May 2000 she started to receive compensation. On 9 March 2001 she suffered a stroke and has not returned to work since.

In September 2005 her solicitors lodged a claim for lump sum compensation for impairment to her legs and back. The employer disputed whether Whitehead's condition was a disease and sought a determination as to the deemed date of injury.

The Act provides that if an injury is a disease which is of such a nature as to be contracted by a gradual process the injury shall, for the purposes of this Act, be deemed to have happened:

- at the time of the worker’s death or incapacity, or
- if death or incapacity has not resulted from the injury—at the time the worker makes a claim for compensation with respect to the injury.

The employer submitted the correct date was the date on which the claim of compensation was made, namely 19 September 2005. Whitehead submitted the correct date was the date of incapacity, namely 22 May 2000 when she was first paid weekly compensation.

Why does it make a difference? If the deemed date was May 2000, then benefits are assessed under the old Table of Maims for impairments and if the deemed date was September 2005 then benefits are assessed as a whole person impairment("WPI"). The compensation payable under the Table of Maims would be significantly more than for a WPI.

The Deputy President of the Workers Compensation Commission noted Whitehead was incapacitated in May 2000 and paid compensation. However the current claim was one for lump sum compensation not weekly compensation. The two types of

claims were distinguished on the basis Whitehead's incapacity had not resulted from the losses she alleged in the impairment claim and on which she based her claim for lump sum compensation on 12 September 2005. For this reason Whitehead's injury for the purposes of her lump sum claim was deemed to have happened on 12 September 2005. This approach was supported by the Court of Appeal decision of *Alto Ford Pty Limited -v- Antaw (1999)* which makes it clear that there can be different deemed dates of injury for different claims arising from a disease.

The end result is that for the purposes of a lump sum impairment claim the deemed date of injury will be the date when the claim was made.

There is a clear distinction between a claim for weekly compensation and lump sum compensation. Under a claim for weekly compensation based on incapacity, the date of incapacity will be the trigger date for the deeming of the injury date. The date of injury will be when the physical incapacity results in some loss of wages. However, for lump sum compensation the deemed date of injury will be the date the claim was duly made.

Workers Compensation Claims In NSW - Approved Medical Specialist Appeals

The recent decision of *Marina Pitsonis - v - Registrar of the Workers Compensation Commission [2008] NSWCA88*, has confirmed that simple factual errors in a Medical Assessment Certificate do not amount to an error capable of resulting in a successful Medical Appeal.

In this matter the Approved Medical Specialist issued a medical certificate concluding that on the basis of the worker's history and subsequent events she suffered from 7% whole person impairment in relation to a psychiatric injury. The worker sought to exercise her right to appeal to a Medical Panel by Application to the Registrar. The worker contended that there were available statutory grounds for appeal, namely the use of "incorrect criteria" and that there was a "demonstrable error".

The Registrar, acting as the statutory gatekeeper in the appeal process, formed the opinion on the material before him that there were no arguable grounds of appeal. Consequently the application for Appeal to a Medical Panel was dismissed. The worker appealed the Registrar's "gatekeeper" decision through judicial review in the Supreme Court. This was dismissed by Associate Judge Malpass. The matter proceeded on to the Court of Appeal.

The Court of Appeal finally determined that factual errors made by an Approved Medical Specialist and contained in the Medical Assessment Certificate, would not usually satisfy the "incorrect criteria" ground of appeal. Whilst there may be factual errors in the data, as long as the Approved Medical Specialist applied the appropriate criteria in making the assessment of whole person impairment, there would be no valid ground of appeal. The decision confirms the earlier Court of Appeal decision of *Campbelltown City Council - v - Vegan [2006]* in that whilst there may be factual errors made by an Approved Medical Specialist, they would not satisfy Incorrect Criteria provided the Approved Medical Specialist has used the correct guidelines in the assessment.

Furthermore, for a certificate to have a "demonstrable error" in order to be capable of appeal, the worker needed to demonstrate there was an arguable case of error "appearing" on the face of the certificate. Mere speculation by the worker as to what should be contained on the certificate and competing assertions did not reach the evidentiary hurdle that would satisfy a Registrar there was a sufficiently realistic prospect that this ground of appeal would be made out.

This decision reinforces that the prospects of success in appeals from binding Approved Medical Specialists continue to remain tenuous. Statistics published by the Workers Compensation Commission in 2006 have revealed that only 3% of medical appeals were successful. The necessity to satisfy the Registrar (acting as gatekeeper) of an arguable ground of appeal on the face of the medical certificate is a difficult evidentiary burden. The large majority of appeals simply seek to cavil at matters of clinical judgment and factual matters that are not recorded by the Approved Medical Specialist. These would likely to be matters in which the Approved Medical Specialist placed no weight in any event and to prove to the Registrar this amounted to an arguable use of incorrect criteria or a demonstrable error is not an easy task. This is even before the Appeal can get to the Medical Appeal Panel for final determination! Finally convincing the Medical Appeal Panel to actually overturn the Approved Medical Specialists decision is another challenge in itself.

The Importance Of The Section 74 Notice

In New South Wales in workers compensation claims where a scheme agent wishes to dispute a claim for compensation by a worker it must provide a notice specifying the reasons for the dispute. The dispute notice is known as a Section 74 Notice as

it is provided pursuant to section 74 of the *Workers Compensation Act, 1987* .

A recent decision of an arbitrator in the Workers Compensation Commission has highlighted the fatal consequences for a Scheme Agent that can follow if proceedings are commenced in the Workers Compensation Commission before a section 74 Notice is sent to the worker.

Irene Manning commenced proceedings in the Workers Compensation Commission seeking compensation following the death of her husband as a result of the contraction of Meningococcal Meningitis, Septicaemia and subsequently a Pulmonary Embolism. Mrs Manning alleged that her husband contracted the Meningococcal organism during either work related travel or during contact with clients whilst he was working with the Offices of the Ombudsman and the Public Guardian. Effectively, Mr Manning had two employers.

Claim forms were submitted to both employers and the same Scheme Agent was responsible for both claims. The Offices of the Ombudsman disputed liability and issued a section 74 notice. The Public Guardian did not issue a dispute notice. Proceedings were commenced in the Commission and were listed for Arbitration and the Public Guardian sought to issue a Section 74 Notice annexing investigations and medical evidence upon which the Public Guardian intended to rely. The notice was delivered only eight days prior to the arbitration. The Public Guardian sought to tender the notice by way of an Application to Admit Late Documents. This application was dealt with on the day of the arbitration and the application was rejected.

The Public Guardian had been on notice of the claim since 2004 and the Public Guardian did not issue the Section 74 notice until some four years later.

As the arbitrator refused to admit the Section 74 Notice, the arbitrator determined that the Public Guardian could not rely on any of the information contained in the notice and could not dispute issues as there was no dispute notice. Irene Manning still had to satisfy the Commission of the bona fides of the application and ultimately the arbitrator accepted the evidence led in support of the claim.

The end result was an award in favour of Irene Manning where she received an award of death benefits pursuant to Section 25, together with weekly benefits for her four dependant children.

In this case an employer was prevented from disputing a claim due to the failure to provide a dispute notice. An expensive lesson learnt. A failure to provide a dispute notice can have dire consequences. Effectively, if there is no notice disputing a claim, there can be no evidence led by an employer to dispute the claim.

Discrimination Against Employees

The Federal Court of Australia has found the Australian Taxation Office ("ATO") discriminated against an employee worker (“Mr Gordon”) when his employment offer was withdrawn following a medical examination. Mr Gordon claimed he was subject to discrimination in employment contrary to Section 15(2)(c) of the Disability Discrimination Act, 1992 (Cth) (the “Act”) which makes it unlawful for an employer to discriminate against an employee by dismissing the employee on the ground of the employee’s disability and ultimately received substantial compensation.

According to Section 5(1) of the Act discrimination occurs if, as a result of a person’s disability, a discriminator treats or proposes to treat the person with the disability less favourably than the discriminator would treat a person without the disability.

However employers can rely on the defence provided by Section 15(4) of the Act which provides a person will not have discriminated against an employee because of the employee’s disability if, after taking into account the person’s training, qualifications and experience, the person because of his or her disability:

- would be unable to carry out the inherent requirements of the particular employment; or
- would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of the services or facilities would impose an unjustifiable hardship on the employer.

Mr Gordon was a single man aged 39 years. He was offered continuing employment by the ATO. His offer of ongoing employment was subject to the conditions set out in a letter dated 10 April 2003. One of these conditions was that all new

ongoing employees were required to undergo a medical examination to satisfy the ATO of their fitness to undertake the duties for which they had been selected. If the employee was found to be unfit for employment, the employment offer could be withdrawn or the employment terminated.

Mr Gordon attended a medical examination on 22 April 2003. His weight was recorded as 138.8 kilograms. His blood pressure reading was 200/110.

On the same day, Mr Gordon attended his general practitioner, who recorded a blood pressure reading of 190/105. The general practitioner prescribed some medication for blood pressure.

On 28 April 2003 Mr Gordon commenced duties at the ATO offices in Launceston. Mr Gordon was allowed to commence his duties as there had been no indication that he would not be certified medically fit for work.

On 8 May 2003 Mr Gordon received a letter from the ATO advising that he was not medically fit for his duties and that the offer of employment had been withdrawn. On 9 May Mr Gordon visited his GP who recorded his blood pressure at 170/105. His GP refused to provide Mr Gordon with a medical certificate for Centrelink on the grounds that he considered Mr Gordon was fit for normal sedentary office duties.

On 13 May Mr Gordon attended for a second examination with Dr Payne. His blood pressure was 200/125. It was also found Mr Gordon had “white coat syndrome” which caused his blood pressure to be elevated when testing.

It was accepted hypertension was a disability. Mr Gordon’s white coat syndrome was also a disability. The Court accepted that without the disability, Mr Gordon would have continued in the job that had been offered to him. It was concluded by withdrawing the offer of employment, the ATO had treated Mr Gordon less favourably than it would have treated a person without the disability.

The Court considered the defences available to an employer pursuant to Section 15(4) of the Act. It found the inherent requirements of the particular employment included driving frequently and sometimes for substantial distances. However the 16 week training period involved much less travel and virtually none in which Mr Gordon would need to drive alone.

The Court found that hypertension problems could have been resolved by medication well before the end of the training period and his requirement to drive long distances.

Under the Disability Discrimination Act, 1992 the Court could have ordered reinstatement. However by the time the case was heard, Mr Gordon had obtained alternative employment. The Court ordered the ATO pay an amount for past economic loss of $63,000 together with a sum of $20,000.00 for mental anguish.

Employers should be extremely careful when terminating employees that have a disability. Employees who suffer an injury at work may well suffer injuries that result in disabilities. An employer will be found to have discriminated against employees with injuries or other disabilities if an employer treats or proposes to treat an employee less favourably where a person without the disability would be treated differently.

The case serves as a reminder that pre-employment medicals can be problematic.

Injured Worker Resigned - Found To Have Been Terminated

Hastie was employed as a machine operator by Impress Australia Pty Limited (“Impress”). Hastie suffered an injury to her ankle which already had degenerative changes. As a result of her injury, Hastie could no longer operate the machinery she had been operating in her role as a factory worker. She was paid workers compensation benefits. She returned to perform light duties, however from medical evidence available, her condition was unlikely to improve without surgery. The medical evidence available concluded Hastie would be unable to return to her pre-injury duties.

Impress assessed the worker’s degenerative ankle condition and the medical evidence available which indicated she was unlikely to be able to return to her pre-injury duties. Impress considered Hastie was not suitable for any other position it had within its organisation. The employer advised Hastie:

- to take any leave that she had accrued to see if her ankle improved;

- if her ankle did improve, she could return to her pre-injury employment;
- after her accumulated leave had expired, it would not be paying Hastie for any further time she had off work as a result of her degenerative ankle condition.

The worker eventually resigned her employment. She brought a claim for unfair dismissal pursuant to Section 643 of the Workplace Relations Act, 1996 (the "Act") alleging her termination was unlawful and in breach of Section 659 of the Act. The worker alleged her resignation had really been a dismissal and had been at the initiative of the employer pursuant to Section 642(4) of the Act.

Section 642(4) provides that the resignation of an employee is taken to constitute a termination of the employment of that employee at the initiative of the employee if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer. The Commission observed as a resignation was not demanded by the employer, it had to have made the conditions of work so oppressive or repugnant to the employee and/or else limit the worker's choices such as the resignation was a legitimate response.

The Commission noted that Impress had acted reasonably in the circumstances where it had provided Hastie with suitable alternative duties and that those duties were no longer available to the employee, and it had not been malicious or sought to deprive the worker of any benefits. However, by not offering the worker alternative employment, causing her to exhaust all of her benefits and holding out an indeterminate job offer at some time in the future, it had narrowed her options to such an extent that her resignation was the only real alternative.

Consequently the Commission considered Hastie's termination had been at the initiative of the employer and she could proceed with her claim for unlawful termination.

This case again highlights the minefield facing employers when discharging their obligations to rehabilitate injured workers and maintain a healthy workforce and business. Some businesses cannot afford to provide suitable duties to injured workers where those duties are merely made up or token duties to provide an injured worker with some rehabilitation. Ultimately an employer may need to determine on financial grounds whether it can continue to offer suitable employment to injured workers.

Issues of discrimination and unlawful termination must always be considered by employers when determining whether or not employers can provide continued employment to injured workers.

Gillis Delaney Lawyers specialise in the provision of advice and legal services to businesses that operate in Australia. We can trace our roots back to 1950. The name Gillis Delaney has been known in the legal industry for over 40 years. We deliver business solutions to individuals, small, medium and large enterprises, private and publicly listed companies and Government agencies.

Our clients tell us that we provide practical commercial advice. For them, prevention is better than cure, and we strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service. The changing needs of our clients are met through creative and innovative solutions - all delivered cost effectively. We make it easier for our clients to face challenges and to ensure they are 'fit for business'.

We look at issues from your point of view. Your input is fundamental to us delivering an efficient, reliable and ethical legal service. We like to know your business, and take the time to visit your operation and develop an in depth understanding of your needs. Gillis Delaney is led by partners who are recognised by clients and other lawyers as experts in their fields. Our service is personal and 'hands on'.

Our clients receive the full benefit of our ability, knowledge and effort in our specialist areas of expertise. We provide superior and distinctive services through a team approach, drawing the necessary expertise from our specialists. Our mix of professionals ensures that clients enjoy high level partner contact at all times.

We are committed to delivering a quality legal service in a manner which will exceed your expectations and we maintain a focus on business and commercial awareness whilst delivering excellence in legal advice.

We have a proven track record of delivering commercially focused advice. Whether it is advisory services, dispute resolution, commercial documentation or education and training, a partnership with Gillis Delaney offers:

- practical innovative advice
- timely services
- expert insight
- accessibility
- cost effective solutions

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtn@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.

Gillis Delaney Lawyers