# 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 employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

## Homeowners Liability to Visitors

The NSW Court of Appeal has recently delivered a judgment in *Novakovic v Stekovic*, which clarifies the approach of the Courts in personal injury claims resulting from injuries at domestic premises.

Novakovic was visiting the home of her brother and sister in law, the Stekovic's. The Stekovic's owned a bull mastiff.

Novakovic had a fear of dogs and upon entering the house and seeing the dog, retreated from the house quickly where she slipped and fell, suffering injuries.

Novakovic argued that it was both foreseeable and reasonable for her to take urgent evasive action and that her brother and sister in law should have anticipated this action and that that they acted unreasonably by failing to remove the dog from the house before inviting her inside.

At trial the Stekovic's admitted that they owed a duty to take reasonable steps to avoid a foreseeable risk of injury. The trial judge ultimately determined that the risk of Novakovic suffering injury was not foreseeable.

Novakovic appealed.

In a unanimous judgment the Court of Appeal rejected Novakovic's claim. In rejecting the claim the Court set out the basis upon which the claim should be determined. McColl J noted that the analysis to apply to the claim was as follows:

> *"The respondents, as occupier of the land onto which the appellant entered, owed her a duty to take reasonable care to prevent injury to her on the assumption she was using reasonable care for her own safety.*
>
> *What was reasonable turns on the circumstances of her entry upon the premises..The duty to take reasonable care required the respondents to protect the appellant, or the class of person of which she was a member, from a "not insignificant" risk which could reasonably be foreseen and avoided. The measure of the discharge of the duty, at common law, was what a reasonable person would, in the circumstances, do by way of response to the foreseeable risk. .. The measure is now prescribed by s 5B of the Civil Liability Act.*
>
> *The inquiry about whether the respondents ought to have taken the precautions for which the appellant contends turns on (amongst other relevant matters) the foreseeability of the risk, whether that risk was not insignificant and whether in the circumstances, a reasonable person in the person's position would have taken those precautions. The inquiry is not to be undertaken in hindsight.. but must be answered prospectively, before the incident occurred.*
>
> *The inquiry is not confined to what could have been done to eliminate, reduce or warn against the risk. While asking what could have been done will reveal what was practicable, it is necessary to ask also: would it have been reasonable for the respondents to take those measures?: ... In other words, the knowledge of how the appellant actually came to sustain her injury has to be excluded when considering whether the respondents were obliged to*


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***Inside***




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*take any precautions in the circumstances of having a dog in the house to which guests had been invited.*

*A person does not breach his or her duty of care merely because there are steps that he or she could have taken to avert the risk that actually materialised."*

These comments provide a concise summary of the analysis that is required in claims involving injuries at domestic premises however the analysis is equally applicable to all personal injury claims.

McColl J then went on to note:

*"The first question which must be asked is whether the presence of the dog in the house posed a foreseeable and not insignificant risk in the circumstances: s 5B(1)(a) and (b). Only if that question is answered in the affirmative does the question arise as to what a reasonable person would do by way of response to the risk: s 5B(1)(c). That was the approach the primary judge took. Having answered the first question in the negative he did not proceed further."*

When examining a personal injury claim there are threshold questions which include:

- Was there a risk of harm and what was that risk?
- Was the risk foreseeable?
- Was a duty of care owed and what was the scope of the duty of care?
- What was a reasonable response to the risk?

McColl J noted there was no evidence from Novakovic that she feared the dog. McColl J concluded it was open to the trial judge to conclude that it was not incumbent on the Stekovic's to foresee that there was a risk that Novakovic would, upon seeing the dog, fear it and run from the house in panic. Accordingly the claim failed as the risk of harm was not foreseeable. Novakovic failed to establish one of the essential elements in a negligence action.

## Proportionate Liability – Did the Actions Cause The Damage?

The proportionate liability regime found in the *Civil Liability Act 2002* has operated in New South Wales since 2002. Proportionate liability applies to an apportionable claim where there is a concurrent wrongdoer. An apportionable claim is a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but does not include claims arising out of personal injuries. Apportionable claims include claims for economic loss or damage to property in actions under the *Australian Consumer Law (NSW)* or the *Fair Trading Amendment (Australian Consumer Law) Act 2010*.

A concurrent wrongdoer in relation to a claim is a person who is one of two or more persons whose acts or omissions, or act or omission, caused, independently of each other or jointly, the damage or loss that is the subject of the claim. Where there is an apportionable claim and concurrent wrongdoers the Court must award damages in an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of the tortfeasor's responsibility for the loss or damage.

There will be a single apportionable claim in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not the same or of a different kind).

However, a recent decision of the NSW Court of Appeal in Mitchell Morgan Nominees Pty Limited v Vella demonstrates that it is not as simple as pointing to two wrongdoers that cause loss to establish that the proportionate liability regime applies.

Vella and Caradonna entered into a joint venture to sell tickets to the Danny Green Title Fight. Ticket proceeds were placed in a joint account. Vella and Caradonna borrowed $300,000 from a friend to be used in the joint venture. The two needed additional money to stage the event and attended upon Mr Vella's solicitors and obtained a number of Certificates of Title belonging to Vella which were in the lawyer's custody.

Caradonna obtained possession of Mr Vella's Certificates of Title and unknown to Vella, used them to borrow money for his own purposes. Caradonna borrowed money from Mitchell Morgan Nominees Pty Limited. He caused an application for finance to be made in Mr Vella's name, forged his signature to a loan agreement and provided a mortgage over one of Vella's properties. He was assisted by his cousin, Lorenzo Flammia, who the Court decided was a dishonest solicitor. Flammia dealt with Mitchell Morgan's solicitors, Hunt & Hunt and misrepresented to them that the documents had been signed by Mr Vella. A mortgage was registered and $1 million was paid into the credit of the joint account in accordance with directions provided

by Mr Flammia, who purported to be Mr Vella's solicitor.

A case was ultimately brought by Mitchell Morgan against its solicitors, Mr Vella and Caradonna and Flammia. The trial judge held that:

- Vella was not liable to Mitchell Morgan as a borrower;
- Although forged, the mortgage had gained indefeasibility under the Real Property Act but because it was so worded so as to secure money payable by Mr Vella to Mitchell Morgan and no money was payable, it secured nothing and should be discharged;
- Hunt & Hunt was liable to Mitchell Morgan in negligence but Hunt & Hunt was a concurrent wrongdoer with Mr Caradonna and Mr Flammia and its liability should be limited to 12.5%.

An appeal followed.

The Court of Appeal has subsequently determined that Hunt & Hunt are 100% liable for the loss as the proportionate liability regime did not apply in the circumstances. The Court of Appeal noted the question which had to be asked was whether Hunt & Hunt was a concurrent wrongdoer in relation to the apportionable claim, that is, was Hunt & Hunt one of two or more persons "whose acts or omissions ... caused independently of each of other or jointly, the damage or loss that is the subject of the claim".

Mitchell Morgan argued that the loss the subject of its claim against Hunt & Hunt was the absence of a mortgage security for the money purportedly lent to Mr Vella and that the fraud of Caradonna and Flammia did not cause loss. The Court of Appeal agreed.

The Court of Appeal noted that the legislation refers to a claim for economic loss or damage to property, not a claim for compensation.

The Court of Appeal noted there is a well recognised distinction between damage and damages. Damages are to compensate a person for the damage done. As was seen in the case of Murray VJ Kruschich (Demolitions), an employer and a doctor couldn't be liable in respect of the same damage, being the employee's disabilities, notwithstanding that the damages payable by the employer might be greater than the damages payable by the doctor. The Court noted in a negligence claim damage is what the plaintiff suffers as a foreseeable consequence of the tortfeasor's act or omission.

In this case the Court of Appeal noted that Mitchell Morgan's claim against Hunt & Hunt was not having the benefit of a security over the Enmore property. The acts or omissions of Caradonna and Flammia did not cause that harm and did not cause the loss the subject of Mitchell Morgan's claim for economic loss.

The Court of Appeal noted that it is necessary to first identify the damage or loss and then determine whether or not a wrongdoer's acts of omissions have contributed to that loss.

The Court of Appeal noted that approaching claims by looking at the damages rather than the damage caused resulted in the potential to mislead. A wrongdoer must have contributed to the damage, rather than the damages, to attract the application of the proportionate liability regime

The decision is a tough call for Hunt & Hunt's insurers. However, the decision sounds a clear warning to all that to invoke the benefits of the proportionate liability regime it is necessary for wrongdoers to have contributed to the same loss or damage and not same damages. A careful analysis of the actual damage caused by each wrongdoer is necessary. It is necessary to identify the damage caused by the negligent act as it is only contribution to that damage that will attract the application of the proportionate liability regime.

## Deny An Insurance Claim & There Can Be Serious Consequences

The insurance claim manager's life is not always an easy one. When considering whether or not a claim falls within the cover provided by an insurance one must be mindful of:

- the impact of Section 54 of the *Insurance Contracts Act* which provides that where the effect of a policy would be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into the insurer may not refuse to pay the claim by

reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act; and

- the fact that a decision to refuse to pay a claim when wrong can result in an award of damages against the insurer for losses suffered by an insured in addition to those losses covered by the policy.

In Australia where a party to a contract breaches a term of a contract the party that is not in default is entitled to sue for damages and the measure of damages will be that amount that puts the party in the position it would have been in had the contract been performed. When it comes to insurance, if an insurer has declined pay a claim in breach of the policy, the measure of damages can include consequential losses flowing from the fact that the insured was without funds to replace equipment and has suffered a loss as a consequence as was seen in the Western Australian Supreme Court judgement in *Highway Hauliers Pty Limited v Matthew Maxwell* (the authorised nominated representative on behalf of various Lloyds underwriters).

The full impact of Section 54 of *the Insurance Contracts Act* and the decision to decline claims under the policy was seen when underwriters rejected 2 claims for property damage to vehicles that were insured Highway Hauliers, a trucking company.

Highway Hauliers arranged cover for their fleet of trucks with certain underwriters at Lloyds.
The contract of insurance contained an endorsement that provided that the insurer would not pay if it did not receive an approved in writing driver declaration and that declaration included details of a driver test score and the driver had achieved a minimum score on the PAQS test.

Two trucks were damaged in separate incidents as a consequence of the actions of two drivers who had not undertaken the PAQS test. The underwriters declined to pay the claims. Highway Hauliers conceded that the drivers had not taken the test. Highway Hauliers commenced proceedings against the underwriters and sought to invoke the operation of Section 54 of the Insurance Contracts Act arguing that the act of the drivers in not sitting the test did not cause or contribute to the loss and therefore the underwriter could not refuse to pay the claim.

The underwriter accepted that the driver's failure to achieve the minimum score on the PAQS test had not caused or contributed to the losses suffered, however argued the endorsement to the policy went to the scope of cover and was not a policy condition which if breached attracted the operation of Section 54 of the Insurance Contracts Act.

The underwriters relied on the Queensland Court of Appeal decision in *Johnson v Triple C Furniture & Electrical Pty Limited and Rural & General Insurance Limited*. In that case the Court determined that Section 54 could not be invoked to extend the scope of a policy and the Court of Appeal noted:

"The act or omission which founds the refusal cannot change the event or circumstances in respect of which the insured claims indemnity".

In Johnson's case the policy included an exclusion that provided that the policy did not apply whilst the aircraft, with the knowledge of the insured or the insured's agent was used for any illegal purpose or if the aircraft was operated in breach of recommendations, regulations, orders or bylaws which would be regarded as appropriate authority by aviators in relation to air worthiness, air navigation and the legal operation of the aircraft. The Court in that case determined that the exclusion was engaged and Section 54 could not be used to extend the scope of the insurance.

However in the Highway Hauliers case Corboy J categorised the relevant act or omission for the purpose of Section 54(1) as the act of Highway Hauliers operating the vehicles on the particular run on which each accident occurred with drivers who did not satisfy the requirements of the policy as it allowed the insured vehicles to be driven by non declared drivers who had not attained a minimum PAQS score.

The Court noted the non declared driver exclusion was not expressed in the term of the use of an uninsured vehicle, rather it imposed an obligation on the insured to submit driver declarations.

The act of letting the undeclared drivers drive the vehicle was the act which gave rise to a breach of the condition of the policy and that act was the action that needed to be considered under Section 54 of the Insurance Contracts Act.

Ultimately the Court determined that Section 54 was engaged and the insurer was not entitled to refuse to indemnify the

insured. We would not be surprised if there was an appeal on this point.

However, more concerning for underwriters was the finding that as a consequence of the failure to pay the claim, the insured had suffered consequential loss and the insurer was liable in damages for that consequential loss.

In this case the impecuniosity of Highway Hauliers meant that it was not able to replace its trucks when damaged. Consequently, Highway Hauliers lost a contract with a key client. The Court ultimately determined that as a consequence of the breach of contract by underwriters they were liable to compensate Highway Hauliers that loss, which was assessed at $145,000.

Corboy J noted:

> *"(a) No authority was cited for the proposition that an insured was presumed, in fact, to be able to purchase its own equipment to replace damaged equipment in the event that an insurer wrongfully refused to pay or indemnify under a contract of insurance. No policy reason was advanced for the presumption and I can see no rationale for why the common law would presume that, as a matter of fact, an insured could repair or replace damaged property where an insurer had wrongfully refused to indemnify the insured for that damage.*
>
> *(b) The question of remoteness in contract is determined by what the parties reasonably contemplated would flow from a breach of their contract at the time that the contract was made.*
>
> *.....*
>
> *(d) Remoteness and mitigation are closely related. The impecuniosity of the plaintiff is not relevant to mitigation. There is no reason in principle or policy why questions of remoteness should be analysed differently.*
>
> *...*
>
> *the plaintiff's impecuniosity does not operate in contract as a separate and concurrent cause of loss so as to provide an additional limitation on the damages that may be recovered following a breach. That conclusion accords with the principles on which remoteness of loss and damage is determined in contract.*
>
> *...*
>
> *The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."*

Corboy J concluded that the claim for damages was not too remote and it was reasonably contemplated by the insurers that Highway Hauliers could lose a set run if they breached the contract of insurance by not replacing a vehicle that was damaged, by repairing or paying the market value for the vehicle.

The difficulty for underwriters was the approach of the Court to the operation of Section 54. More concerning was the award of damages for the breach of the terms of the contract of insurance.

Insurers, when declining indemnity need to be aware of the risk that their actions may result in an insured being unable to continue with its business operations and that may well result in an award of damages reflecting the consequential loss that flows from the failure to pay a claim. Life is not easy for an underwriter.

## Limitation Periods – When Is The Cause Of Action Discoverable?

In NSW the *Limitation Act 1969* provides that personal injury claims must be brought within three years of the date of discoverability. That generally means that a claim must be commenced within three years of the date of the accident.

*The legislation provides in Section 50D that:*

> *"50D Date cause of action is discoverable*
>
> *(1) For the purposes of this Division, a cause of action is discoverable by a person on the first date that the person knows or ought to know of each of the following facts:*
>
> *(a) the fact that the injury or death concerned has occurred,*
>
> *(b) the fact that the injury or death was caused by the fault of the defendant,*
>
> *(c) in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on*

*the cause of action.*

*(2) A person ought to know of a fact at a particular time if the fact would have been ascertained by the person had the person taken all reasonable steps before that time to ascertain the fact."*

However, there are situations where the date of discoverability is not the date the accident happened as the date of discovery turns on the knowledge of fault of person. But does that mean that a claimant must know that they have a viable cause of action?

The NSW Court of Appeal was recently called on to determine that very issue in State of New South Wales V Gillett.

In Gillett's case five Judges of the Court of Appeal were called on to determine whether or not Gillett, a senior member of the NSW Police Force was precluded from bringing a claim due to the expiration of the limitation period as the date of discovery was arguably the date that he ascertained there was fault on the NSW Police Service rather than the date he acquired knowledge that he had a viable action against the Police Service.

Gillett commenced proceedings, claiming damages for an alleged psychiatric injury. The allegation of negligence was that the Police Service failed to disclose to the Director of Public Prosecutions all relevant information and conduct of Gillett obtained during an investigation of Gillett's conduct which preceded his being charged with a number of criminal offences. The circumstances giving rise to the claim occurred in 2003. In October 2003 Gillett was charged with offences of common assault, two charges of act with intent to pervert the course of justice and a corruption charge.

The criminal trial proceeded on 7 June 2004 and after conclusion of the evidence the Crown Prosecutor concluded there was no evidence capable of establishing a prima facie case. The Crown Prosecutor offered no further evidence and the charges were ultimately dismissed.

Gillett sought legal advice in April 2005 in relation to a negligence action against the Police Service and a barrister was briefed and advised there were no prospects of success of the claim for assault and no reasonable prospects of success in respect of a claim of malicious prosecution. Consequently, no proceedings were commenced by Gillett.

Several years later Gillett had a conversation with his next door neighbour who was a solicitor who then referred Gillett to another barrister. This time the barrister advised Gillett that he had a reasonable claim against the Police Force that was framed in negligence and breach of a statutory duty in failing to disclose the documents during the trial. Consequently legal proceedings were commenced. Up until the time that Gillett consulted the second barrister he did not know that he had a viable cause of action against the Police service.

The NSW Police Service argued that Gillett knew that his injury was caused by the fault of the Police Service in early 2005 and in fact sought advice in relation to a possible claim.

The issue for the Court of Appeal was the meaning of 'fault" in the Limitation Act 1969.

In a unanimous judgment the Court of Appeal determined that it is knowledge of the cause of action that is relevant, not perceived fault on the part of a person.

Beazley JA, in the leading judgment, with which all judges agreed, concluded that a cause of action was discoverable when a plaintiff knew or ought to have known the key factors necessary to give rise to liability. That involved a relationship of causation between "fault" and "injury".

Beazley JA noted:

*"For a person to be in a situation where he or she knows or ought to know that an injury was sufficiently serious to justify the bringing of an action on the cause of action, they would have to know (or be in a position where they ought to know) that they have sufficient prospects of recovering enough damages for it to be worthwhile litigating. That would require, at the least, knowledge (whether derived from the plaintiff's own knowledge, from friends or acquaintances, or from professional advice) that the injury in question is one for which the law would hold the defendant liable in damages, and that the damages that could be recovered are large enough to be worth the time and trouble of suing. Thus, knowledge of actionability is necessary before s 50D(1)(c) is satisfied. And, because it is involved in there being "fault", actionability is likewise one of the "key factors necessary to establish liability" that must be known before s 50D(1)(b) is satisfied."*

Accordingly, the Court of Appeal determined that it was knowledge of the actionability of a claim that determined the date of discoverability.

In New South Wales the limitation period for a personal injury claim will only run from the date that a person has knowledge there was fault on the part of a person which is actionable.

A claimant does not need to have received legal advice that he has an actionable claim before there can be finding that there is a particular the date of discoverability although the claimant does need to have knowledge that the claim is actionable. Where an injured person receives advice that they have no claim and subsequently discovers that there is a viable cause of action, the limitation period will commence when the claimant acquires knowledge that they have an actionable claim. In some circumstances the date of discoverability will be much later than the date of the accident and it must not be assumed that the limitation period starts to run from the date of the accident.

This means that lawyers who provide incorrect advice as to whether or not a cause of action is available may not actually cause their clients to trigger the discoverability date. Does that mean that lawyers who provide incorrect advice may escape negligence actions? Perhaps!!

However the is one thing for certain, limitation periods will not commence to run until the discoverability date and that is the date that the claimant knows or ought to have known that there is fault on the part of a person which is actionable.

**Negligence & Causation**

Negligence and causation can be tricky issues particularly in medical negligence claims as was seen in a recent decision of the NSW Court of Appeal in *Wallace V Kam*.

The factual circumstances were relatively simple.

Dr Kam performed a fusion of the lumbar spine. One of the risks of that surgery was the risk of paralysis. Another risk was a 5% risk of bilateral femoral neuropraxia, which is local nerve damage to the anterior femoral or thigh region of both legs caused by lying prone for an extended period during surgery.

Wallace underwent surgery that was performed by Dr Kam who did not warn Wallace about either of those risks. The risk of paralysis did not eventuate however Wallace developed bilateral femoral neuropraxia and underwent a surgical procedure the following day to treat that condition.

The trial judge concluded that Dr Kam had breached his duty of care in failing to warn of the risk of bilateral femoral neuropraxia, however was not satisfied that Wallace would have declined the surgery had he been warned of that risk and held that Wallace failed to establish any causal connection between the breach of duty and the injuries. It followed that the claim failed.

Essentially the trial judge determined that any failure to warn of a risk of a catastrophic outcome such as paraplegia was irrelevant as Wallace had argued that if he had been warned of the risk of paraplegia he would not have had the operation and therefore would not have suffered the transient local nerve damage. Fortunately for Mr Wallace he had recovered from the femoral neuropraxia by the time the case proceeded to trial.

Wallace appealed and the Court of Appeal was called on to examine the legislative regime in the *Civil Liability Act 2002* which governs causation and various failure to warn cases determined by the High Court, the NSW Courts, Canadian Courts, UK Courts and American Courts.

In Wallace's claim no single approach to the resolution of the appeal was necessarily agreed on by the Appellate judges however the appeal was ultimately dismissed by a two to one majority.

Perhaps the most interesting conclusions were those of Allsop P, with whom Basten J agreed, noting:

> *"Since writing the above, I have had the opportunity to read the reasons of the President. To the extent to which our reasoning is consistent, I agree with his more expansive analysis of the issue. To the extent we differ, primarily as to whether S5D demands a rigid separation of physical and policy considerations in assessing causation, I would accept his*

*alternative analysis, if thought to be preferable."*

Allsop P has provided an interesting analysis of the way one approaches the question of causation in all negligence claims.

Section 5D of the Civil Liability Act 2002 is in the following terms:

> *"5D General principles*
> *(1) A determination that negligence caused particular harm comprises the following elements:*
> *(a) that the negligence was a necessary condition of the occurrence of the harm (factual causation), and*
> *(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).*
> *(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.*
> *(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:*
> *(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and*
> *(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.*

Allsop P found:

> *"... the task involved in s 5D(1)(a) is the elucidation of the factual connection between the negligence (the relevant breach of the relevant duty) and the occurrence of the particular harm. That task should not incorporate policy or value judgments, whether referred to as "proximate cause" or whether dictated by a rule that the factual enquiry should be limited by the relationship between the scope of the risk and what occurred. Such considerations naturally fall within the scope of liability analysis in s 5D(1)(b), if s 5D(1)(a) is satisfied, or in s 5D(2), if it is not.*
>
> *Of course, the factual enquiry in s 5D(1)(a) is governed by the nature and content of the duty and its breach since that is the "negligence" referred to in s 5D(1). It is the connection between that and the harm that is to be analysed, factually.*
>
> *.....*
> *The correct course is to undertake the whole factual enquiry called for by s 5D(1)(a) in order to determine the factual relevance and connection of the negligence to the harm caused.*
>
> *One then turns to the operation of s 5D(1)(b) to assess whether it was "appropriate for the scope of the negligent person's liability to extend to the harm so caused". It is that enquiry which will draw in (without intending to be exhaustive) value judgments, an assessment of the scope of the risks, the type of breaches and risks involved, their relationship to the risk that came home and legal policy questions as to how widely to permit the scope of liability to reach."*

Allsop P noted that strictly speaking the trial judge had not undertaken the enquiries required by Section 5D(1)(a) or (b) and factual matters had not been determined relevant to the enquiry of factual causation. However, the enquiry required by Section 5D(1)(b) which involved a value judgment only needs to take place once Section 5D(1)(a) has been satisfied , that is it is established the negligence caused the harm.

Allsop P noted:

> *"If it is then accepted that there is a connection between the negligence and the harm, a value determination needs to be made under Section 5D(1)(b) to assess whether it is appropriate for the scope of a negligent person's liability to extend to the harm caused. That value judgment incorporates an assessment of the scope of the risks, the type of breaches and the risks involved in the relationship to the risk that came home and legal policy questions as to how widely to permit the scope of liability to reach."*

Allsop P concluded the correct approach to the determination of the claim was as follows:

> *"One of the risks, of a number of which Mr Wallace should have been warned, came home. Mr Wallace was in one sense entitled to make his decision on the basis of complete information. That said, the approach to the enquiry under s 5D(1)(b) should reflect the underlying legal aims of the duty and the rule of responsibility: that is, to protect the patient by holding the doctor responsible for the harm that may result from material inherent risks that were not the subject of warning. The duty and the rule of responsibility are not to protect the patient from the risk of an uninformed decision; they*

*are not to protect the integrity of the decision: .... They are to protect the patient from harm from material inherent risks that are unacceptable to him or her."*

At the end of the day Allsop P concluded that there was little doubt that the doctor owed a single comprehensive duty, however the harm that he should be held liable for should not extend to harm from risks a patient was willing to hazard whether through "an *express choice or as has been found, had their disclosure been made*".

Allsop P noted "*this limits recovery to what was an unacceptable risk (or risks), and harm therefore that has (or has not) been the subject of a warning*."

A doctor will be held liable for the consequence of material risks that were unacceptable to a patient and that eventuate. However, a failure to warn of a risk which would have caused a patient not to proceed with the surgery does not cause the harm that ultimately eventuates if the risk does not eventuate.

The differing reasoning in the Court of Appeal will probably result in an appeal to the High Court although the quantum of the claim is only $350,000(the agreed assessment of damages).

If there is an appeal the approach to Section 5D of the *Civil Liability Act 2002* propounded by Allsop P will come in to question. For now the approach is as follows:

- There must first be a factual enquiry to determine the connection between the negligence and the occurrence of a particular harm.
- Before the factual enquiry is undertaken the negligence must be determined.
- That means issues of the scope of duty and the breach must be determined before examining the connection between the negligence and the occurrence of the harm.
- Once there is a connection between the negligence and the occurrence of harm it is then necessary to make a value judgement on whether the scope of the liability should extend to the harm caused. That value judgment incorporates an assessment of the scope of the risks, the type of breaches and the risks involved in the relationship to the risk that came home and legal policy questions as to how widely to permit the scope of liability to reach.

We will have to wait and see whether Wallace appeals to the High Court and whether the High Court adopts the analysis of Allsop P to the application of Section 5D of the *Civil Liability Act 2002*.

## Council Liability For Dog Attacks

In NSW the *Companion Animals Act 1998* provides a regime for the compulsory identification and registration of companion animals and governs the liability for injury or death caused by dogs as well as providing a regime for the declaration of dogs as dangerous dog and imposing added responsibilities that are imposed on owners of dangerous dogs. A dog that has been declared to be a dangerous must be fitted with a muzzle securely fixed to its mouth to prevent it from biting any person or animal and kept on an adequate chain, cord or leash which is held by or secured to a person when the dog is away from the property where it is ordinarily kept. The owner of a dangerous dog must also keep the dog in an enclosure where the dog is ordinarily kept and when outside its enclosure it must be controlled by a competent person and muzzled.

Section 25 of the *Companion Animals Act* provides that an owner of a dog is liable in damages in respect of bodily injury to a person caused by the dog wounding or attacking that person and for any damage to personal property caused by the dog attack. However, the liability does not apply in respect of an attack by a dog that immediately responds to and is wholly induced by intentional provocation by a person other than the owner or the owner's employees or agents or where the attack occurs on a property or vehicle of which the owner of the dog is an occupier or on which the dog is ordinarily kept, however the exclusion only applies if the person attacked was not lawfully on the property or vehicle and the dog was not a dangerous dog or restricted dog (American Pitbull Terriers, Pitbull Terriers, Japanese Tosa, Dogo Argentino or Fila Brasiliero have been declared as restricted dogs for the purposes of the Companion Animals Act at the time of the attack).

Effectively, owners of dogs have a strict liability for injuries caused by their dogs when the dogs are away from their home and in the case of dangerous dogs and restricted dogs that strict liability extends to attacks on persons lawfully on property where the dogs are kept and to trespassers on properties where the dogs are kept where the dogs are dangerous dogs or restricted dogs.

An authorised officer of a Council may, if satisfied that a dog is dangerous, declare it to be a dangerous dog. That declaration can be made on the officer's own initiative or on the written application of a Police Officer or any other person. In addition, the Local Court has the power to declare dogs to be dangerous. The declaration of a dog as dangerous creates additional responsibilities and liability for the owner.

Local Councils have been vested with a special statutory duty which permits Council Officers to declare dogs dangerous and therefore the question will arise as to whether or not a person injured in a dog attack can bring a claim against the Council for failing to properly exercise that special statutory duty and whether or not a Council can be held liable in negligence for failing to declare a dog dangerous. This issue was recently determined by the NSW Court of Appeal in *Warren Shire Council v Kuehne.*

On 19 July 2006 a young girl, apparently unsupervised, wandered into the backyard of a property. Although the precise sequence of events is unknown, the young girl encountered a number of dogs in the backyard and one or more of the six dogs mauled her terribly and she died the next day. The dogs were kept there by their owner Mr Wilson. Two separate proceedings were brought in the District Court by the girl's father for nervous shock suffered by the father and the girl's brother. The trial judge held that the Council was liable for the injuries that were sustained. The Council appealed.

The Court of Appeal was called on to determine whether or not a local council could be held liable in negligence for failing to declare a dog as dangerous and failing to heed complaints made to it concerning the potential risk to peoples' safety presented by dogs. The Council denied that it was negligent and argued the defence in Section 43A of the Civil Liability Act which provides that where a council is exercising a special statutory power, any act or omission involving an exercise of, or failure to exercise the special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise its power.

The Court of Appeal noted that the claim that was brought against the Council was a claim in negligence rather than a breach of a statutory duty. It was necessary for the Court to determine whether or not a duty of care existed. In a unanimous judgment the Court of Appeal determined that having regard to the scope and purpose of the Companion Animals Act, the relevant statutory regime erected a relationship between the Council and the class of persons who may be injured as a consequence of dog attacks. Essentially the Council could be held liable in negligence.

Accepting that there was a potential liability, the Court then turned to consider the circumstances of the claim. At the time of the incident, the definition of a "dangerous dog" was in the following terms:

> *"A dog is dangerous if it has without provocation:*
>
> *(a) attacked or killed a person or animal (other than vermin); or*
>
> *(b) repeatedly threatened to attack or repeatedly chased a person or animal (other than vermin)".*

The facts of this case did not reveal that the dogs had previously attacked or killed a person or animal without provocation. The dogs were hunting dogs, used for hunting pigs, and whilst they may have attacked animals that was a consequence of their training and was not "without provocation".

The Court of Appeal noted that the trial judge found that a dog trained to hunt is likely to be a dangerous dog. The Court of Appeal noted whilst that may be true, it was not the definition in Section 33 of the Companion Animals Act at the relevant time. The Court of Appeal determined that the trial judge had erred in finding that trained hunting dogs were dangerous dogs.

The Court of Appeal concluded that it was necessary for the dogs to have attacked an animal "without provocation" for them to be declared dangerous and the fact that the dogs were pig hunting dogs removed them from the definition under Section 33 of the Companion Animals Act as the dogs attacked but not "without provocation". As the dogs were not dangerous dogs within the definition of the legislation the Council could not be held liable in negligence for failing to declare the dogs as dangerous.

The Court of Appeal also noted that whilst there had been complaints to the Council about the dogs, the Court did not consider the complaints to be sufficient to warrant a declaration that the dogs were dangerous.

In relation to the Council's defence under Section 43A, the Court of Appeal noted that:

> *".. but in the main, these were complaints about the dogs being a nuisance, eg barking, roaming the streets or polluting lawns etc. Complaints of that nature did not require the Council to make a dangerous dog declaration. They*

*did not require the Council to consider s33 and s34 at all".*

The circumstances of the accident were tragic and the Court of Appeal regarded that the trial judge's original findings were infected by hindsight reasoning arising from the tragic and terrible consequences of the attack. That hindsight reasoning was not appropriate.

The Companion Animals Act was amended in a number of respects as a response to this tragic death and one of those amendments included prescribing "hunting dogs" as dangerous dogs.

The current definition of "dangerous dogs" is now:

"*(1) A dog is dangerous if it:*
- *(a) has without provocation, attacked or killed a person or animal (other than vermin); or*
- *(b) has, without provocation, repeatedly threatened to attack or repeatedly chased a person or animal (other than vermin); or*
- *(c) has displayed unreasonable aggression towards a person or animal (other than vermin); or*
- *(d) is kept or used for the purposes of hunting.*

*(2) A dog is not for the purpose of Section 1(d) to be regarded as being kept or used for the purpose of hunting if it used only to locate, flush, point or retrieve birds or vermin*".

Whilst in this case the Council was not held liable for the injuries suffered consequent to the dog attack and death of a family member, the case serves as a reminder that liability can attach to Councils if they fail to properly exercise their special statutory duty imposed under the Companion Animals Act and that they can be held liable for negligence if they fail to declare a dog dangerous where appropriate.

If the incident occurred today in all likelihood the claim would succeed as a consequence of the amended definition of dangerous dogs in the legislation.

## Is There an Implied Term of Mutual Trust & Confidence in an Employment Contract?

The NSW Court of Appeal in *Shaw v State of New South Wales* noted that "the question whether a term compendiously described as one of "mutual trust and confidence" is, in the ordinary course, implied in every employment contract" has received considerable attention in recent years. If such a term is found to be implied in an employment contract, a breach of that term will give rise to an entitlement to damages. However, the question whether that term must be implied in all employment contracts is far from settled.

In Shaw v State of New South Wales the Court of Appeal was called on to consider whether a trial judge erred when he acceded to the request of an employer, the State of New South Wales, to strike out claims by former employees that were based on an alleged breach of a term of mutual trust and confidence that was said to be implied in an employment contract and a claim that the employer was negligent in failing to follow procedures set down in its internal policy documents.

Shaw and Salt were appointed as officers of the Education Teaching Service of NSW under the Teaching Service Act 1980. The appointment of each was subject to a mandatory probationary period of 12 months and the two officers were assigned to Bourke Public School and commenced working there. Their appointments were annulled by the Director General of Education in accordance with the Teaching Service Act 1980 and the two ceased to be officers of the Education Teaching Service and ceased to be employees of the Crown.

Salt and Shaw sued the State of New South Wales, alleging that it was a term of their contract of employment that the State of New South Wales, through its offices would not act in a manner likely to destroy or seriously damage the relationship of mutual trust and confidence between Shaw and Salt and the State of New South Wales. That duty was said to require the employer to:

- Provide reasonable notice of any material critical of them provided by staff to the Principal,
- provide Salt and Shaw with adequate counselling and support in regard to any difficulties experienced as probationary teachers,
- not distress and humiliate Shaw and Salt ,and
- afford procedural fairness to each.

The destruction of the term of mutual trust and confidence was said to repudiate the employment contracts and give rise to an entitlement to damages.

At a preliminary stage the State of New South Wales applied to have parts of the Statement of Claim struck out on the basis that damages would not be available to Salt and Shaw and there would be a significant waste of time if they were allowed to pursue those claims. The trial judge struck out the claims based on the alleged breach of an implied duty of mutual trust and confidence and also struck out the allegation that there had been a breach of duty of care as he concluded that the law does not give rise to such a duty,

Salt and Shaw appealed to the Court of Appeal and sought to restore the claims which had been struck out so that their claims could ultimately proceed to hearing.

Five judges of the Court of Appeal, in a unanimous judgment concluded that the trial judge was correct in striking out the negligence action, however should not have struck out those claims arising from an alleged breach of an implied duty of mutual trust and confidence.

A claim can only be struck out at a preliminary stage before a hearing where the claim does not have a triable quality. The Court noted that:

> *"The question is therefore whether the claims in question are so obviously untenable or groundless that there is "a high degree of certainty" that they will fail if allowed to go to trial and whether this is one of the clearest of cases in which the Court may accordingly intervene to prevent the claims being litigated."*

In relation to the negligence claim, the unanimous conclusion of the Court of Appeal was that:

> *"In substance, applicable employment law (in both its contract aspects and its statutory aspects) coupled with administrative law procedures, occupied the relevant field in such a way as to leave no scope for the development of a novel duty of care based on a new concept of what involved a safe system of work.*

To extend the scope of negligence into a field already sufficiently occupied and regulated was determined to be inappropriate.

However, Shaw and Salt found favour with the Court of Appeal in relation to their arguments that they had a triable case when it came to their contention that there was an implied term of mutual trust and confidence in their employment contract and a breach would entitle them to damages.

Whilst the Court of Appeal did not decide definitively that a term of the kind in question was a legal incident of employment contracts as a class of contracts, it was clear that Australian Law has developed in such a way that it is at least arguable that there is such a term implied in employment contracts.

The Court of Appeal noted that the existence of a term of mutual trust and confidence as a legal incident of employment contracts has been recognised in England.

The Court of Appeal noted that the Full Court of the Supreme Court of South Australia in The State of New South Wales v McDonald, in a joint judgment of Doyle CJ, Warwick J and Kelly J, noted:

> *"The development of the implied term can be seen as consistent with the contemporary view of the employment relationship as involving elements of common interest and partnership, rather than of conflict and subordination.*
>
> *It is plain that the duties which may be required of an employer under the implied term of mutual trust and confidence, or perhaps the conduct, from which an employer should refrain, are still being developed. This seems inevitable given the open-ended nature of the way in which the duty is expressed. In England, the implied term of mutual trust and confidence has evolved into a duty by employers to treat their employees fairly. Basten JA appeared to approve of this evolution in Russell. But other authorities have resisted the notion that the implied term connotes an obligation which is closely related to that of fairness, namely, an obligation by employers to treat employees reasonably.*
>
> *It may be that the better view is that the implied term operates in a variety of circumstances within an employment relationship to restrain abuses of an employer's power. This purpose of the term is suggested by the authors of Macken's Law of Employment:*
>
> > *'Whilst the duty may add little to the obligations of the employee, its importance lies in the extent of obligations it*

*imposes on the employer. It provides a means by which "a balance [is] struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited". In a climate of reduced collective bargaining, it protects the vulnerable employee by imposing limits on the managerial prerogative.'"*

The NSW Court of Appeal noted there had been cases where reservations and contrary views have been expressed and cases have not necessarily come to any firm conclusion on the question however at the end of the day the Court of Appeal concluded that there was clearly a triable issue which should be allowed to proceed to hearing.

The State of New South Wales also argued that the case of "*Addis*", an English case, stands for the principle that an employee cannot recover damages for the manner in which a wrongful dismissal took place, through injured feelings or for any loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. It has been said that Addis' case is generally understood to have decided that any loss suffered by the adverse impact on the employee's chances of obtaining alternative employment is to be excluded from an assessment of damages for wrongful dismissal.

The case of Addis has been the subject of discussion in jurisdictions throughout the world but has only been referred to by the High Court in Australia on three occasions. After an extensive review of the application of Addis' case in different jurisdictions, the Court of Appeal noted that the claim made by Salt and Shaw was not a claim for damages for distress or injured feelings following their termination, nor was it a claim for damage to reputation as such. Rather, the claim was that there was a breach of the implied term of mutual trust and confidence and the claim related to loss of earnings and earning capacity on the basis that the State of New South Wales, in breach of the implied term, deprived Shaw and Salt of the ability to earn remuneration and related benefits after they were terminated was an incidence of the breach. The claim was that financial loss actually sustained followed from the breach of contract.

The Court of Appeal noted:

*"Such a claim is arguably consistent with the principle that damages are intended to "put the injured party in the financial position the party would have been in had the breach of contract not taken place". Recovery of damages for breach of an implied term of mutual trust and confidence in the Court of Appeal's view accorded with:*

*(a) UK Authority that "if pecuniary loss can be established, the mere fact that the pecuniary loss is brought about by the loss of reputation caused by a breach of contract is not sufficient to preclude the plaintiffs from recovering in respect of the pecuniary loss;*

*(b) that recovery of financial loss in respect of damage to reputation caused by a breach of contract is not necessarily excluded;*

*(c) that the decision in Addis (and another case of Malik) does not preclude the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term and this caused financial loss; and*

*(d) that damages for breach of contract are for making good financial loss."*

Accordingly, the Court of Appeal determined that the claims made in respect to the alleged implied term of mutual trust and confidence should not be struck out.

Shalt and Shaw's claim will now proceed to hearing where a District Court judge will be called on to determine whether or not there was an implied term of mutual trust and confidence in their employment contracts and if so, whether the conduct of the State of New South Wales was such that there was a breach of that term which resulted in damages.

The judgment highlights the state of flux of the law of employment when it comes to the question of whether or not there is an implied term of mutual trust and confidence in employment contracts. The debate on that issue is a long way from decided, however what is certain is that a claim that there is such a term should not be dismissed on the basis that the existence of an implied term is not arguable.

So, is it only a matter of time before Australian Courts conclude that there is an implied term of mutual trust and confidence implied in every employment contract? We will have to wait and see, however, we speculate that wait will not be too long.

## What is Reasonably Practicable When it Comes to Safety?

The new harmonised Work Health & Safety Laws provide that a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the person, and workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

The concept of reasonable practicability has introduced a potential defence to a prosecution for a breach of health and safety duties as can be seen in the recent decision of the High Court in Baiada Poultry Pty Limited v The Queen. In this case the High Court was called on to consider whether a conviction under the Victorian Occupational Health and Safety legislation should be overturned where the jury was not properly directed on the deliberations that they needed to make concerning what was reasonably practicable.

Baiada carries on business processing broiler chickens in Victoria. Baiada agrees with growers to supply them with chickens, feed and assistance and the growers agree to raise the chickens until they are 32 days old. Baiada agreed with growers that it would round up the chickens and transport them to its plant

Baiada engages independent contractors known as chicken catchers to round up and pack chickens into crates and other independent contractors to transport the crates to Baiada's processing plant.

Baiada engaged Azzopardi Haulage to transport crates of chickens from the grower's farms to the Baiada plant. Azzopardi Haulage supplied the prime mover and driver and Baiada provided a trailer loaded with empty crates stacked into a series of steel pallets or modules.

Baiada also engaged DMP Poultech ("DMP") to do the chicken catching and to supply a forklift to load the modules of filled crates onto the trailer.

The principal of Azzopardi Haulage, Mr Azzopardi, was killed when a module fell whilst he was strapping down the load and an employee of DMP was shifting some of the modules on the trailer using the forklift.

In Victoria at the relevant time the *Occupational Health and Safety Act 2004* provided:

> *"An employer must so far as is reasonably practicable provide and maintain for employees of the employer a working environment that is safe and without risks to health."*

The legislation also provides that for the purposes of determining what is reasonably practicable in relation to ensuring health and safety:

> *"regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety*
>
> *(a) the likelihood of the hazard or risk concerned eventuating;*
>
> *(b) the degree of harm that would result if the hazard or risk eventuated;*
>
> *(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;*
>
> *(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;*
>
> *(e) the cost of eliminating or reducing the hazard or risk.*

These legislative provisions are similar to those found in the new Harmonised Health and Safety Laws throughout Australia.

A prosecution was brought against Baiada under the Victorian Occupational Health and Safety Act. The essence of the prosecution was that Baiada failed to control how the forklift was to be operated at grower farms. Baiada argued that it was entitled to rely on its subcontractors and their experience as being a practical method of performing its business and its duties that it had and in doing so it had carried out its obligations so far as is reasonably practicable.

In the initial hearing Baiada was convicted by a jury. Baiada then appealed to the Victorian Court of Appeal. The Court of Appeal noted that Baiada had a contractual power to give safety directions in relation to the loading activities.

The Court of Appeal determined:

> *"that the jury should have been directed in clear terms that, unless the prosecution had satisfied them beyond*

*reasonable doubt "that Baiada's engagement of DMP and Azzopardi Haulage was not sufficient to discharge Baiada's obligation to do what was reasonably practicable to [provide] and maintain a safe work site in the particular respect in issue", they (the jury) were bound to acquit."*

The Court of Appeal was divided on whether, despite the absence of this direction, no substantial miscarriage of justice had actually occurred and the majority of the Court of Appeal decided that there was no miscarriage of justice and upheld the conviction.

An appeal followed to the High Court which has now overturned the conviction but ordered a new trial.

The High Court noted that Baiada's submission was that the prosecution had not established beyond reasonable doubt that it had failed "so far as was reasonably practicable" to provide and maintain a safe work environment.

The High Court concluded that the duty to provide and maintain a safe working environment could not be determined by reference only to Baiada having a legal right to issue instructions to its contractors. In a joint judgment four of the judges commented that:

*"The question required consideration of not only what steps Baiada could have taken to secure compliance but also, and critically, whether Baiada's obligations "so far as is reasonably practicable" to provide and maintain a safe working environment obliged it:*

*(a) to give safety instructions to its (apparently skilled and experienced) subcontractors; and*

*(b) to check whether its instructions were followed;*

*(c) to take some steps to require compliance with the instructions; or*

*(d) to do some combination of these things or even something all together different."*

The High Court noted that these were questions which the jury had to decide in light of all the evidence at the trial about how the work of catching, caging, loading and transporting chickens was done.

The majority of the High Court noted:

*"the jury's guilty verdict told the Court of Appeal nothing about the issue of whether Baiada was bound to give directions or give directions and take steps to procure compliance with them. The jury had not been required to consider either issue. Reference by the majority in the Court of Appeal to the jury's verdict was therefore irrelevant to the majority's consideration of whether the evidence at trial showed beyond reasonable doubt that it was reasonably practicable for Baiada to have given directions to DMP about how to operate the forklift and to have checked that the instructions were observed.*

*The Court of Appeal could conclude (as the majority did) that it was proved beyond reasonable doubt that it was reasonably practicable for Baiada to take these steps only if it was not open to a jury to conclude to the contrary. If it was open to a jury to reach a contrary conclusion, the point was not established beyond reasonable doubt. In particular, if it was open to a jury to conclude that it had not been proved beyond reasonable doubt that it was reasonably practicable for Baiada to give its subcontractors instructions about how they were to perform their work and to check that the instructions were observed, it was open to a jury to acquit."*

The High Court accepted that the evidence led at trial permitted the jury to conclude beyond reasonable doubt that it was reasonably practicable for Baiada to take steps to ensure compliance with instructions of that kind but the evidence led at trial did not compel that conclusion. The jury needed proper directions on this point and therefore a retrial was necessary.

The High Court's decision highlights that the delegation of work to contractors does not necessarily mean that a business needs to maintain direct control over the processes to ensure the health and safety of those involved in that process as far as reasonably practicable. Each case will turn on its facts. For example outsourcing an activity to a skilled contractor where a business has no experience in the independent contractor's specialist field of expertise may well be acting in a way to ensure the health and safety of those involved in that process as far as is reasonably practicable.

The case highlights the evidentiary onus prosecutors will face to establish breaches of the new Health and Safety laws and that all elements of an offence must be established beyond reasonable doubt. A bald assertion by a prosecutor that a business had the capacity to control safety and did not exercise control over an independent contractor will not necessarily be enough to succeed in a prosecution for a breach of a health and safety law.

The High Court has confirmed that it is a question of fact whether or not engaging a contractor to perform work was a

reasonably practicable way for ensuring worker's health and safety. To succeed in a prosecution the prosecutor must demonstrate that engaging a skilled contractor was not a reasonably practicable way to carry on the activity and the businesses health and safety responsibilities.

The High Court did not determine that Baiada should not be convicted and there will be a new trial with the jury being properly directed on the deliberations on reasonable practicability that are necessary.

## Workers Compensation Roundup

### Injury During Sex On An Overnight Stay For Business- Yes The Injury Is Compensable

Workers compensation benefits in Australia extend to injuries sustained by employees whilst they are on a temporary absence for work related to their employment where a person's employment requires them to be away from home on business. The Courts have been called on to consider a wide variety of circumstances where employees have been injured to determine whether or not the entitlement to compensation should extend to activities undertaken by an employee whilst they are away from home.

Justice Nicholas of the Federal Court was recently called on to consider a claim by an employee who was injured whilst having sex in a motel room whilst she was in a country town to meet colleagues and carry out budget reviews and conduct training. The employee's identity has been protected from publication to avoid ridicule. The employee was injured when a light fitting attached to the wall behind the bed was pulled off during her sexual encounter and struck her in the face causing injuries which required hospitalisation.

The employee claimed compensation as she was temporarily absent from work and her injuries were sustained during that absence.

The Courts have concluded that whilst on a temporary absence from work activities undertaken by an employee can take the employee outside the ordinary course of employment.

The NSW Court of Appeal in Watson v Qantas Airways Limited found that an employee may take himself or herself outside the course of their employment (which would otherwise be continuing) by engaging in an activity unrelated to the employment and not positively supported by the employer.

However, Nicholas J's judgment reveals that sex with a friend in a motel room during a work trip is not be one of those activities that takes an employee outside the ordinary course of employment.

The woman, who in the judgment is known as PVYW, brought a claim for compensation under the Comcare legislation, her employer being subject to the Commonwealth Employer Compensation Regime.

Section 6(1)(c) of the Safety, Rehabilitation and Compensation Act 1988 provides that an employee's injury may be treated as having arisen out of, or in the course of, his or her employment, if it was sustained while the employee was temporarily absent from the employee's place of work undertaking an activity associated with the employee's employment or at the direction or request of the Commonwealth.

It was necessary for the Court to determine whether or not the activity in which the employee was engaged was sufficiently connected with her employment to constitute an activity undertaken in the course of her employment.

When the claim originally proceeded to hearing the Tribunal determined that the employee was not entitled to compensation. The Tribunal found that it was insufficient for the employee simply to be at a particular location during an interval or interlude in an overall period or episode of work for liability to arise. The activities engaged in during that interval which led to the employee's injury must be expressly or impliedly induced or encouraged by the employer. There needed to be a nexus with the employment.

However, Nicholas J did not agree. Whilst the employer argued that recreational activity engaged in during the evening in question was not countenanced by the employer, in the sense that it was not supported or approved, that did not mean that it would not be tolerated or permitted.

Essentially, the Tribunal concluded once an employee embarks on a private activity in the interval when the employee is temporarily absent from employment the course of employment is interrupted.

Nicholas J concluded:

> *"In considering the correctness of the proposition that an interval or interlude is interrupted when an employee embarks upon "a private activity" a question arises as to what that expression actually means. If it means no more than an activity "unrelated to employment" then it merely states a conclusion which can only be arrived at upon a consideration of all relevant factors. But if it was intended by the Tribunal to mean an activity usually undertaken in private then it does not provide any assistance in determining whether an interval or interlude in an overall period or episode of work involving an overnight stay at a motel has been interrupted. Many of the activities which an employee might be expected to engage in during such a stay are engaged in private."*

Nicholas J concluded that the issue which needed to be determined was whether it was open to the Tribunal to hold that the employee was not in the course of employment at the time she suffered her injuries.

Nicholas J found that:

> *"It was necessary to look at the temporal relationship between the employee's employment and the injuries suffered by her. The temporal relationship between the injuries and her employment was that her injuries were suffered whilst she was at a particular place where her employer induced or encouraged her to be during an interval or interlude between an overall period or episode of work. Absent serious and wilful misconduct or an intentionally self inflicted injury, an employee who is at a place at which he or she is induced or encouraged to be by his or her employer during an interval or interlude in an overall period or episode of work will ordinarily be in the course of employment. While it is true that in determining whether an injury occurred in the course of employment regard must always be had to the general nature, terms and circumstances of the applicant's employment, there was nothing of that description in the present case which would justify that the interval or interlude was interrupted by the applicant's lawful sexual activity."*

The Court concluded that the Tribunal erred in determining that the activity undertaken by the employee had to be expressly or impliedly induced or encouraged for an entitlement of compensation to be derived. The injury during the night in the motel occurred in the course of employment.

As can be seen, temporary absences from work on business can and do give rise to novel claims. Where an employer requires its employees to be away from home on business there are added risks for an employer as injuries sustained by an employee during the absence will be compensable in the absence of serious or wilful misconduct or an intentionally self inflicted injury.

**Seizure During A Coffee Break- Compensable?**

In NSW it is easier for a worker to establish an entitlement to compensation when a worker is away from the workplace during a recess than it is for any injury sustained at a workplace as there is no need for the worker to establish that the employment was a substantial contributing factor The recent decision of *Parsons Brinckerhoff Australia Pty Limited v Vanceva [2011] NSW* examined both the concept of the place of employment and personal injury in recess claims under section 11 of the Workers Compensation Act 1987. The matter concerned an injury suffered by a worker in the form of a seizure after ordering and paying for a coffee at a ground floor café in the office tower in which she worked.

The employer argued that the worker was not temporarily absent from her place of employment as required by section 11 because she did not leave the building where her workplace was situated. The employer also argued that the worker became sick when she suffered the seizure which subsequently caused her to fall and hit her head.

The Senior Arbitrator found in the worker's favour and the employer appealed. Deputy President Bill Roche dismissed the employer's appeal.

The Deputy President indicated there was no justification for extending the wording in section 10(4) which deals with the commencement or the end of a journey with regard to a worker's "place of abode" when determining the place of employment in section 11. He noted that the term 'place of employment' had been defined in the old 1926 Act but it was omitted from the 1987 Act. As it had not replaced it with any other definition, the meaning of the phrase 'place of employment' must be determined by reference to ordinary principles of statutory construction.

The Deputy President indicated the Senior Arbitrator was right to conclude that Section 11 was intended to cover injuries sustained during a break in work for the purpose of refreshment or relaxation. He disagreed however with the Senior Arbitrator that it was a simple matter of applying "common sense" to determine if a worker was temporarily absent from his or her "place of employment". Applying the principles of statutory construction however, he reached the same conclusion as the Senior Arbitrator.

Whilst the employer's right to control premises where the accident occurs may be relevant to deciding if a worker is temporarily absent from his or her place of employment it was not determinative. He indicated it was neither necessary nor appropriate to attempt to define a place of employment as each case would depend on its own facts.

In this matter, the worker's employer occupied level 4 in tower A in one of two towers in Chatswood. Those premises were not open to the public. Nevertheless the foyer and courtyards of both towers were open to the public including the café situated on the ground floor of tower B.

In all the circumstances it was accepted that the level on which the employer's premises were situated in tower A was her place of employment. However as the worker suffered the seizure in the café on the ground floor of tower B, it was found that she was temporarily absent from her place of employment when she suffered the seizure. As the café was not a place where the worker performed any part of her work and was not a place where her employer conducted any of its business or over which it had any control or right of control, the Deputy President indicated the evidence was clear that at the time of her seizure the worker was temporarily absent from her place of employment. The Deputy President specifically rejected the employer's submission that the worker was still at her place of employment because she had not crossed the boundary of the land in which the place was situated (as with journey claims under Section 10).

The employer also submitted that the worker suffered a medical condition (the seizure) and there was no evidence of a pathological change due to that medical condition. It was argued that as the seizure caused the fall, the applicant did not receive a personal injury. The Deputy President commented that section 11 is not concerned with causation. If a worker receives a "personal injury" in the circumstances to which section 11 apply, they are entitled to the benefits of the Act.

The Deputy President determined that it was not necessary for the worker to prove that she suffered a pathological change as a result of the seizure as would be required under the journey provisions contained in Section 10. Under Section 10, compensation is not payable if the personal injury resulted from the medical or other condition of the worker and the journey did not cause or contribute to the injury. He found that provision applies only to journey claims and has no application to recess claims under section 11. The limiting provision in section 11 is that a worker in the course does not subject herself to any abnormal risk of injury.

Buying a takeaway coffee clearly would not be an act that would expose the worker to an abnormal risk of injury.

The decision highlights the beneficial nature of the recess provisions of the 1987 Act. There is no necessity to establish employment was a substantial contributing factor to injuries received during temporary absences from a worker's place of employment. One wonders whether the outcome would have been different had the applicant suffered the seizure in her office and not the café of the office block. In that situation a workers claim should fail as the worker would need to show that employment was a substantial contributing factor to the injury.

So is the moral to the storey- lock the doors on employees and do not allow employees to take a break to get a take away coffee. Seems harsh but employers must be mindful of the fact that when an employee is on a recess (temporarily away from their place of employment) if they suffer an injury there is no need to prove that employment was a contributing factor when they claim compensation.

### When Can You Strike Out A Pre-Filing Statement?

President Judge Keating examined the circumstances when it would be appropriate to strike out a pre filing statement for want of prosecution by a plaintiff. In Sydney South West Area Health Services v Palau (2012) the employer attempted to strike out a pre filing statement for want of prosecution.

The worker had initially suffered an injury in 2004 and received compensation in late 2008 for 22% whole person impairment. On 7 August 2009, the employer conceded that the worker had reached the 15% threshold in order to bring a claim for work

injury damages. On 1 December 2010 the worker made a further demand for an additional 16% whole person impairment and further pain and suffering. At the same time, a pre filing statement was served on the defendant and a pre filing defence was served shortly thereafter.

Over the next 12 months the employer indicated they would arrange for the plaintiff to be medically examined in respect of the further claim for whole person impairment but did not take steps to organise the appointment. No other steps were taken by either party to advance the matter prior to the filing of the application to strike out a pre filing statement.

Section 151DA of the Workers Compensation Act 1987 allows a defendant to strike out a pre filing statement after at least six months have elapsed after the pre filing defence was served. The President may order that a pre filing statement be struck out but must not do so if satisfied that the degree of permanent impairment of the injured worker is not yet fully ascertainable and the matter is subject of a referral for assessment of the degree of permanent impairment.

Further, Section 280 of the Workplace Injury Management and Workers Compensation Act 1998 (WIMA) limits the recovery of damages by a worker until any permanent impairment compensation and pain and suffering compensation to which the worker is entitled in respect of the injury has been paid. Whilst it does not prevent the worker bringing a claim for work injury damages in the meantime, it simply ensures that the worker receives all the Section 66 and 67 compensation to which they are entitled before the damages are paid.

President Keating noted the prohibition under Section 280 of WIMA provides a powerful argument against striking out a pre filing statement. He noted it would be an anomalous result if the worker's pre filing statement was struck out for failing to prosecute a work injury damages claim when by virtue of Section 280 she was prohibited from advancing the claim for work injury damages until she resolved the claim for additional pain and suffering and impairment. The fact that the employer has already conceded that the threshold for claiming work injury damages had been reached was irrelevant. If the worker's medical evidence was accepted, her condition had deteriorated to a significant extent and she should be afforded the opportunity to recover any lump sum compensation to which she was entitled before pursuing her work injury damages claim. The President pointed out that the defendant had in fact not arranged for an independent medical examination to address the additional permanent impairment. No reasons were given by the defendant for the failure to do so. Although no further steps were taken by the plaintiff between mid 2011 and December 2011, the defendant had not either paid the claim for additional lump sum compensation or required her to undergo that further medical examination.

Finally, we note the defendant relied upon an alleged absence of liability evidence served in support of the allegations of a breach of duty of care. The Deputy President commented that whether liability could be established on the available evidence was a matter to be determined in due course not an actual reason for the striking out of a pre filing defence. Whilst the continuing delay had been less than ideal, no actual prejudice had been demonstrated.

Ultimately a pre filing statement is unlikely to be struck out whilst ever there are outstanding issues with regards to deterioration and additional permanent impairment. Even if the worker has already reached the 15% threshold to bring a claim for work injury damages, the Commission will be mindful not to prejudice the worker's right to further lump sum compensation whilst a pre filing statement remains on foot. Noting the three year limitation period to bring a claim for work injury damages is relatively tight, it is understandable that workers will seek to serve the pre filing first and finalise outstanding claims for additional lump sums safe in the knowledge that they have brought the work injury damages claim within time.

## CTP Roundup

### Due Inquiry and Search - New Law After Over 35 years

On 4 April 2012, the NSW Court of Appeal delivered a landmark decision altering the legal landscape for CTP Nominal Defendant claims in NSW. There are now additional considerations that need to be taken into account when considering the "due inquiry and search" test that applies to claims against the Nominal Defendant where an unidentified motor vehicle is involved in the accident. To satisfy the due inquiry and search requirements to bring a claim, claimants may be required to have taken steps to identify the motor vehicle at the time the accident occurred.

In the *Nominal Defendant v Meakes [2012] NSW CA 66*, the Court of Appeal heard and determined an appeal made by Allianz, on behalf of the Nominal Defendant, which contested trial Judge Levy DCJ's determination that Meakes had established due inquiry and search.

Meakes, a solicitor, was involved in an accident on 1 August 2008 when he was a pedestrian crossing Park Street at its intersection with Elizabeth Street in Sydney. Meakes gave evidence at Trial that he was in a hurry to attend an appointment and did not check the pedestrian lights before crossing the road.

Meakes was struck by a motor vehicle and the driver of that vehicle stopped and got out of his vehicle. There was a short exchange between Meakes and the driver and Meakes left the accident scene without taking down the details of the car or the driver.

Section 34 of the *Motor Accidents Compensation Act 1999* allows a personal injury claim to be made against the Nominal Defendant by a person injured by the fault of a driver which cannot be identified, Meakes sued the Nominal Defendant. There is a requirement that anyone bringing such an action must establish due inquiry and search in an attempt to identify the vehicle involved.

Levy DCJ found that due inquiry and search had been established on the basis that Meakes' failure to record the registration number of the vehicle was not unreasonable and also on the basis that he had made efforts to ascertain the identity of the vehicle by reporting the accident to police some days later and returning to the scene in an attempt to find witnesses and placing various advertisements in newspapers in an attempt to locate witnesses.

Levy DCJ found the driver of the unidentified vehicle had failed to keep a proper lookout, therefore negligently causing the injury to Meakes, and rejected the allegation made by the Nominal Defendant that Meakes had been contributory negligent by failing to keep a proper lookout and to ensure the roadway was clear before attempting to complete his passage across the pedestrian crossing. Levy DCJ however stated if, contrary to his view, Meakes had been contributory negligent, he would have apportioned his responsibilities for the accident at 10%.

Levy DCJ awarded damages of $433,565 plus costs.

On appeal, the Nominal Defendant did not challenge the primary finding that the driver was negligent but challenged the findings made in respect to Due Inquiry and Search, contributory negligence and the assessment of damages.

Sackville AJA, with whom McColl and Basten JA agreed, overturned Levy DCJ's decision in respect to due inquiry and search and conclude the claim must therefore fail.

Sackville AJA when examining the approach of the Trial Judge and the appropriate test concluded:

> *"… His Honour seems not to have consistently kept in mind the statutory standard. The question was whether it was understandable and inexcusable for the respondent (Meakes) not to have recorded the vehicle identification details immediately after the accident, having regard to his pre-occupation with the imminent business transaction … nor was it whether it was unreasonable for the respondent, in view of what was said to be his stoic disposition, to have allowed the driver to leave the scene of the accident without taking her details. The question was whether the respondent had shown that the identity of the vehicle would not be established after due inquiry and search."*

Sackville AJA also concluded there was no basis on the evidence for the Trial Judge's comment that the failure to record details at the scene "did not cause prejudice to the Nominal Defendant".

Perhaps the most significant conclusion of Sackville AJA is reflected in the comment in the judgement that:

> *"there are some striking circumstances in the present case suggesting that due inquiry and search required the respondent to have taken steps at the time of the accident to obtain the registration details of the vehicle that struck him."*

The Court of Appeal distinguished the case from an accident where there was difficulty ascertaining the identity of the vehicle or driver at the time the accident occurred.

The Court of Appeal did not find favour with Meakes argument that, at the time of the accident, Meakes considered he had not sustained injuries.

Sackville AJA commented:

> *"While the respondent, like many people injured in accidents, may not have appreciated at once the full extent of his injuries, he was aware that he had been injured and that his injuries were caused by the actions of the driver of the*

*vehicle that had struck him."*

The Court of Appeal has introduced a subjective test to the issue of due inquiry and search concluding what should be done at the time of an accident turns on the knowledge of the injured person. Sackville AJA commented:

*"In assessing the due inquiry and search that should have been undertaken in this case it is appropriate to treat the respondent (Meakes) as a reasonably informed member of the community. Such a person could be expected to know that a victim injured in a motor vehicle accident, where another person is at fault, may be able to claim compensation from the person at fault. Where the victim is a pedestrian, a reasonably informed member of the community could be expected to appreciate that it is important to obtain the registration number of the vehicle and, if possible, the details of the driver in order to pursue any claim for compensation."*

In relation to contributory negligence, the Nominal Defendant submitted a figure of 25% should have been deducted. Sackville AJA and McColl JA agreed and Basten JA believed that 50% would have been more appropriate but did ultimately agree with the 25%. Whilst the finding was not necessary as the claim was be dismissed the finding was made to determine all issues that could arise if there was a further appeal.

In relation to quantum, the Court of Appeal reduced the determination of past and future economic loss to $10,000 to past loss only, on the basis that the financial records disclosed no actual loss and the original findings were based on "conjecture rather than on evidence".

So there are now new considerations to take into account when considering due inquiry and search in Nominal Defendant claims. Where a claim involves a reasonably informed member of the community, the requirement to conduct due inquiry and search could be, and in this case was, immediately at the time of the accident occurs.

There has been some suggestion that Meakes will make an Application for Special Leave to the High Court. For now the Court of Appeal's decision stands and reflects the law that will be applied in Nominal Defendant claims. The subjective knowledge of an injured person is important when considering what inquiry should have been made at the time of the accident.

## Recent Decisions in Relation to Liability and Contributory Negligence

### Moukahal v Zeait

Moukahal's claim for damages for injuries sustained in a motor vehicle accident on 16 January 2010, came before Levy DCJ. Breach of duty of care had been denied by Zeait and contributory negligence was alleged.

The accident occurred when Moukahal was driving in lane two along Pitt Street, Parramatta at 40-50 km/h when she indicated her intention to change lanes, looked in the rear view mirror, the driver's side mirror and then turned in the direction of her right shoulder, prior to determining that there were no cars obstructing her manoeuvre. She then allegedly made a gradual lane change to the right, when her vehicle then collided into Zeait's vehicle.

Zealt's version was that she turned into Pitt Street and travelled in lane three at a "rough" estimate of 40 km/h, when she collided with Moukahal. Zealt provided a contradictory version as to whether or not she noticed Moukahal's vehicle prior to the collision. On questioning she stated "I first noticed it in front of me in my lane, turned sideways." She later stated that she could "not remember seeing the vehicle, although may have noticed it at the time of the accident."

Levy DCJ accepted that Zeait was negligent noting that "it was surprising that the defendant had not seen the plaintiff's vehicle until immediately before the impact and that it was the defendant's duty to look in her immediate vicinity."

Zealt alleged that there was contributory negligence based on the failure to change lanes safely, failure to warn of an intention to change lanes, turning in front of Zealt's path, changing lanes in contravention of the Australian Road Rules 2008, failure to keep a proper lookout and to take care of her own safety.

Levy DCJ determined that Moukahal contravened Regulation 148 of the Australian Road Rules which states that "the driver of the vehicle changing lanes must give way to the vehicle travelling in the lane into which the lane changing vehicle is moving". In this respect, Levy DCJ concluded:

*"although the plaintiff had appropriately looked before changing lanes, and had then started to change lanes, I*

*consider that she should have at least looked into her rear vision mirror again before contemplating the manoeuvre..... she could have taken evasive action by discontinuing her lane changing manoeuvre in the face of the defendant's continued approach. It would have been prudent for the plaintiff to have made such a momentary check before she continued her lane change to completion as there were no other vehicles around or in front of her at that time which required her continued attention to the roadway ahead."*

Levy SC DCJ determined Moukahal's contributory negligence at 20% for her failure to keep a proper look out in the "immediate vicinity of her vehicle".

**Nominal Defendant v Rooskov**

This matter involved an appeal from a decision of McLoughlin DCJ in respect to primary liability and contributory negligence. Rooskov had given a number of different versions as to how he came to be injured when he was riding his bike in a southerly direction along Walker Street, Helensburgh in May 2005. He told a passersby who found him, and the initial investigating Police Officers, that he had been struck by a motor vehicle which forced him off the road and into a ditch.

Rooskov sustained spinal injuries and was transferred by ambulance to Wollongong Hospital. The hospital notes on the evening of the incident first referred to Rooskov falling from his bicycle. Thereafter, he gave accounts that he was not sure whether he had fallen from the bicycle or had been hit by a car and knocked from his bicycle.

Dr Day, in a report tendered at trial, opined that the nature of the injuries were not consistent with merely falling from a bicycle and were consistent with being involved in a motor vehicle accident where the bicycle was propelled from the roadway.

Evidence was also given on behalf of the Nominal Defendant by biomedical and mechanical engineer, Mr Griffiths, that the nature of the injuries were within the range of what might have been expected to occur from a fall from a cycle after a loss of control.

McLoughlin DCJ concluded, based upon the contemporaneous reports of Rooskov and the existence of skid marks that accorded with the nature of evidence Rooskov gave at trial, that a finding should be made that an unidentified vehicle had collided with him.

Although Rooskov was not wearing a helmet at the time of the incident and was over four times over the legal limit for alcohol content in the blood, McLoughlin DCJ only reduced damages he assessed by 5% for contributory negligence.

The Nominal Defendant appealed against the liability determination and against the contributory negligence apportionment.

Campbell J, who delivered the Court of Appeal judgment, noted that he was in some doubt as to whether he would have come to the same conclusion as the trial judge about liability had he been the trial judge. Campbell J however noted that he was not positively persuaded that the conclusion reached by the trial judge was wrong, taking into account the advantages the trial judge had in assessing the evidence before him.

In relation to the assessment of contributory negligence, being the failure to wear a helmet, and the level of intoxication Campbell J noted, McLoughlin DCJ determined:

*"Any damage that flows from not wearing a helmet, is miniscule as I will refer to later when I deal with the question of the head injury and did not attract a finding by the MAS Assessor of anywhere near a matter that would attract general damages on its own. The economic loss is principally attributed to the back injury, the need for care is attributable to the back injury, so there is little damage that flows from the failure to wear a helmet".*

As to intoxication, Campbell J noted McLoughlin DCJ concluded:

*"As to the significant degree of intoxication, if there is any evidence to indicate the plaintiff should have been aware of the approach of the vehicle earlier than what he was, or could have responded in any other way than being forced from the roadway by the contact with the motor vehicle, then there would be a very strong case for a substantial finding with contributory negligence against the plaintiff. The difficulty for the defendant in this area is that the defendant has the onus of proving contributory negligence and that that contributory negligence is causative of the plaintiff's injuries. There is no evidence on the facts of the case as I find it, that would support the defendant's contention".*

The Court of Appeal were not persuaded that the trial judge was in error, in a way that could be corrected on appeal, in

concluding that Rooksov had not made out a case of contributory negligence based on the manner in which he reacted in the short period of time before the car hit him, nor did they interfere with the 5% finding in relation to failure to wear a helmet.

As evidenced from yet another Court of Appeal determination, it will be difficult to overturn a trial judge's determination on liability and particularly apportionment for contributory negligence having regard to the reluctance of an Appellant Court to interfere in this discretionary task as the trial judge has the benefit of hearing all the evidence presented.

**Lenders And Insolvency Practitioners Take Note: Equuscorp Pty Ltd v Haxton And Four Other Appeals**

The March 2012 decision of the High Court in these five appeals about managed investment schemes sets out important statements of principle. These will be of interest to lenders and insolvency practitioners appointed as receivers.

**Factual background**

The respondents in these appeals were members of the public who had invested during several financial years in the late 1980s in farm schemes which two brothers operated. The brothers controlled a group of 4 companies, as follows:

- Corindi Blueberry Growers Pty Ltd ("CBG"), which was the owner of land near Grafton in New South Wales. The land was used for blueberry farming.
- Johnson Farm Management Pty Ltd ("JFM"), who for payment of a fee, performed maintenance and harvesting of blueberries for the investors;
- Rural Finance Pty Ltd ("Rural"), which made advances to investors under loan agreements with investors. The funds advanced enabled the investors to pre-pay management fees to JFM.
- Kathleen Drive Stone Fruit Growers Syndicate No 1 Pty Ltd ("the buyer"), which purchased from the investors produce from the farms for the first five years at an agreed price.

Upon entering into a farm agreement with CBG, each investor acquired rights in relation to part of the farm and became obliged to maintain plants and harvest blueberry crops. Upon entering into a management agreement with JFM, that company was required to perform the investors' obligations to maintain plants and harvest blueberries.

Upon entering into a loan agreement with Rural, an investor was only required to make two modest capital repayments, and Rural was required to advance management fees to JFM on the investors' behalf. Upon entering into a sale agreement with the buyer, the buyer became obliged to purchase the first 5 yearly harvests from the investor.

In this way, the investors acquired interests in a blueberry farm and the blueberry farming business, anticipated future profits and capital gains, as well as obtaining the immediate advantage of a significant tax deduction for pre-paid management fees. At the time, these deductions were available even against non-farm related income of the investors.

Each loan agreement charged the investor's interest in the farm or net proceeds from it, as security for the investor repaying the principal and interest due to Rural under the loan agreement ("Investor Charges"). Investors also gave mortgages over their interests in the farm and crop liens to Rural.

The loan agreements included the familiar acceleration clause requiring all principal and interest due from investors to Rural to be paid immediately upon default under the loan agreement.

The invitation to invest in the schemes breached the requirements of the law because no offer document had been registered with the predecessor to the Australian Securities and Investments Commission.

The law required the offer document to set out extensive information about the relevant investment and provided that a breach of the requirement to register the offer document would result in a penalty of $20,000 or imprisonment for 5 years or both.
The investors in the schemes did not commit an offence by investing even though CBG, JFM and their directors had committed offences by failing to register the offer document.

The policy underpinning the law requiring detailed disclosure was to enable members of the public to make informed investment decisions. The equivalent, current requirements are now found in Chapter 6 of the Corporations Act.

Equuscorp was not a party to any of the loan agreements with investors. Equuscorp was an arms-length lender to the group of companies which the brothers controlled.

**Chronology of key events**

On 7 January 1991 CBG granted a registered mortgage to Equuscorp over the land, and that mortgage covered each of the investors' farms.

On 10 January 1991, Equuscorp registered with the Commission charges over the assets of each of CBG, JFM, the buyer and Rural. The charge over Rural prevented Rural from enforcing the Investor Charges.

None of the investors received any proceeds from the sale of blueberries after 1 July 1991, and none of the investors made any repayments to Rural of the loans.

The farm schemes collapsed. The four companies defaulted on their loans from Equuscorp. In August 1991, Equuscorp appointed receivers and managers to each of the four companies under the charges from those companies to Equuscorp.

In October 1995, Equuscorp exercised its mortgagee's power of sale over the land on which the investors' farms were being operated.

In March 1996, creditors of Rural resolved under section 439A of the Corporations Law to wind up Rural and appoint a liquidator to it.

Lenders and insolvency practitioners will recall that upon the appointment of a liquidator to a company, a receiver appointed to that company is not the agent of the company. Furthermore, a receiver appointed before a liquidator cannot continue to trade the business without the liquidator's written consent or an order of the Court. So from March 1996, Equuscorp, as the receivers' appointor, became liable for the actions of the receivers, who were no longer Rural's agent.

In May 1997 the receivers executed an asset sale agreement which assigned Rural's loan agreements with the investors to Equuscorp. Separately, Rural assigned its interests under the loan agreements and the debts due under them to Equuscorp by a deed of assignment.

In November 1997 the investors were given notice of the assignment and within six months Equuscorp had sued them to recover the debts.

**Key issues in the litigation**

Rural's loan agreements with the investors were unenforceable because they had been made in furtherance of an illegal purpose, due to the failure to register the offer document, and because the loan agreements were an integral part of the illegal farm schemes.

Equuscorp brought its claim against the investors for money had and received (being a type of restitutionary claim). It sought recovery of the loans advanced to investors, arguing they had been unjustly enriched by the advances.

The High Court was required to decide whether:

- A restitutionary claim was available, and could be assigned from Rural to Equuscorp; and
- If so, whether the asset sale agreement which the receivers signed, and the deed of assignment which Rural executed, operated to assign a restitutionary claim against investors from Rural to Equuscorp.

The merits of Equuscorp's restitutionary claim were not easily determined. The law in this area has many subtleties. A major difficulty is that even when public policy prevents a contract from being enforced, that is not always a reason to allow a party to that contract to keep a benefit (i.e. to be unjustly enriched) at the expense of the other contracting party.

The High Court majority (French CJ, Crennan and Keifel JJ) held that Equuscorp could not make a restitutionary claim to recover funds from investors. This was because of the policy underlying the requirement to lodge the offer document (protection of the public) and the criminality of CBG, JFM and the brothers in failing to lodge the document. As a result, Equuscorp was unable to obtain restitution from the investors and thereby overcome the unenforceability of the loan

agreements.

The majority judgment also indicates that if restitutionary claims had been available to Equuscorp, such claims were capable of assignment, but the deed of assignment in this case was not drafted so as to properly effect such an assignment. The High Court majority dismissed Equuscorp's appeals.

Notably, Gummow and Bell JJ (who also dismissed Equuscorp's appeals) found that if Equuscorp had sued investors on the loan agreements (which were made in 1988 and 1989), aside from their furtherance of an illegal purpose, the loan agreements could not be enforced as they were time-barred.

However, those Justices also held that if restitutionary claims had been available, such claims would only have arisen when the investors had filed their defences. That is because the defences alleged that the loan agreements were not binding on the investors.

**Lessons for lenders and insolvency practitioners**

- A restitutionary claim may be available even if a claim in contract is out of time, so an asset may be available in the form of a restitutionary claim.
- In this case, the receivers were party to an arrangement by which loan agreements and debts apparently due under them were purportedly assigned. However, debts under the loan agreements could not be recovered. As such, the receivers in effect sold a valueless asset.
- The sale of a valueless asset could make a receiver liable to a purchaser of that asset. Accordingly to protect the receiver, the sale agreement and assignment deed must be carefully drafted.
- Where a receiver ceases to be the agent of the company to which they have been appointed due to a liquidator also being appointed to that company, the lender becomes liable for the receiver's actions and the lender and the receiver should each obtain separate, independent legal advice about their respective liabilities.
- A careful assessment of the value and saleability of available assets, including any debts included in charged property, should be made where the receiver is no longer able to trade the business of the company, because the lender will be required to:
  - meet the receiver's expenses and remuneration which might otherwise have been capable of payment from trading income or asset realisations; and
  - indemnify the receiver against claims against him or her from a third party if the receiver sold a valueless asset to a third party and that third party sues the receiver as a result.
- It is vital for deeds of assignment to be drafted correctly if the intention is to assign all legal rights available, such as restitutionary claims, as distinct from only assigning a debt or series of debts.

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