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.

No Recollection Of The Circumstances Of An Accident And The Probative Value Of Comments In Ambulance Reports

The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. But what happens when a person cannot recall what occurred. Can they look to comments in an ambulance report or other documents to tease out an inference that an accident occurred in a particular way? After all, the injured person must prove the facts that they seek to make out.

An injured person with no recollection of the circumstances of an accident will often look to documents such as ambulance reports that document opinions of ambulance officers as to the existence of matters when they attend at a scene of the accident and seek to draw support for the view that a compellable inference is the finding of the ambulance officer. The High Court of Australia in *Lithgow City Council v Jackson* was recently called on to consider the admissibility under the Evidence Act of comments in an ambulance report and the probative value of such comments as well as the viability of an injured person's attempts to establish the circumstances of the accident through the information contained in the report.

In a previous issue of GD News we have discussed the decision *of Lithgow City Council v Jackson*. Craig Jackson had sued Lithgow City Council as a consequence of an incident on 18 July 2002. Jackson was found unconscious and badly injured in a concrete drain in a park in Lithgow. The park sloped generally downward from The Great Western Highway and there was a large, shallow concrete drain which ran in the same east/west downhill direction at the Amiens Street end of the park. At the western end the drain had a vertical face, topped by a small retaining wall projecting at different points between 90 and 280 mm from the grass, partially concealed by foliage. The distance from the top to the bottom of the vertical face was 1.41 metres. In contrast, the northern and southern side were not vertical but sloped down although the distance from top to bottom was approximately the same. Shortly before 6.57 am Jackson was found lying badly injured in the drain. Two dog leads were found near Jackson. The two dogs were sat by Jackson's side.

The plaintiff contended that he fell by tripping from the small retaining wall at the top of the western vertical face of the drain and not from one of the sides. Jackson conceded that if he failed to establish this then his entire case would fail. By the time the case reached the High Court it was not in dispute that Jackson's injuries were caused by falling either from one of the sides or from the western vertical face of the drain. The injuries sustained by Jackson meant that he had no recollection of how he came to be injured. This caused a serious problem for Jackson. A further obstacle was created by the absence of any other evidence, save a statement in the Ambulance Service of NSW' records, made by an ambulance officer, which contained a statement – *"? Fall from 1.5 metres onto concrete*".

Jackson contended that this established he fell from the vertical face of the drain.

The matter had an unusual history. At trial the trial judge, Judge Ainslie-Wallace found in favour

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of Jackson. The trial judge found that Lithgow City Council failed to take steps to avoid the risk of injury, such as erecting a fence above the western vertical face. The trial judge found that a sober person walking through Endeavour Park at night and taking reasonable care for his or her own safety would not have seen the wall.

The matter proceeded to the Court of Appeal. The Court of Appeal found that the ambulance report was an opinion, admissible under Section 78 of the Evidence Act, that Jackson had fallen over the wall above the western vertical face.

Section 76(1) of the *Evidence Act* provides that:

> *"Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."*

Section 78 of the Evidence Act provides:

> *"The opinion rule does not apply to evidence of an opinion expressed by a person if:*
>
> *(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and*
>
> *(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event."*

An application for leave to appeal to the High Court was filed. Unfortunately, a problem arose with the first Court of Appeal trial. The entry in the ambulance report had a question mark at the start of the sentence which was not reflected in the appeal books when the case was considered by the Court of Appeal. The matter was therefore remitted by the High Court to the Court of Appeal for further hearing to deal with the issue taking account of the existence of the question mark in the ambulance report. In the second Court of Appeal decision, the Court of Appeal determined that the representation was "less positive" but admissible and adhered to their original conclusion that the ambulance report was evidence that could be relied on and that Jackson had proved the facts that gave rise to his cause of action.

An application for special leave to appeal to the High Court was pursued and granted. The High Court had to consider whether the Court of Appeal, in its second decision, was correct to hold that the impugned representation was admissible and the second issue was whether or not, even if that were incorrect, the conclusion that causation was established was supported by other evidence.

The High Court held unanimously that the Court of Appeal had erred in treating the statement in the ambulance record as an admissible opinion under Section 78 of the Act. The High Court was of the view that the statement was so ambiguous as to be irrelevant. The High Court also found that in any event, the nature of the ambulance record was such it was not possible to find positively that it stated an opinion. Even if it did, it wasn't one that satisfied Section 78 of the Evidence Act.

The High Court therefore determined that Jackson had not established causation as the conclusion that a fall from the vertical western face of the drain caused his injuries could not be found on the balance of probabilities.

The situation in this case is somewhat unusual. Nevertheless, the finding may be relevant if there is an argument as to intoxication and the like and a reference to intoxication is found in clinical notes or ambulance records.

An injured person with no recollection of the circumstances of an accident will always find it difficult to establish a cause of action as evidence must be available to support the case which an injured person seeks to make and inferences alone may not be enough to establish a course of action.

The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. 'More probable' means no more than that upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood, and it does not require certainty.

However it remains necessary for a plaintiff relying on circumstantial evidence to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstances must do more than give rise to conflicting inferences of an equal degree of probability or plausibility. The choice between conflicting inferences must be more than a matter of conjecture. If the Court is left to speculate about possibilities as to the cause of the injury, the plaintiff must fail. Establishing a

cause of action is a test of common sense, with the onus of proof at all times being on the plaintiff.

Medical Practice Found Negligent for Failing to Keep up to Date Contact Address

The NSW Supreme Court has delivered a warning to medical clinics that their records should contain current contact information about patients otherwise they face the prospect of a damages claim from patients who are not notified about test results.

In *CS v Anna Biedrzycka*, Justice Latham of the Supreme Court was called on to consider a claim for damages by a male who had contracted HIV after having sexual relations with a patient of a medical practice who had not been advised by doctors in the medical practice that the results of a HIV test were equivocal.

LB was a patient of a medical practice in East Sydney operated by Idameneo (123) Pty Limited which provided all relevant administrative services and facilities under an arrangement with the doctors that worked in the practice.

Drs Gross and Johnson had been consulted by LB in March and April 2004. The patient was not informed that tests carried out for the presence of the HIV virus were unresolved. LB had unprotected sexual intercourse with CS, resulting in the transmission of that disease. Drs Gross and Johnson admitted liability for their negligence and reached settlement with CS and then sought contribution from Idameneo (123) Pty Limited towards the damages paid to CS on the basis that employees of the medical practice were negligent in failing to maintain proper records, namely the current address of the patient.

In 1999 LB attended the medical centre for a consultation. At that time LB was residing in rented premises at Bondi. In March 2004 LB returned to the practice. She was then residing at a different address in North Bondi. LB requested a test for sexually transmitted diseases. She was referred for pathology. She returned to the practice a week later to pick up the pathology results but was asked to return at a later time. At no stage during LB's visits did staff employed by the medical practice confirm with LB that her address was current and correct. On 5 April Dr Johnson received a call from the pathology service advising the results of the test were equivocal with respect to HIV and the patient needed retesting. That advice was confirmed by the pathologist by hard copy notification to the medical practitioner. Dr Johnson noted the patient records *"by phone, needs bloods repeated, pos result, needs repeat"*.

LB ultimately attended the practice of her own volition on 22 April 2004 and saw Dr Gross, who called up the patient records but did not read the notation of Dr Johnson. Dr Gross advised the patient that her results were clear except for a Candida swab. LB left the practice with the impression that there was no impediment to unprotected sexual intercourse, advised CS accordingly and engaged in at least one episode of unprotected sexual intercourse.

LB's evidence was that had she been aware that there was an equivocal result with respect to HIV and she needed retesting, she would not have engaged in unprotected sexual intercourse.

It was common ground that the medical practice had sent a letter to the address of LB maintained in the records, advising her of the need for retesting. LB did not receive that letter as it was sent to her old address. LB's evidence was that had she received a letter advising of the need for retesting she would have contacted the practice to find out what was wrong.

The practice caused further enquiries to be made in May to attempt to locate LB and ultimately LB was contacted and attended the practice in June and was told of the need for retesting for the HIV virus.

The *Public Health Act 1991* imposes strict obligations on medical practitioners with respect to notification and treatment of communicable diseases. Obligations are imposed on medical practitioners who become aware of a patient with HIV.

The medical practice had a reception training manual and policy and procedures manual which required the receptionist to confirm the patient's address and telephone number when they attend the medical centre and patients are required to complete an information sheet if they are not willing to repeat their address and telephone number.

Justice Latham noted that:

> *"the combination of these policies and procedures reflected an awareness on the part of the fourth defendant (Idameneo (123) Pty Limited) of the importance of maintaining accurate and current patient records, particularly in the case of patients in respect of whom a doctor has requested a pathology sample. The procedures are put in place to*

allow for the collection of accurate information, capable of ensuring ready contact with a patient in the event that a pathology sample was returned with a positive result or indicated a need for retesting. It cannot be suggested that the fourth defendant's employees, including those employed at reception, were not aware of the risk to members of the public posed by a patient who was potentially infected with the HIV virus, engaging in unprotected sexual intercourse, in ignorance of the nature of his/her medical condition. Yet the procedures adopted by the fourth defendant to guard against this very risk were not implemented at this particular practice."

But the existence of the manual did not mean that a duty of care must arise from the recognition of the need for the precautions noted in the manual and other factors were necessary to establish a duty of care was owed. Latham J concluded that:

"it is accepted that a recognised practice, contained within a policies and procedure manual, and its breach do not, without more, establish the existence of a common law duty. In this case the additional factors, including the obligations imposed by the Public Health Act, amplify the circumstances."

Latham J ultimately held that:

"That duty of care consists, in part, of the requirement to maintain current and accurate records that ensure effective and timely contact with its patients when the need arises, particularly when a pathology sample has been taken."

Latham J noted Idameneo (123) Pty Limited acknowledged that if a duty existed, then it had undoubtedly been breached.

Accordingly, the Court determined that the medical practice was negligent however questions of causation remained to be resolved.

The Court then turned to consider whether or not the negligence caused the harm. Section 5D of the *Civil Liability Act 2002* provides that it is necessary to establish that the negligence was a necessary condition of the occurrence of the harm in a negligence claim. It was necessary for the doctors to establish that it was more probable than not, that but for the failing on the part of the medical centre to keep current and accurate records of LB's address, the transmission of the HIV virus to CS would not have occurred. The test of causation in NSW is a *"but for"* test.

Latham J noted that applying that test in this case, the issue would be resolved by posing the question *"whether the harm to the plaintiff would have been averted, if either episode of neglect had not occurred".* In other words, if the medical practice maintained current and accurate records allowing the recall letter to be sent to the correct address, would the HIV virus have been transmitted to the plaintiff?

In this case, if Dr Gross had read LB's complete records and had advised that the test was equivocal, the virus would not have been transmitted to CS. Further, if the recall letter had been received by LB, she would have contacted the medical centre and been advised of the problems with the test and once again, the HIV virus would not have been transmitted. Accordingly the Court determined that but for the negligence of the medical centre, CS would not have contracted HIV.

Ultimately the Court determined that the medical practice was 40% liable for the damages payable.

There was however one last defence posed by the medical centre. It sought to rely on an agreement with the doctor which provided an indemnity to the medical practice.

The agreement provided that *"the doctor is liable for, and ... indemnifies the company against, any liability whatever arising from the doctor rendering medical services pursuant to or in connection with this deed or other acts or failures to act on the part of the doctor, whether or a medical service nature or otherwise."*

The medical practice contended that this indemnity required Drs Gross and Johnson to indemnify the medical practice for the damages claim made by CS. The Court determined that a reasonable person in the position of the doctors would have understood the respective clauses that required each of the doctors to indemnify the medical practice for liability arising out of their acts or omissions in the course of carrying out their duties as doctors within the medical practice, in the event the medical practice was sued by a patient for injuries arising out of treatment provided by either of them. However the indemnity did not extend to require the doctors to indemnify the medical practice in respect of negligent acts or omissions on the part of the medical practice.

Latham J noted:

> *"such an additional burden of liability on Dr Gross and Dr Johnson makes no commercial sense, particularly in the context of each of them seeking to effectively reduce their exposure to professional costs ... accordingly, there is no indemnity that operates to defeat the claim."*

At the end of the day the medical practice was found liable to contribute a sum of $188,400 to the doctors, representing the 40% contribution to the damages obtained by CS.

Medical practices owe a duty to take reasonable care to ensure that they maintain current up to date contact address of their patients. As can be seen a failure to do so can have costly personal and financial consequences.

Changes to NSW Home Warranty Claims and Insurance

On 25 October 2011 the NSW Government passed the Home Building Amendment Act 2011 which introduces substantive changes to the statutory home warrant scheme in the Home Building Act and the changes will have significant impacts on both Home Warranty Insurance and statutory warranty claims.

In NSW the following warranties by the holder of a contractor licence, or a person required to hold a contractor licence are implied in every contract to do residential building work:

- a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract,
- a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
- a warranty that the work will be done in accordance with, and will comply with, this or any other law,
- a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
- a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
- a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

Perhaps the most significant change introduced by the *Home Building Amendment Act 2011* is an amendment to the *Civil Liability Act 2002* which will provide that actions for damages arising from a breach of a statutory warranty under the *Home Building Act 1989* brought by persons having the benefit of the statutory warranty will be excluded from the proportionate liability regime that applies to property claims in New South Wales. The amendment will apply to civil liability arising before the commencement of the Act but not so as to affect proceedings commenced before the commencement of the amendment.

The Supreme Court in *Owners Corporation SP72357 v Dasco Constructions Pty Limited* determined that the proportionate liability regime in NSW applied to statutory warranty claims with the end result being that claimants could only recover from the builder a proportion of damages reflecting the builder's contribution to the damage and where subcontractors were in part responsible for damage or defects, the subcontractor's contribution to the damage would reduce the builder's responsibility to the home owner.

The change to the Civil Liability Act 2002 will mean that proportionate liability no longer impacts on claims for damages for breaches of the Home Building Act statutory warranties. The builder or developer will be liable for the totality of the claim.

There are other significant changes which include:

- The statutory warranties imposed by the Home Building Act will apply for six years for structural defects and two years in any other case. Before the amendment the warranties applied for 7 years for all works and the new periods mirror

the periods of cover provided by the home warranty insurance scheme for structural and non-structural work.

- The warranty period will start on the completion of the works, or if the work is not complete on the date the contract is terminated or if it is not terminated on the date on which work under the contract ceased.
- Proceedings for a breach of warranty will be able to be brought up to six months after the warranty period expired.
- For the purposes of the statutory warranties residential building work done on behalf of a developer is taken to have been done by the developer.
- The threshold requirement for Home Warranty Insurance will be increased from $12,000 to $20,000 and the minimum Home Warranty Insurance cover will increase from $300,000 to $340,000.
- The Legislation will also introduce a "long stop limit on claims" and provide that a contract of Home Warranty Insurance entered into before 1 July 2010 does not in any circumstances provide insurance cover in respect of loss unless a claim in respect of the loss is made to the insurer within ten years after the work insured was completed.

The statutory warranty scheme for residential building works in NSW has changed as has the Home Warranty Insurance Scheme. There is retrospective application of the changes to the proportionate liability regime which will increase the cost of claims for the NSW Government which underwrites home warranty insurance in NSW as the insurer will be liable for the totality of a claim not just the proportionate share of liability attributable to the builders actions.

Statutory Cause Of Action For Breach Of Privacy

The Australian Government is continuing with the task of reviewing privacy laws in Australia.

In May 2008 the Australian Law Reform Commission concluded a 28 month inquiry into the Privacy Act and related laws and made 295 recommendations for reform in a range of areas.

In June 2010 a discussion paper was issued with draft legislation that responded to 197 of these recommendations. Our July 2010 edition of GDNews dealt with the issues raised in the discussion paper and the substance of the draft legislation.

Public hearings were subsequently held. Stage 2 of the Government's plan to reform privacy laws includes consideration of the remaining recommendations of the Australian Law Reform Commission which focus on:

- Proposals to clarify or remove certain exemptions from the Privacy Act;
- Introducing a statutory cause of action for serious invasion of privacy;
- Serious data breach notifications;
- Privacy in decision making issues for children and authorised representatives;
- Handling of personal information under the Telecommunications Act 1987; and
- National Harmonisation of Privacy Laws (partially considered in the first discussion paper).

One of the most significant recommendations of the Australian Law Reform Commission was that the most serious invasions of privacy could be addressed through the introduction of a statutory cause of action for privacy. Stage 2 of the Reforms is now underway with the release of an issues paper which advocates the introduction of a statutory cause of action for serious invasion of privacy. Responses to the issues paper have been invited and must be provided by 4 November 2011.

A cause of action for an invasion of privacy exists in New Zealand, the United States, Canada, the United Kingdom and the European Union however there is no separate cause of action for breach of privacy in Australia. The issues paper advocates the introduction of a cause of action for an invasion of privacy.

The Government recognises that the introduction of a statutory cause of action for breach of invasion of privacy must balance the various public interests that the law should protect which include interest and freedom of expression and freedom of the press and in the free flow of information.

The Government notes that legislation may provide a clearer legal structure for the cause of action and could provide for a more flexible range of defences and remedies than would be possible if the cause of action grew on a case by case basis within the common law and this sets the grounds for the introduction of a statutory cause of action.

So what would be the essential elements of a statutory cause of action for breach of privacy?

One of the essential elements of the cause of action is likely to be a requirement that a plaintiff show that there was, in the circumstances, a reasonable expectation of privacy. Another is likely to be an objective test of seriousness or offensiveness. The issues paper postulates the "highly offensive to a reasonable person of ordinary sensibilities" test for whether or not a cause of action exists. These elements would potentially limit the availability of the cause of action to the most egregious cases of invasion of privacy.

The Australian Law Reform Commission recommended that when considering whether a statutory cause should be created it was the act or conduct which caused the invasion of privacy which should be examined and there should be a need that the act or omission be intentional or reckless to give rise to a cause of action. This would preclude actions brought where there has only been a negligent or accidental invasion of privacy. The issues paper invites comment on the introduction of this limitation.

The paper also speculates that there should be of a non-exhaustive list included in any legislation identifying the types of invasions that fall within the cause of action for a serious invasion of privacy. That list is likely to include an invasion of privacy where:

- There has been an interference with an individual's home or family life;
- An individual has been subjected to an authorised surveillance;
- An individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or
- Sensitive facts relating to an individual's private life have been disclosed.
- Any legislation is also likely to specify defences which will be available.

The defences which have been flagged include:

- Acts or conduct incidental to the exercise of a lawful right of defence or person or property;
- Act or conduct required or authorised by or under law;
- Publication of the information was, under the law of defamation, privileged;
- Consent.

The range of remedies available for the statutory cause of action for breach of privacy are likely to include:

- Damages including aggravated damages but not exemplary damages;
- An account of profits;
- An injunction;
- An order requiring the respondent to apologise to the claimant;
- A correction order;
- An order for the delivery up and destruction of material; and
- A declaration.

The question of whether or not there should be a cap on the damages which can be awarded remains at large and comments have been sought on this issue.

The issues paper also floats the concept of a remedy section that deals with resolving matters without resort to litigation where parties can make offers to pay expenses or compensation or provide an apology to avoid litigation. Cost penalties would attach to those who reject reasonable offers as a deterrent to litigation.

Other issues considered by the paper include whether or not the cause of action should be restricted to living persons and the limitation period in which to bring proceedings (perhaps 3 years) and whether or not class actions should be available.

It is clear that the Australian Government intends to strengthen Australian privacy laws and introduce a statutory cause of action for a serious invasion of privacy. However the elements that will make up that cause of action will require some fine tuning.

With submissions on the issues paper due by 4 November 2011 changes to Privacy Laws in Australia are likely to be some

time away. Will 2012 see the introduction of a statutory cause of action for a serious breach of privacy? We will have to wait and see. No doubt the concept will attract attention from the insurance industry as the Government seeks to introduce yet another potential liability for a business.

The Cost Consequences Of Calderbank Offers – Update

Is a favourable costs order guaranteed when a more favourable outcome than a Calderbank offer is achieved? Maybe.

A "Calderbank Offer" is an offer made during the course of a matter which can be relied upon in an application for a special order as to costs, including an order that a party pay costs on an indemnity basis, should the offer not be accepted and the party to whom the offer is made obtains a less favourable verdict than the offer.

There is a difference in perspectives between plaintiffs and defendants and what constitutes compromise. In the Supreme Court in Symbion Medical Centre Operations Pty Ltd v Alexander [2011] NSWSC 701, the defendants made an offer that the proceedings be dismissed and there be no order as to costs save for a costs order made by Rein J against the plaintiff.

Gzell J, who heard the costs argument followed the authority of *Leichhardt Municipal Council v Green [2004] NSWCA 341* where Santow JA considered whether a Calderbank offer by a defendant for judgment to be entered in its favour with each party to pay its own costs could constitute a genuine offer of compromise. Santow JA pointed out that, unlike a plaintiff, a defendant cannot discount its optimum return by way of compromise. A defendant does not need the same sort of incentive as a plaintiff does to compromise. Santow JA observed that it is trite law that, whether or not an offer is a genuine offer of compromise or merely a demand to capitulate, depends upon an assessment of all the circumstances of the case at the time.

Gzell J observed that Santow JA's analysis of the difference between a plaintiff's Calderbank offer and a defendant's Calderbank offer is still relevant and highly persuasive. The paramount issue was therefore whether or not failure to accept the Defendants second offer was, in all the circumstances, unreasonable?

The test of reasonableness was laid in *SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323* where Giles JA put the proposition as follows:

> *"The making of an offer of compromise in the form of a Calderbank letter (from Calderbank v Calderbank (1976) Fam 93), where the offeree does not accept the offer but ends up worse off than if the offer had been accepted, is a matter to which the court may have regard when deciding whether to otherwise order, but it does not automatically bring a different order as to costs. All the circumstances must be considered, and while the policy informing the regard had to a Calderbank letter is promotion of settlement of disputes an offeree can reasonably fail to accept an offer without suffering in costs. In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure:"*

Gzell J ultimately held that it was unreasonable for the plaintiff to reject the defendant's second offer as it would have been apparent to the plaintiff at that time that its prospects of success were dismal. He ordered that the plaintiff pay the costs of the defendants up until the date of the offer on an ordinary basis and on an indemnity basis from the date of the offer in 2009 (notably also at a time when all defences were filed).

The complexity and history of a matter can be relevant. In *North Sydney Leagues Club Ltd v Synergy Protection Agency Pty Ltd [2011] NSWSC 804*, Einstein J refused to make an indemnity costs order in favour of the defendant. A judgment was entered for the defendant and the defendant relied upon an offer of $334,547.51 plus interest of $141,564.99 plus costs. The matter involved an "unusual and complex environment" with a complex litigation history involving two appeals and six offers conveyed on behalf of the parties.
In making his determination as to whether or not indemnity costs should be awarded, Einstein J provided a helpful summary of the applicable principles in relation to Calderbank offers, indemnity costs and interest on court orders. He confirmed the following authorities and principles:

- A Calderbank letter raises no prima facie presumption in favour of indemnity costs (*SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA* 323 at [37]; Jones v Bradley (No 2) [2003] NSWCA 258 at [8]; Ng v Chong [2005] NSWSC 385 at [13]).
- Merely refusing a Calderbank offer does not automatically lead to an order for indemnity costs (*Ng v Chong [2005] NSWSC 385 at [*13] and see also the authorities identified at Ritchie's [42.13.26]).

- A Court may refuse indemnity costs where a party succeeds at trial on a case that significantly changed after the offer was made (*Wakeford v Ellis*, unreported, Supreme Court of New South Wales, McLaughlin M, 7 May 1998, BC9804384); *Fowdh v Fowdh* (unreported, Supreme Court of New South Wales Court of Appeal, Full Court, 4 November 1993, BC 9302200) at [6] per Mahoney JA.

Einstein J also relied on the decision of Santow JA *in Leichardt Municipal Council v Green [2004] NSWCA 341* at [44] which provides that there needs to be a reasonable offer and unreasonableness in rejecting this offer to warrant the order of indemnity costs. Taking into account the unusual circumstances which faced both parties and, especially the many steps they took to put forward their respective cases, Einstein J ordered that costs should only be paid on an ordinary basis only.

Costs orders can also be varied when the offer is not subject to the Rules. There is a broad discretion. In Nicholas Georgouras v Bombardier Investments No. 2 Pty Ltd [2011] NSWSC 803, the defendant offered to pay damages of $10,000, but the verdict was only $500. In balancing the interests of the two parties, both of whom were found to have wronged the other, and considering the fact that the proceedings could have ended earlier with a more favourable result for the plaintiff than the judgment award, he ordered each party to bear its own costs up to the date of the offer and thereafter, the plaintiff pay 50% of the defendants costs assessed on an indemnity basis.

Parties may attempt to avoid a special costs order by raising lack of clarity or failures to rectify uncertainty. In Chief Commissioner of State Revenue v Platinum Investments Management Ltd (No 2) [2011] NSWCA 197, the Court of Appeal held that it was not unreasonable for the taxpayer to reject the Commissioner's offer which did not deal with another assessment, and was not clarified after the taxpayer's solicitors took the point. No indemnity costs were awarded.

A party may claim they have no knowledge or recollection of the offer. In Investwell Pty Ltd (In Liquidation) v Daryl Leon Roberts [2011] NSWSC 784, the Court held that this did not assist in avoiding an indemnity costs order on the basis that it was accepted by the offeree that the offer was received by the offeree's solicitors. Hammerschlag J found that notice to solicitors was all that could be expected for the purposes of notice and ordered costs on an ordinary basis up until the date the offer expired and, thereafter, on an indemnity basis.

An examination of these cases reveals that failure by a successful party to exceed a Calderbank Offer is certainly no guarantee of an order for indemnity costs.

The test of reasonableness is still the question to be determined. It would seem that where a full disclosure of the basis of the case is provided to a party before or at the time of making the offer, the prospects are increased of obtaining a favourable costs order. Significant changes in the nature of the case can result in a finding by the court that the failure to accept the offer was not unreasonable.

It Is Reasonable To Use Drug & Alcohol Testing In Employment

FairWork Australia has recently considered an industrial dispute between Wagstaff Piling Pty Limited ("Wagstaff"), and the CFMEU arising out of the interpretation of an Enterprise Agreement when Theiss sought to enforce its random drug and alcohol testing program for Wagstaff employees.

Wagstaff was subcontracted to Theiss to undertake piling work on the Tulla-Sydney alliance project which involves substantial freeway widening and construction works.

Theiss has a comprehensive Fitness for Work policy which includes requirements for drug and alcohol testing for its employees and contractors commencing on the project. The policy also requires that employees are subject to random drug and alcohol testing during a pre-announced period each month. Wagstaff was contractually obliged to facilitate participation by its employees in this testing.

In May 2011, the CFMEU confirmed that Wagstaff and various other subcontractor employees would not co-operate with the announced testing for that month. A dispute was notified under the Enterprise Agreement.
The Wagstaff Enterprise Agreement contained the following terms:

> *"48. Drugs and Alcohol Policy*
>
> *The parties acknowledged the effect that employees with drug and/or alcohol problems can cause in the workplace. Any employee with such a problem can lead to a loss in productivity, an unsafe workplace and loss of morale amongst*

the company. To this end the parties encourage such persons with a problem to seek help.

To that end the parties agree to apply the Drug and Alcohol Policy as contained in Appendix I."

Appendix I set out various principles concerning safety and discipline however did not address the concept of random breath testing.

The dispute originally was dealt with by a Commissioner who determined that in the absence of an entitlement in the agreement to carry out random breath testing Wagstaff could not impose a regime of drug and alcohol testing either on a voluntary or involuntary basis.

An appeal followed. The Full Bench reached a different conclusion. Whilst the Full Bench concluded that the Commissioner was correct in finding that the Agreement was silent on the issue of random breath testing, that silence did not mean that there could not be random breath testing.
The Full Bench concluded:

"We do not consider that clause 48 operates to limit drug and alcohol testing, or for that matter, other safety initiatives. Appendix 1 and the Policy clearly endorse a cooperative and collective approach to the management of drug and alcohol issues but cannot be read as prohibiting mandatory drug and alcohol testing. Indeed testing of this nature was not as common an issue at the time of the inception of the Policy in 1993 as it is now. Other provisions of the Wagstaff agreement recognise the need for continuous change and improvement and the obligations on Wagstaff to advance workplace safety. The risks to employee safety posed by drug and alcohol use have long been recognised by this Tribunal and compulsory drug and alcohol testing is, of itself, not so extraordinary that it could not be argued to be a reasonable employer instruction. . . "

The Full Bench concluded that the Enterprise Agreement did not prevent or prohibit Wagstaff from requiring an employee to submit to drug and alcohol testing. Whilst the Full Court noted there might be a dispute over the implementation or means of implementation of compulsory drug and alcohol testing that did not mean that the testing could not take place.

The case serves as a reminder that employers should develop drug and alcohol policies and safety policies that ensure that any proposed procedures for drug and alcohol testing of employees fall within the scope of the employment contract. When an Industrial Agreement is silent on the issue of drug and alcohol testing it does not limit the employer's right to require employees to submit to drug and alcohol testing. It is not unreasonable for an employer to require compulsory drug and alcohol testing of its employees although care should be taken when crafting a policy to ensure that the implementation or means of implementation of the testing is clearly understood by all.

Consequence of a Sham Contracting in the Building Industry

Businesses in the construction industry often engage contractors to carry out work. Sometimes there is a fine line between an employment contract and a contract of service where an independent contractor is engaged. The Fair Work Act contains provisions which prohibit sham contracting arrangements where employees are paid as if they were contractors.
Section 357 of the Fair Work Act provides:

"Misrepresenting Employment as Independent Contracting Arrangement

1 A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer's contract for services under which the individual performs, or would perform, work as an independent contractor.

2 Subsection (2) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether,

the contract was a contract of employment rather than a contract for services."

So what are the consequences?

The Federal Court in Federal Magistrates Court in the *Australian Building and Construction Commission v Rapid Formwork Constructions Pty Limited* considered an alleged contravention of Section 357(1) of the Fair Work Act 2009 as a consequence of Rapid Formwork Constructions Pty Limited representing that contracts of employment with two employees Brischetto and

Donnelly were contracts for service under which they worked as independent contractors. It was also alleged that Rapid were in contravention of the Building and Construction Industry (ACT) Award by failing to pay these employees in accordance with the terms of the award.

Brischetto worked for Rapid between August 2009 and April 2010 and Donnelly worked for Rapid between May 2009 and March 2010. Both workers were required to obtain an ABN, sign a contract that provided for an hourly rate of pay (and which contract had no time limit or specified duration) and both workers were provided with some protective work clothing by Rapid. Brischetto was also provided with some work tools by Rapid.

Brischetto did not have public liability insurance or accident or sickness insurance nor did he contribute to any superannuation fund. He was not paid any sickness benefits. He was not registered for the Goods and Services Tax. Rapid did not contribute to any superannuation on his behalf. Donnelly fell into the same situation and she was not paid for any annual sick leave or for public holiday.

Prior to the hearing Rapid had reimbursed the monies the workers payable under the Award which in Donnelly's case amounted to approximately $6,000 and the amount paid to Brischetto was described as "not large".

Rapid pleaded guilty to a contravention of the Fair Work Act and faced a maximum penalty of $33,000. The Director was also prosecuted and he pleaded guilty as well.

At the end of the day the employer was fined $10,500 for the contravention of Section 357(1) of the Fair Work Act 2009 and the Director of the Company was also fined $1,500.

Businesses that engage in sham arrangements that seek to represent a contract of employment as a contract of service will face claims for unpaid superannuation, sick leave, annual leave, holiday pay and other entitlements under Awards as well as prosecution under the Fair Work Act and the penalties which can be imposed are not insubstantial.

OH&S Roundup

Fatality And $130,000 Fine

Waterway Constructions Pty Limited was recently fined $130,000 following a fatality when a truck driver was killed when hit by the arm of an excavator that was moving in the vicinity of a truck whilst the truck was being loaded.

Jason Gorken operated a small transport company known as Tilt Time Pty Limited. In operating his business, Gorken drove a Hino truck. Tilt Time was contracted by Waterway Constructions to deliver a steel beam to the Rozelle premises of Waterway Constructions. Waterway Constructions provided maritime construction services for repair and maintenance of commercial wharves and jetties.

Gorken attended the premises of Waterway Constructions and an employee of Waterway Constructions went to get a forklift whilst Gorken waited at the back of the truck. An employee of Waterway Constructions was moving an excavator and had proceeded to lift the grab of the excavator off the ground and started tracking the excavator away from the truck when the driver of the forklift saw Gorken pinned against the rear passenger side of the truck by the grab of the excavator.

Waterway Constructions were prosecuted for a breach of the Occupational Health & Safety Act for failing to ensure there was a safe system of work for its employees and contractors whilst undertaking tasks associated with loading the truck.

It was alleged the defendant failed to develop and enforce an adequate system of monitoring and supervising contract truck drivers, failed to ensure that truck drivers complied with a job safety analysis for loading and unloading trucks and failed to develop a safe work method statement for loading and unloading trucks.

The Court noted there was a failure to ensure that the contractor had received adequate training and that the system of monitoring and supervision of contractor truck drivers also fell short of what was required. The Court noted the failure to require contract truck drivers or courier drivers to undergo yard induction or be given or trained in the yard job safety analysis meant the defendant could not ensure contractor drivers either were informed not to undertake tasks to assist in loading and unloading operations, or had knowledge and training in what tasks they were permitted to undertake in the yard.

The Court found the risk of injury was foreseeable and the consequences of the breach were serious. The maximum penalty was $550,000 and the fine of $130,000 was imposed.

The case serves as a warning to all businesses that it is essential to ensure that contractors are inducted on site as well as trained in any existing safe work methods if they are to participate in activities at the work site they are visiting.

In addition businesses must ensure there is clear separation between vehicle and pedestrian movements and that those who are not actively involved in a work task do not position themselves in a dangerous location whilst they are waiting on equipment that is to be used, when a truck is loaded particularly when the driver is a visitor to the site.

Doing Construction Work Yourself Can Lead To An OH&S Prosecution

Gould Bros carry on business as a timber and building product suppliers and were recently fined $300,000 for breaches of the OH&S Act arising as a consequence of a fall when an employee of a contractor was injured whilst working on the interior fit out of Gould Bros' new trade retail facility.

John Cooper, a sole trader, was engaged by Gould Bros to carry out work on the fit out at Gould Bros' premises in Scone. Cooper engaged two Housing Industry Australia Limited apprentices, and one was a carpenter and the other an electrician.

Gould Bros did not appoint a principal contractor for the works and engaged a range of contractors to complete the works. In the absence of a principal contractor, Gould Bros appointed one of its area managers as the site coordinator.

One of Cooper's crew, whilst standing on a mezzanine level looking at the proposed location for a light, looked up towards the ceiling, turned to move and lost his balance and fell off the unguarded edge of the mezzanine level. He fell some 2.95 metres.

The site coordinator had previously inspected the mezzanine level and identified that handrails had not been installed.

WorkCover alleged that Gould Bros failed to ensure that the system of work for persons who were not in their employ was safe and without risk to health when working at heights of approximately 2.9 metres. WorkCover alleged the measures that should have been taken were to appoint an appropriately skilled and qualified principal contractor for the construction works and to develop and implement specific safety plans. It was alleged that safe work method statements should have been obtained from Cooper.

The Court noted that although the defendant had been intimately involved with the construction industry for many years and no doubt had a great deal of expertise in its particular area of operation, it did not directly engage in the construction of premises including the premises from which it conducted its business. The Court noted Gould Bros operation was effectively the same as undertakings in the domestic construction area by an owner builder without having any particular expertise in the management of the project.

The Court was critical of the absence of handrails whilst construction works were being undertaken and although the work was being undertaken by Cooper and his employees, this did not relieve Gould Bros from its obligations under the OH&S Act.

Gould Bros were prosecuted for three offences, representing risks to Cooper and his two employees over a period of two days as a consequence of the absence of a handrail on the mezzanine level.

In determining the penalty, it was necessary for the Court to have regard to the principle of totality to reflect the overall culpability of the defendant where the three charges effectively arise out of the same facts. The Court determined that an appropriate overall penalty was $300,000 in the circumstances. However, if there was only one charge the appropriate penalty would have been $250,000.

It appears that a decision to save on costs and to supervise construction works rather than engage contractors to manage the works has resulted in a significant fine for Gould Bros.

Whilst a business cannot delegate its OH&S responsibility, if a construction manager was engaged the construction manager will have control of the site effectively removing control from the owner and the construction manager would be in the sights of WorkCover for any break down in the system of work and in reality the owner would be unlikely to face prosecution as it does not have control of the process.

Workers Compensation Roundup

Working From Home – The Compensation Perspective

Recently the Administrative Appeals Tribunal in *Hargraves v Telstra Corporation Limited (2011)* examined whether two injuries which occurred at home whilst a worker was performing services at home were covered under workers compensation legislation. The worker worked two days from home and three days in the Telstra CBD office. Telstra provided the worker with equipment at home including laptop cabling, a mobile telephone and paid for the worker's internet and computer system access.

On 21 August 2006 the worker fell down the stairs at home and injured her left shoulder. On 9 October 2006 she once again fell down the stairs and again injured her shoulder. The worker required surgery and she later developed a secondary depressive and anxiety condition.

Although this matter was determined under the Comcare federal workers compensation system, the provisions relating to injury are similar to those contained within Section 4 of the NSW workers compensation legislation. That is, the injury will need to arise out of or in the course of the worker's employment in order to be compensable.

On both occasions when the worker had fallen down the stairs she had been logged on to Telstra's computer system and had got up from her home based work station to go downstairs. Both times the injury occurred when she had coughed and lost her balance before falling down the stairs. On the first occasion she was retrieving cough medicine from downstairs and on the second occasion the worker was going down stairs to lock her front door after her son had left for school. It was a specific instruction of Telstra that the worker's front door was locked whilst she was working at home given there had been a burglary in the local area the year before.

The Administrative Appeals Tribunal found the physical injuries arose in the course of the worker's employment. In relation to the first fall, the Tribunal determined that the worker going down stairs to obtain cough mixture was equivalent to "*relieving the necessities of nature*" or on a refreshment or toilet break. In order to continue carrying out her work duties, the worker required the cough syrup and hence she attempted to retrieve it from downstairs when she fell. Presumably the outcome would have been different if she had been descending the stairs to attend to her child or to take out her domestic rubbish for collection.

In relation to the second fall, once the Tribunal accepted the worker had been directed by her employers to lock her screen door when working from home, her injury was found to have occurred whilst in the process of carrying out a specific employer requirement for carrying out work at home.

This decision is a reminder of the additional liabilities faced by employers in allowing their employees to work from home as part of a more flexible workplace environment. Nevertheless, when the home becomes the place of employment, it does not necessarily mean that any injury which occurs whilst the worker is at home will result in a compensable claim. Injuries that occur whilst not carrying out employment duties such as walking the dog, tending to children or washing the car would not be covered, just as they would not be covered in the traditional workplace.

When an employee has specifically agreed with an employer to work certain fixed hours or days from home the scope of the compensable injuries is relatively easy to define. The scope of these boundaries become blurred when employers have specifically requested certain duties to be carried out at home and/or out of hours but a worker decides of their own volition to carry out those additional duties when an injury occurs.

We expect the Court or Commission will look at whether the duties were expected by the employer to be performed and there was a practice of those duties being performed at home and/or out of hours. In these circumstances it is very possible an injury which occurs whilst carrying out those duties could also arise out of or be in the course of the employment.

The potential liability for such claims can be reduced if employers take appropriate steps. This should include clear parameters when considering a working from home arrangement to ensure that all work related activities are carried out in accordance with the employers' workplace health and safety requirements and a working from home policy is instituted. This should include adherence to workplace based drug and alcohol policies.

It should be remembered an employee cannot be requested as part of a flexible working arrangements to waive any rights

they may have to make a claim under Workers Compensation Legislation. Such agreements are void at law.

Finally, although some view it as cynical, there is the ultimate concern that the home based workplace environment is very likely to not contain other employees which could act as witnesses if an injury occurred in the circumstances alleged. One imagines that for less scrupulous employees, informal work from home arrangements may allow a claim to be pursued for purely domestic injuries beyond an employer's watchful eye but under the employer's workers compensation insurance umbrella.

Reasonable Actions By An Employer

Continuing with recent discussions of various cases involving airline employees, we examine the recent Presidential decision of *Jetstar Airways Pty Limited v Canterbury (2011)*. President Judge Keating determined an appeal by the employer as to whether actions taken by Jetstar that led to a psychological injury of a worker were reasonable.

Mr Canterbury was employed as a flight attendant by Jetstar and on 4 December 2009 he was "dead heading" on a flight between Sydney and Melbourne. Dead heading is a term used to describe travel performed at the direction of the employer but not associated with operational duties of the aircraft. It often occurs when positioning for a tour of duty or returning to a home base. Whilst on that flight, Mr Canterbury consumed alcohol and allegedly purchased wine, cheese, crackers and confectionery. Mr Canterbury offered to pay for the refreshments by presenting his credit card to one of the flight crew to process but it appears the transaction was not processed.

As part of the Jetstar policy, employees "dead heading" are not allowed to consume alcohol if they are either in company uniform and/or required to work within eight hours of the consumption of that alcohol. The policy makes it clear that failure to abide by the policy in can result in termination of their employment. Mr Canterbury was ultimately subject to performance management for consuming the alcohol on the flight and failing to pay for the refreshments consumed. Qantas argued the actions conducted by them in formal performance management were reasonable and thereby compensation was not payable due to the defence available to the employer under Section 11A of the Workers Compensation Act 1987.

Although it was conceded at the arbitration that the worker's psychological injury was due to "formal performance management", President Keating reminded the profession to closely examine the strict defences available Section 11A. He noted that Section 11A did not refer to "performance management" but rather "performance appraisal" which was a much narrower concept. There was some evidence to suggest that the worker's psychological injury may have been caused by other factors unrelated to the "formal performance management". In order for an employer to rely upon a defence under Section 11A, an employer must establish that the injury was wholly or predominantly caused by the conduct on which it relies. In this matter it appeared the performance appraisal, whilst it may well have been a major cause, it was not a whole or predominant cause. This was not the main issue that was examined on appeal. The main issue was whether Jetstar's actions with regards to "discipline" were reasonable.

Noting the concession that the worker suffered an injury in the course of his employment and the employment was a substantial contributing factor, were the actions taken by Jetstar with respect to discipline reasonable? Whether an employer's actions are reasonable is an objective test. If the Commission takes the view that the action taken by an employer is not reasonable in all the circumstances, the employer cannot rely upon Section 11A merely because it is a genuine belief based on its reasonable grounds that the action was unreasonable.

President Keating determined that the Jetstar policies and procedures with respect to the consumption of alcohol in flight whilst "dead heading" were confusing and contradictory. The ambiguity in the policies would have been apparent to Jetstar when the company carried out its discipline process. Given this ambiguity, the President rejected Jetstar's submission that the worker's admission with respect to the consumption of alcohol during the flight was itself sufficient to support a finding of a breach of company policy. The President particularly focussed on the lack of definitions within the policy and procedures as to when a worker was on off duty travel, undertaking dead heading or being a simple passenger. As the worker was not on duty in a conventional sense and therefore permitted to drink alcohol during the flight, provided he was not in uniform (which appears to be the case), the actions by Jetstar were unreasonable.

In relation to the second allegation by Jetstar that the worker did not pay for goods consumed on board, the accepted evidence that the worker handed over his credit card and there was no evidence to establish he contrived to ensure that the credit card was not debited, and the failure to pay was not something for which the worker could be held responsible. Jetstar had failed to put to the worker an allegation that he ought to have known his credit card had not been debited and he ought to

have taken further steps to pay. As he was not given the opportunity to respond to this type of allegation this reflected an unreasonable treatment by the employer.

The decision is once again a reminder of the difficulties in maintaining a Section 11A defence. The test for reasonable actions by an employer is an objective one and ambiguity in company policies and procedures will see workers defences fail under Section 11A. It should not be forgotten that once the defence is alleged by the employer in relation to Section 11A, the onus rests with the employer to demonstrate on the balance of probabilities that the actions within the specific confines of Section 11A were reasonable. Simple performance management is not enough to trigger Section 11A and the worker must be under a strict performance appraisal process or being subject to discipline before the employer can rely upon the Section 11A defence.

CTP Roundup

Intoxicated Pedestrians And The Liability Of A Driver When Watching The Road Ahead

The issue surrounding a driver's culpability when keeping their eye on the roadway ahead whilst pedestrians move into the path of vehicles has certainly been the subject of many trials and appeals. Increasingly, we are seeing a pattern where in these sorts of situations, judgments favour the driver more and more and consider the personal responsibility of the pedestrian for the accident.

In a recent District Court of Russell v Lozanes (2011) NSWDC 149, her Honour Judge Gibson was faced with this issue. The plaintiff, Russell, had been at a hotel for potentially a period of four hours, accompanied by her son's girlfriend whilst they consumed, on Russell's evidence, "a couple of drinks". They left the hotel on foot and Russell's next memory was that she saw lights and then woke up in hospital. Her blood alcohol reading at the time was 0.16.

Russell's son's girlfriend was not able to be found, therefore did not give evidence however the defendant Lozanes gave evidence. She stated she was familiar with the motor vehicle she was driving as well as the intersection and, despite the late hour, she was alert and was watching the road. She was allegedly travelling between 50-60 kilometres per hour when she saw the plaintiff. She stated she could see Russell was already on the road and running and she slammed on the brakes, pulled over to the right and the vehicle collided with Russell.

A witness, Lamplough, travelling in a vehicle behind Lozanes, provided a statement which was tendered into evidence. He stated that he noticed a person running from the left hand side of Richmond Road and immediately formed the view that this person was running directly into the path of Lozanes' vehicle. He heard a thud and looked away from the impending accident therefore did not see Lozanes take any evasive action prior to the accident however, as the vehicle had come to a stop at an angle to the right he concluded Lozanes must have veered to the right.

It was submitted on behalf of Russell, that Lozanes awareness of her was late or in breach of her obligation to keep a proper lookout, especially in circumstances where Lamplough had seen her earlier.

Her Honour did not agree, stating: "The speed at which the plaintiff chose to cross the road, in the path of oncoming traffic, would have taken any motorist by surprise. "

Her Honour rejected Lonzaes' submission that this was a case of an obviously erratic pedestrian.

Her Honour was satisfied Lozanes was approaching an intersection with which she was familiar "… was watching the road ahead of her, and that this constituted in the circumstances keeping a proper lookout."

In the event the findings concerning liability were in error, Her Honour set out findings concerning contributory negligence. She stated the accident occurred entirely as a result of the inattention of Russell who ran into the path, not only of Lozanes, but Mr Lamplough "in circumstances of the utmost danger. Some form of impact was inevitable and accordingly contributory negligence should be assessed at 100%."

Clearly, the focus was on the personal responsibility of an intoxicated pedestrian, rather than the duty of a driver watching the road ahead.

The Reluctance Of Appellate Courts To Disturb Trial Judge's Assessments Of Contributory Negligence

Whilst personal responsibility is clearly in focus when the Courts consider a claim brought by an injured intoxicated pedestrian, the Court of Appeal is reluctant to disturb findings of contributory negligence made by a trial judge.

In *The Nominal Defendant v Stephens [2011] NSW CA 312*, the NSW Court of Appeal considered an appeal by The Nominal Defendant in relation to a decision of His Honour Chief Judge Blanch of the District Court of NSW, where Blanch DCJ determined the driver of an unidentified vehicle breached their duty of care when colliding with the plaintiff, Stephens, whose blood alcohol reading at the time was assessed at 0.17. Blanch DCJ also found Stephens was 55% to blame for the accident.

Stephens was at a local hotel and consumed what she described as "a fair quantity of alcohol". Stephens allegedly had an argument with her partner and walked into the night along the highway. On her own evidence, she endeavoured on a number of occasions to hitch a ride back towards her home.

Stephens maintained she was walking "just inside the fog lane when she saw a truck coming across the Serpentine Bridge". She alleged the truck's lights were on high beam, she saw the truck veer to the middle of the road and then saw the cabin and first trailer beside her. She stated as she turned, she found herself thrown in the air and hurled to the ground.

Stephens suffered injuries to her lower left leg, later resulting in its amputation, and suffered fractures and injuries to the lower right arm. As the vehicle could not be identified the Nominal Defendant was sued and the driver could not be called to give evidence.

The trial Judge accepted the plaintiff's version that the vehicle swung away which meant that the driver of the vehicle saw her in time to take some action, but that the evasive action was not sufficient. Blanch CJ stated:

> *"I would expect a reasonable prudent driver of a B-double to be aware of the movement of trailers if a particular manoeuvre of changing of the direction of the prime mover was done".*

In relation to contributory negligence, Blanch CJ took into account the fact that Stephens was intoxicated, walking alone in an area where pedestrians do not normally walk and she was wearing dark clothing. He considered contribution to, or responsibility for the accident was more than half of that of the unidentified driver and assessed contributory negligence at 55%.

The Nominal Defendant appealed and in the appeal challenged the finding of negligence and argued contributory negligence should have been assessed at 80%.

In the Court of Appeal, Justice Whealy, with whom Justices Hall and J Giles agreed, upheld the trial judge's findings on primary liability finding "*the driver was either inattentive to the respondent's presence when he should have first seen her or he was simply too slow in reacting when he did see her*".

In relation to contributory negligence, Whealy J stated:

> *"The principle that intermediate and ultimate appellate courts must show restraint in reviewing a primary judge's apportionment of contributory negligence remains steadfastly the position today...I am not prepared to find that his Honour fell into error in his assessment of the respondent's share in the responsibility for the injuries she suffered. Bearing in mind the restraint that should properly be exercised, I am not persuaded that it has been demonstrated that this court should intervene. In my opinion, the apportionment should stand."*

The Court of Appeal was satisfied that the trial judge had assessed contributory negligence at a percentage resulting in Stephens having the major responsibility for the accident and the appeal was dismissed with costs.

It is evident that the Court of Appeal will hesitantly intervene in assessments of contributory negligence as a finding on apportionment of blame turns on a "*question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds.*"

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