GD News

Gillis Delaney Lawyers

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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.

High Court– Employers Can Sue Those Who Injure Employees For Damages For Loss of Services

When a person is injured by the negligence of another they are entitled to claim damages for the injuries and loss they suffer. However, an injury to an employee can have far reaching consequences for an employer and Australian Law has recognised the right of an employer to bring a "loss of servitium" claim against a negligent party when the employer suffers loss consequent to the loss of services of an employee.

It is not common to see employers bring claims for loss of servitium as generally the employer can replace the services of an injured employee with little or no additional cost. However, in some circumstances a key employee may be extremely difficult to replace and considerable expense may be incurred by an employer to obtain the services necessary to replace the lost services.

The High Court in *Barclay v Penberthy* has now had cause to consider the nature of a loss of servitium claim and whether or not such claims are still available in Australia and has confirmed that loss servitium claims are alive and well. Insurers need to be mindful of the fact that when a person is injured, not only can the injured person bring a personal injury claim, so can their employer.

So what was the case of *Barclay v Penberthy* all about?

Nautronix was a US corporation who carried on business of researching and developing marine technology, in particular, acoustic technology for subsea communications used in defence, oil and gas and related industries. It operated from Fremantle. Five of its key employees were involved in a plane crash. Two of the employees were killed and three were injured.

Proceedings were commenced alleging that the plane accident resulted from the negligence of the pilot and an engineer, Barclay who was involved in the design of repairs to a sleeve bearing within an engine driven fuel pump. The proceedings were commenced by:

- two Nautronix companies bringing loss of servitium claims;
- the three surviving passengers bringing damages claims;
- the spouses of the passengers who had died who made claims pursuant to the *Fatal Accidents Act 1959* (WA).

The claims in negligence succeeded however the claims by Nautronix against Mr Barclay were dismissed.

An appeal followed to the Court of Appeal which held that both the pilot and Barclay owed Nautronix a duty to exercise reasonable care and were liable in negligence for any economic loss suffered as a result of the deprivation to Nautronix of the services of the three injured employees. However, the Court of Appeal held that Nautronix could not base any claim upon the loss of services suffered as a result of the death of the two employees. This was because of a preclusion rule known as the rule in *Barker v Bolton* which applied to an action for loss of services

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of a deceased employee and an action in negligence.

The case ultimately found its way to the High Court.

In the High Court it was argued that an action for loss of servitium no longer existed as a separate cause of action at common law. It was argued that the action should now be regarded as absorbed into and subsumed by the tort of negligence and there was no basis to rationalise the action in the setting of modern social and economic relations.

That argument did not find favour with the High Court.

The High Court noted that an action for loss of servitium has arisen as an exception to the rule that no liability arises for breach of a duty of care unless damage to the person to whom the duty was owed is the proximate result of the breach.

The High Court noted that this is not a principle directed at questions of proximity or remoteness of damage resulting from breach of duty of care. It provides a remedy for the wrongful invasion of a proprietary right which a master is considered to possess in respect of the services which his servant is under an obligation to render.

The High Court confirmed that the characteristics of a loss of servitium claim are:

- the injury to the employee must be wrongful. That is, it must be inflicted intentionally or in breach of a duty of care;
- the loss of servitium action depends upon demonstration of a wrong having been done to the employee;
- the loss of servitium claim does not depend on negligence as it will also be triggered where the wrongdoer's actions are intentional;
- the loss of servitium action is not directed towards the consequences of a breach of duty of care owed by the wrongdoer to the employer.

The majority of the High Court noted that loss of servitium claims should not be absorbed as part of the common law.

The High Court confirmed that loss of servitium claims are claims which are independently available from an employee's damages claim and is not based on a duty of care owed to an employer but rather based on the duty of care owed to the employee and the action protects the employer's right to the benefit of services of its employees.

However, the measure of damages for loss of services is a difficult issue. The majority of the High Court whilst not called on to determine the quantum of damages in this case commented:

> *"If the employer employs numerous staff which can take up the duties of the injured employee, the prima facie measure of the employee's loss may be any extra payments by way of overtime and the like which the employer has to make to secure the performance of these additional duties. Where a replacement employee has to be engaged but this is achieved on terms more favourable to the employer, no loss will have been suffered. If it were possible to engage a substitute, at or as near as practicable to the level of skill of the injured employee, but this is not done by the employer, then the employer fails to mitigate the loss. The essential point is that like any plaintiff the employer is obliged to take reasonable steps to mitigate the loss occasioned by the defendant's interference with the provision of services by the injured employee."*

The majority of the High Court noted that the proper measure of damages was the increased cost of a replacement employee. However, difficulties arise when there is a "one man company". The majority of the High Court noted that when assessing damages in such a case, the measure of damages does not include loss of profit suffered by the company unless the company satisfies the Court that the loss is attributable to the loss of services and no other likely cause has been identified.

The majority of the High Court commented that generally a claim for loss of profits will not be available in a loss of servitium.

The comments of the majority on the assessment of damages are indicative of the approach that the High Court would be likely to take if called on to determine the quantum issue, however two Justices of the High Court preferred not to express any comments on the law as it applied to the assessment of damages.

So there we have it.

Employers are entitled to sue wrongdoers for damages for losses they suffer as a consequence of the loss of services of injured employees.

The loss of servitium action is based upon a breach of duty owed to the employee.

Employers are entitled to bring damages claims when their employees are injured.

Generally, the measure of damages recovered will be the cost of replacement services.

In some cases employers may be able to recover loss of profits, however that will be dependent upon the employer establishing that the loss of services of the employee was the sole cause of the loss of profits. However, the Courts will be reluctant to award loss of profits to employers as employers have a duty to mitigate their loss and the form of mitigation which should be employed is the engagement of replacement labour.

What is important is that a loss of servitium claim is a claim for damages for loss of services. It is not a claim for damages for loss of earnings or the deprivation or impairment of earning capacity or for loss of expectation of financial support.

Throughout Australia, States and Territories have legislated to introduce laws which regulate awards of damages for economic loss, and caps on awards were introduced. There is little doubt that those caps apply to personal injury claims, however as a consequence of the High Court's clarification of the nature of loss of servitium claims, employers are likely to argue that they are not subject to the caps on economic loss as the damages claim is for loss of services rather than for financial impairment or loss of financial capacity. Insurers may well find that an employer's loss of servitium claim is not capped to a maximum by the provisions found in Civil Liability Legislation capping claims for economic loss which is consistent with the approach of the NSW Supreme Court.

The High Court's decision serves as a reminder that an employer's right to bring a loss of servitium claim is alive and well.

Whilst it is unlikely that there will be a rush of loss of servitium claims, employers who do suffer increased costs as a consequence of loss of the services of an injured employee can bring a damages claims which can be piggybacked by claims made by an injured worker. Most of those claim for the cost of replacement labour, and in some situations a loss of profits claim which is dependent on the employer establishing that the loss of services of a particular employee was the sole cause of any loss of profits.

Duty of Care Owed by Homeowners

In NSW the *Civil Liability Act 2002* goes a long way towards codifying the laws of negligence and it is incumbent on a judge to refer to the provisions in the Act when determining a personal injury claim.

Section 5B of the Act provides:

"(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions."

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the Court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken;

(b) the likely seriousness of the harm;

(c) the burden of taking precautions to avoid the risk of harm;

(d) the social utility of the activity that creates the risk of harm."

Further, Section 5C of the Act provides:

"In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk."

Section 5D of the Act provides:

"(1). A determination that negligence caused a 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 interests.

(4) For the purposes of determining the scope of liability, 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."

These provisions set the criteria for determining whether a duty of care was owed, whether there was a breach of duty and if there was a breach of duty whether that breach caused the loss or injury.

The fact that there is a duty of care owed does not mean as of necessity mean that there is a breach of a duty when a person is injured. In many situations the crux of the issues for determination will be whether or not the response of a person to a risk is a reasonable response in the circumstances.

Homeowners owe a duty of care to persons that visit them and homeowners must take care to ensure they do not create dangers which can injure visitors, however, homeowners are not liable for all dangers created, as was seen in the recent decision of the NSW Court of Appeal in *Sibraa v Brown*.

Sibraa and Brown had been neighbours for many years. Brown was aged 60 years and lived alone. Sibraa lived in his house with two of his children, Joel (aged 14) and Shaylee (aged 13), and a great niece, Brooke (aged 14).

Sibraa worked for the RTA and needed to travel to his place of work and would stay away from home whilst working. Sibraa had an arrangement with Brown where she would effectively keep an eye open for the children to make sure that there was nobody hanging around at night when they were by themselves whilst Sibraa was away at work.

It came to pass that Brown would sleep at Sibraa's house from Sunday or Monday night until the succeeding Saturday when Sibraa would return from work. It was Sibraa's practice to leave the house on a Monday morning to travel to work and stay there until the following Saturday afternoon when he returned home. Brown slept in her own home when Sibraa returned.

Sibraa's practice was to knock on Brown's window at 4.30 am when he was leaving for work so that Brown could get up and

commence supervision of the children.

One Saturday Brown and Shaylee had a difference of opinion and Shaylee advised Brown they did not want Brown to come back to say in their house. On the following Monday Brown did not receive any knock on her bedroom window and did not go to Sibraa's house.

On Tuesday Brown heard Shaylee crying and could not attract Shaylee's attention from her own yard so went next door. The only way to enter the house was through the back door as both the glass door and security door at the front were locked, as was usually the case when Sibraa went to work.

Shaylee was distressed as Brooke was running away from home and Brown drove Shaylee to search for Brooke, located Brooke and brought her back to Sibraa's house. A conversation took place between Brown, Shaylee and Brooke about teenagers running away and the teenagers suggested to Brown that she return home to watch the "Soaps" and they would let Brown know what they intended to do at a later time. At the end of watching "Home & Away", at 7.30 pm Brown returned to Sibraa's home and during this visit she fell and sustained personal injury.

Sibraa had left a piece of wire mesh laying on the ground in the front yard of his house, close to the beginning of the path that led down the right hand side of the house. The mesh was concrete reinforcing mesh and was approximately one metre by half a metre in dimension. Brown had previously seen that mesh or similar mesh on other parts of the lawn or on the nature strip. Brown had noticed grass seeds laid underneath the mesh when she had noticed the mesh previously. The mesh was placed over the grass to stop people walking on the grass.

Brown tripped on the mesh. It was dark at the time of the accident. There was an exterior light on Sibraa's house which was turned off.

Brown commenced proceedings against Sibraa, claiming damages for the injuries she sustained.

The trial judge found that the mesh was not the usual sort of risk one would encounter on a suburban lawn. The trial judge found that it was foreseeable that in placing the mesh on the front lawn there would be a risk of injury to a class of persons including Brown. The trial judge found that Sibraa had been negligent in allowing the mesh to remain in place at night time and could have arranged for one of the children to move the mesh at night.

Sibraa appealed.

In a unanimous judgment the Court of Appeal determined that Sibraa had not been negligent. The Court of Appeal noted:

> *"It was foreseeable that a visitor might encounter the mesh, might trip on it, and thereby there was a risk that injuries that were more than insignificant might result. It should be observed that the mesh was positioned such that it was possible for a person tripping on it to fall not only on the lawn, but against the house, garden statuary, or the concrete path. The significance of the possible injuries is one part of assessing whether the risk itself is not insignificant, but not the whole of that assessment. As well, the likelihood of the harm arising enters into that question. I would accept that the Respondent had established that the risk of harm arising from the presence of the mesh was not insignificant."*

The risk of harm arising from the presence of the mesh was not insignificant. However, the Court of Appeal formed the view that there had been no breach of duty. The Court of Appeal noted that determining whether or not a person has taken reasonable care is a question of fact. The Court of Appeal noted that the High Court has held that a householder is not liable when a visitor to the premises tripped on an uneven surface of the driveway of the home attending a garage sale, noting:

> *"Very few occupiers keep their land in perfect repair. People are permitted to occupy, and some people can only afford to occupy, premises that are in a state of some disrepair. Legislative and regulatory incursions upon the general proposition that a landowner may use land as the landowner sees fit, extensive as they may have been, have never gone to the point of requiring people to remove all potential hazards from their land. It would not be possible to comply with such a requirement. ...*
>
> *Ordinary dwellings contain many hazards which give rise to a real risk of injury. Most holders do not attempt to eliminate or warn against, all such hazards."*

It was noted that the Queensland Court of Appeal had determined that there had been no breach of a duty of care in a case where a milk deliverer injured herself when at night she tripped on a hose on a householder's front lawn.

In this case, the question for the Court was what was a reasonable response to the risk at hand? The Court noted that by day or night someone would be likely to encounter the mesh only if they had permission to proceed to the back door and even at night there was a low risk of harm resulting from its presence. The Court of Appeal noted the social utility that created the risk was quite slight, rather than non existent because aesthetic factors of a well presented lawn to the street should not be ignored in assessing negligence.

The Court of Appeal noted that after considering the factors found in Section 5B of the Act, it was then necessary to undertake an evaluative task of weighing up the relevant factors and determine:

> *"Whether in the circumstances, a reasonable person in Sibraa's position would have taken the precautions against a risk of harm that he had in fact failed to take."*

The Court of Appeal noted:

> *"... it is not uncommon for householders to leave lying on their lawn objects like a hose, a gardening tool or a child's toy. It is not unusual for a lawn to have a potential obstruction like a tap or bird bath protruding from it, to have obstacles to free passage like garden furniture on it, or to have potential hazards like watering system outlets sunk in it. A reasonable householder would often not feel any need to take precautions against harm arising from the presence of such objects. In daylight they will be visible, and many a reasonable householder would take no precautions concerning such objects in case people came to be on his or her lawn (as opposed to front path or driveway) at night. It would be quite a surprise to many householders to be told that reasonable behaviour requires them to clear all obstacles from their lawns before each night. Many a town or suburban house lacks lighting that permanently illuminates at night obstacles to free progress over the entire front yard. The appellant (Sibraa) in the present case did not fail to take reasonable care by having the mesh where it was, and unlit."*

The duty owed by a homeowner is not a duty to make every danger safe. The question is whether or not a homeowner has acted reasonably in response to a risk which has been created.

The determination of whether a person has acted reasonably involves a consideration of the criteria in the *Civil Liability Act 2002* as well as the application of common sense and the determination of what is a reasonable response to the risk. A danger created does not of necessity result in a finding that there has been a breach of duty of care by a homeowner.

High Court Decision On Penalties

Last month the High Court granted leave to appeal against the decision of the Federal Court in the Australia & New Zealand Banking Group Limited ("ANZ") representative action that sought to recover fees charged to customers by ANZ which were arguably penalties and not enforceable. The High Court held that the fact that particular fees were not charged by the ANZ upon breach of contract did not render the fees incapable of being characterised as penalties.

The applicants, approximately 38,000 group members, commenced representative proceedings in the Federal Court seeking amongst other remedies, declaratory relief that certain provisions between each of them and the ANZ were void or unenforceable as penalties. The applicants claimed repayment of fees charged to them by way of "honour fees", "dishonour fees", "late payment fees", "non payment fees" and "over limit fees".

The applicants asked the Federal Court by way of separate questions for determination, whether the fees were payable by the applicants upon breach of contractual obligations owed to the ANZ and, in the alternative, whether it had been the responsibility of the applicants to foresee that the circumstances occasioning the imposition of the fees did not arise. If either question was answered in the affirmative, the applicants then asked whether such fees were capable of being characterised as penalties.

On 5 December 2011 the Federal Court held that only the late payment fees were payable upon breach of contract. Following the decision of the NSW Court of Appeal in *Interstar Whole Finance Pty Limited v Integral Home Loans Pty Limited (2008) 257 ALR 292*, the primary judge held that the penalty doctrine was limited to breaches of contract and thus could only be applied to the late payment fees. The applicant sought leave to appeal to the Full Court of the Federal Court of Australia.

On 11 May 2012 the High Court, acting pursuant to Section 40(2) of the Judiciary Act 1903 (Cth) removed the application for leave so the matter could be dealt with in the High Court. The question before the Court was whether the *Interstar* decision

correctly stated the law with respect to penalties and whether the modern doctrine in respect of penalties had become wholly a doctrine of the common law rather than of equity.

The High Court unanimously rejected the proposition that the penalty doctrine applies only where there has been a breach of contract, holding that the question is one of substance rather than of form. The High Court also rejected the proposition in *Interstar* that the doctrine had been absorbed into the common law. The fact that the honour, dishonour, non-payment and over limit fees were not payable for breach of contract did not prevent them from being characterised as penalties. It will be for the Federal Court on the further hearing of the matter to decide whether these Exception Fees are penalties.

In reaching its decision the High Court ruled that the Interstar decision is incorrect on the basis that relief against penalties is available even if a fee is not payable on breach of contract. The High Court decided that the correct approach to determining whether a fee is a penalty is to ask whether the purpose of the fee is to secure performance of a primary obligation by the party subject to the fee or whether the fee is truly a fee for further services or accommodation. If it is a fee for further services or accommodation, it will not constitute a penalty even where the fee payable is significant. If the fee is payable to secure performance of the party subject to the fee, it will only be enforceable if it is a genuine pre-estimate of the damage suffered by reason of that party's non-performance.

As a result of the High Court's decision, contractual fees drafted on the basis of the now overruled *Interstar* authority could be capable of constituting penalties and be unenforceable. Fees payable under a number of agreements may now need to be re-evaluated, for example, loan, franchise, lease and transport agreements. The purpose of the fees need to be considered and a determination made as to whether they are payable to secure the performance of a primary obligation. It will be relevant in this regard whether some further accommodation is provided for the fee.
The ANZ representative action will now continue in the Federal Court and we will have to wait and see if the fees are penalties and not recoverable.

It Can be Difficult to Overturn a Personal Injury Damages Award

Defending a claim for damages for personal injury is nota n easy task particularly when it comes to claims for damages for gratuitous domestic assistance and commercial domestic assistance in the future. Claims for economic loss where a person is not working at the time of the accident and alleges that it was their intention to return to work but the accident has prevented that are also difficult to challenge. Surveillance is a forensic tool available to counter such claims. Nevertheless, successful surveillance is not the be all and end all and Courts must balance the overall evidence presented during the trial.

The recent NSW Court of Appeal decision in *Coles Supermarkets Australia Pty Limited v Haleluka* is instructive on the approach of the Court of Appeal takes when a defendant challenges awards for non economic loss, gratuitous domestic assistance and commercial domestic assistance.

Haleluka was injured when she was hit by a laden trolley at a Coles supermarket. She was squatting, examining products on display when an employee crashed the trolley into her. Haleluka was 50 years of age and a registered nurse. Haleluka lived with her husband in a large two storey free standing house with four bedrooms and a number of bathrooms, a study, a family room and a billiards room. Haleluka looked after the inside of the house and her husband looked after the outside.

A month after the accident Haleluka and her husband became foster carers for a ten and a half month old child. At the time of the trial they were hoping to adopt.

The medical evidence accepted by the trial judge was that there had been a derangement in the right hip caused by the incident which caused deep hip pain and the mechanism of injury could well result in post traumatic changes. There was also an aggravation of pre-existing degenerative changes in the back.

Prior to the incident Haleluka had been diagnosed with cancer and whilst recuperating from her cancer surgery she completed a Bachelor's Degree in Nursing at the University of New England.

Haleluka's evidence was that it was her intention at the time of the accident to return to work part time and progress to full time work. She conceded taking on a foster child would have, in any event, affected those intentions. Haleluka also gave evidence that she found housework very difficult because of her hip and the housework was now done by her husband with some help from her mother. The husband gave evidence that he had given up overtime and work on Saturdays and left to go to work very early so that he could return earlier in order to carry out domestic activities. Haleluka gave evidence that her husband

provided seven hours a week of care (one hour over the six hour threshold to give rise to an entitlement for gratuitous domestic assistance).

Coles adduced medical evidence from Dr Matalani that suggested domestic assistance in the vicinity of four to five hours per week was required. Coles also tendered video footage of Haleluka which included a good deal of time during which the plaintiff was carrying her foster child on her right hip. Coles suggested the footage showed Haleluka walking freely however the trial judge thought there was a limp that was apparent although not marked. The trial judge also noted the footage depicted the plaintiff rubbing her hip consistent with pain.

The trial judge awarded Haleluka approximately $500,000 in damages. He assessed damages on the basis of 30% for non economic loss - $115,000 for past gratuitous care at seven hours per week and future commercial domestic care at five hours per week.

Haleluka argued that she would have earnt $1,000 nett per week when she returned to full time work. The trial judge concluded Haleluka had a 50% diminished earning capacity and her return to work would have been delayed until 2013 and then she would have had a graduated return to the workforce. Taking those matters into account, the Court determined future economic loss based on an allowance of $300 per week. Coles had argued that a buffer of $30,000 was appropriate.

Coles challenged the trial judge's award on appeal, attacking the awards for non economic loss, future economic loss, gratuitous domestic assistance and future commercial domestic assistance. The thrust of the attack was that the findings of the trial judge were inconsistent with the footage shown.

The Court of Appeal unanimously rejected Coles' attack on the award. In a unanimous judgment, Allsop P made the following findings:

> *"In relation to non economic loss, the nature of the discretion exercised by a trial judge is neither scientific nor normative. The assessment does not rely on a mere list of medical conditions. In this case the percentage was not outside the legitimate or reasonable range and so excessively high to reflect a wrongful exercise of discretion. As to future economic loss, the difficulty with criticising the primary judge's approach was that it conformed in substance with the evidence of Haleluka. That evidence being accepted, the approach of the trial judge was entirely sensible. The underlying facts in this case were not so imprecise and impossible of assessment as to require a buffer. Haleluka was a skilled and resourceful person who had undertaken a variety of roles. In accepting her evidence it was clear that she would return to work."*

In relation to past domestic assistance, once again the evidence of Haleluka was accepted and it was held that because of the accident she could not do housework. The Court of Appeal noted in those circumstances there was a reasonable need for the services of domestic assistance provided by her husband. He provided them. It took him seven hours. This was longer, on the findings that the five hours assessed by Dr Matalani.

The comments of Allsop P on the award of gratuitous damages were interesting. Allsop P noted:

> *"The number of hours is a factual question, on what has occurred or will occur. Here, the evidence of the plaintiff was accepted: that because of the accident she could not do the housework. There was, therefore, a reasonable need for the services of domestic duties to be provided by her husband. He provided them. It took him seven hours. This was longer, on the findings, than the five hours per week that would be taken by paid professional cleaners.*

It was submitted that one only gets payments for satisfying the reasonable needs created by the injuries. Allsop P when considering section 15 of the Civil Liability Act which regulates gratuitous care claims noted:

> *"But the section does not identify some standard of efficiency in delivery of the services. The services by the person who is providing them gratuitously must be in response to a reasonable need. Those services must be provided for a specified time. The section does not require only those services of a length of time reasonably or professionally provided by some posited objectively skilled person. The section is dealing with the commonplace circumstance that a family member will take up tasks that he or she may not normally do. There is no warrant to imply into s 15(3) a requirement that the time taken to perform the services must be referable to some objective standard of efficiency."*

Allsop P noted that section 15 prescribes a maximum rate for gratuitous domestic assistance rather than a specified rate and commented:

> *"If a gratuitous provider of services was sufficiently slow or inefficient to warrant treatment in the evidence, the appropriate*

way to reflect this is in the sum awarded per hour"

In relation to future commercial domestic care, the Court of Appeal noted there was ample basis for paid commercial assistance. Allsop P noted:

> *"The voluntary assistance by the husband was coming at a financial cost to him and the family. Not only was he leaving home at 3.30 am and commencing work at 4.30 am in order to be home in the early afternoon to attend to household chores, but also he was giving up overtime and Saturday work to enable him to carry out domestic duties."*

The Court of Appeal held that that evidence justified paid assistance. The evidence was that the husband was making economic sacrifices to perform domestic duties which a paid professional would take five hours per week to complete. It was legitimate to provide for that need at commercial rates to enable the husband to cease sacrificing economic benefits to provide it.

In this case, whilst five hours of care was allowed in the future, Coles submitted that the trial judge failed to address in the lifetime award of future care, the recognition that age alone will likely create a similar need for domestic assistance in later years. Allsop P noted that the matter was only lightly touched on in oral argument and there was no real evidential foundation for the argument. Allsop P concluded:

> *"As the years advance, it can be accepted that there will be a need for assistance with housework and domestic chores because of age. That said, for some as age progresses the tortiously caused injuries may magnify the need for assistance and earlier than would otherwise be the case. It is also reasonable to expect a smaller house in later years. Little assistance was given by the parties in address, or in evidence about these matters. The primary judge did not address this because it was not put to him. In these circumstances it is not proper to interfere on appeal with an approach which if challenged might have been met by evidence."*

These comments highlight the fact that to manage a challenge on the basis argued it was necessary to have adduced evidence addressing the argument in the original trial and this was not done. Oral submissions were not enough and evidence was needed if there was to be any reduction in the award for these contingencies.

Coles failed in all of its challenges.

The argument that the gratuitous care was being provided for a period longer than a medical provider had estimated failed on the basis that there was evidence of the time that Haleluka's husband took to provide the domestic assistance.

In relation to the claim for future domestic care, the fact that the provision of gratuitous assistance by the husband was resulting in economic detriment to him was sufficient to overcome an argument that he would have continued to provide gratuitous assistance in the future. An allowance for commercial care was appropriate.

As can be seen, it is difficult to overturn a damages award in a personal injury claim particularly when the Court accepts the injured person's evidence. Video footage of a claimant demonstrating a capacity to carry out activities can be useful in reducing damages awards particularly where a claimant denies in evidence they have restricted capacity however surveillance material is subject to interpretation and there is always the "good days and bad days" evidence that confronts a defendant.

Implied Term of Mutual Trust & Confidence in Employment Contracts

In Australia over the last few years Courts have grappled with arguments of employees that in every employment contract there is an implied term of mutual trust and confidence. The English Courts have accepted that there is such a term implied by law in every employment relationship however there has been no definitive finding by an Australian Court that the term is implied in every employment relationship in Australia. However that has changed as a consequence of the decision in the Federal Court *in Barker v Commonwealth Bank of Australia*, where Justice Besinko has stepped up to the plate and knocked the ball out of the park and confirmed that the law in Australia implies a term of mutual trust and confidence in every employment contract unless it is expressly precluded by the employment contract.

Barker was an Executive Manager at the Commonwealth Bank and was made redundant in 2009. He had been employed by the Bank for over 20 years. In 2004 Barker executed a new contract of employment which included clauses relating to redundancy.

The Bank had a redeployment policy. Barker was told that the Bank would prefer to redeploy him to another position rather than terminate his employment and he was placed on gardening leave whilst the redeployment process was to take place. He was sent on gardening leave on the day he was told he would be made redundant.

Barker did not attend work during the redeployment process and the Bank did not redeploy Barker. In fact the Court ultimately found the Bank did little to attempt any deployment. Barker's employment was terminated and he was made redundant.

Barker subsequently commenced proceedings against the Bank alleging that the redeployment policy was incorporated into the terms of his employment and the Bank had breached the policy giving rise to an entitlement to damages. Alternatively, Barker argued that there was an implied term of mutual trust and confidence in the employment contract and where an employer failed to follow its employment policies, a breach of those policies was a breach of the implied term of mutual trust and confidence which would give rise to an entitlement to damages.

The employment contract that Barker signed in 2004 did not contain a specific term incorporating the Bank's policies into the terms of the employment contract.

The Bank's HR reference manual which included its policies contained a notation:

> *"The manual is not in any way incorporated as part of any industrial award or agreement entered into by the Bank, nor does it form any part of an employee's contract of employment."*

Courts in the past have determined that where an employment contract contains a provision that the employee agrees to abide by all company policies and practices currently in place and any alterations made to them and any new ones introduced, then the employment policies form part of the employment contract.

However, in this case there was no such term in the employment contract and Besinko J concluded that the redeployment policy was not incorporated in the terms of employment.

However, Besinko J took a bold step and confirmed that employment contracts contain an implied term of mutual trust and confidence and a breach of that term can sound in damages.

The Court noted that:

> *"It seems clear enough that in England there is an implied term of trust and confidence in a contract of employment so that an employer must not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. ... the position in Australia is not as clear."*

Besinko J noted four Justices of the High Court assumed that there was such a term in Koehler v Cerebos.

Besinko J noted that there were various judgments in Courts in Australia which had considered whether or not there was an implied term of mutual trust and confidence in an employment contract, however in many case it was not necessary for the Courts to reach a final determination on that issue. Besinko J noted there were also cases where single judges of Federal Court have expressed reservations about whether there is an implied term of mutual trust and confidence.

Besinko J concluded:

> *"If there is an implied term of mutual trust and confidence in contracts of employment, then it is a term implied by law, rather than because of the factual circumstances of a particular case. The term may be excluded by the express terms of the contract or it may be excluded because it would operate inconsistently with the express terms of the contract.*
>
> *In my opinion, I should hold that there is an implied term of mutual trust and confidence in the contract of employment between Mr Barker and the Bank. That would be consistent with the approach taken in England and the basis assumed by four Justices of the High Court in Koehler v Cerebos. Such a term does not interfere with the parties' freedom of contract as they are free to exclude the terms if they wish. The term only operates where a party does not have reasonable or proper cause for his or her conduct and the conduct is likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee."*

That is ground breaking law. The law in Australia implies a term of mutual trust and confidence in employment contracts.

Having found that there was an implied term of mutual trust and confidence, Besinko J then turned to consider whether a serious breach of the Bank's policies amounted to a breach of the implied term of mutual trust and confidence.

Besinko J noted that a finding of a breach of the implied term of mutual trust and confidence was not inconsistent with the conclusion that the Bank's policy was not a term of the contract. Besinko J noted that only a serious breach of the policy could give rise to a breach of the implied term. It was noted that the Bank issued the policies and had the right to amend and vary them. The policies were made available to employees and assisted employees in sorting out matters arising in relation to the employment relationship.

Besinko J noted that:

> *"Each party takes that the policies will be adhered to, subject to the fact that some of these statements are no more than aspiration or descriptive. I think that a serious breach of the redeployment policy by the Bank does give rise to a breach of the implied term of mutual trust and confidence. ... furthermore, a serious breach of the policy, such as to breach the implied term can give rise to a claim for damages."*

The Court found that the Bank did not take positive steps to fulfill its obligations under the redeployment policy. There was no consultation with Barker about the possibility of retraining or advice about redeployment options and no redeployment plan was developed or implemented.

Besinko J noted:

> *"I think that the significant circumstances in this case are that Mr Barker, an employee of the Bank for approximately 27 years, was advised that his position was redundant and asked to leave the Bank and return items associated with his employment on the very day he was given such advice. Furthermore, his access to the Bank's internet and email facilities were immediately withdrawn. In that context, although it was not incumbent on the Bank to redeploy Mr Barker, it was incumbent on it to take timely and meaningful steps to comply with its own policy. It did not do that. It did not contact Mr Barker because of an internal error. When it did contact him, it was very late in the piece. I accept that by 31 March 2009 it was reasonable for Mr Barker to consider that there were no reasonable prospects of redeployment. The Bank's almost total inactivity within a reasonable period meant that its redeployment policy was in serious breach and that it was in breach of the implied term of mutual trust and confidence."*

The Court then turned to the question of damages.

Barker argued that he would have retired somewhere between the age of 60 years and 65 years and suffered a past loss of income of $110,000 and a future loss of between $1.484 million and $1.833 million and suggested that the sums should be reduced by 30% for his residual earning capacity. The lower figure for future economic loss were based on a loss to age 60 years and the higher to 65 years.

The Court determined that Barker should receive 25% of the past economic loss claimed and 25% of future economic loss to the age of 60 years. This resulted was an award of $317,500. The Court noted that in reaching its determination it needed to factor in the early termination of employment clause in the contract and its possible effects as well as the possibility Barker would not have been deployed in any event.

Barker also claimed damages for hurt and distress and loss of reputation and aggravated damages for the manner of his dismissal.

Besinko J confirmed that Barker was not entitled to damages for the loss of reputation as a result of a breach of the implied term of mutual trust and confidence.

Besinko J also noted that any injury to Barker's reputation in the eyes of future employers would flow from the fact of the dismissal rather than the manner in which it was carried out. There was a right of dismissal which was exercised.

The Court rejected the claim for aggravated damages, noting that whilst the Bank's conduct was severe as it required Barker to leave the premises on the day he was told he was to be made redundant, the decision was not lacking in bona fides or improper or unjustifiable.

So there we have it.

A Court in Australia has determined that there is an implied term of mutual trust and confidence in an employment contract and that term is implied by law and not the factual circumstances of the case.

The Court noted that the implied term of mutual trust and confidence can be specifically excluded by the terms of the employment contract.

In addition, serious breaches of an employer's policy will amount to a breach of the implied term of mutual trust and confidence and can sound in damages.

Employers are now on notice that an employer's policies must be adhered to even where they are not incorporated into the terms of the employment contract. A failure to adhere to policies, particularly those relating to redundancy and redeployment can have serious consequences for an employer and give rise to an actionable claim for damages.

Breach of Internet Policy Justified Dismissal of Long Term Employee

The Full Bench of Fair Work Australia (FWA) has recently overturned a decision of Commissioner Ryan in a matter of Rushiti *v Australian Postal Corporation trading as Australia Post* (Australia Post).

Rushiti had been an employee of Australia Post for 12 years. He had an unblemished record of employment with Australia Post.

On 16 May 2011 Rushiti was summarily dismissed from his employment with Australia Post for serious misconduct for sending six emails from his Australia Post email account to a person (his sister-in-law) outside of Australia Post. The emails contained pornographic content.

It was conceded by Rushiti that the emails breached the internet policy of Australia Post. Australia Post conducted an inquiry in relation to Rushiti's conduct. The inquiry concluded the sending of six emails constituted breach of "Our Ethics" and amounted to serious and wilful misconduct.

Rushiti filed an application at Fair Work Australia claiming his termination was harsh, unjust or unreasonable in all the circumstances. Commissioner Ryan found that Rushiti's conduct in forwarding emails that breached the Australia Post's internet policy was a valid reason for his dismissal. However the Commissioner considered that summary dismissal of Rushiti was disproportionate in all the circumstances of Rushiti's employment and his misconduct. The Commissioner quoted Gilbert & Sullivan's "Mikado" where the Emperor of Japan sang "the punishment had to fit the crime".

The Commissioner found the termination of Rushiti's employment by Australia Post was harsh, unjust or unreasonable.

On appeal, the Full Bench found that as each email sent by Rushiti included at the bottom of the email Rushiti's position in Australia Post and Australia Post details, the sending of the emails with objectionable content had the potential to cause damage to Australia Post's public reputation, trusted brand name and corporate image as the emails could have been sent on to third persons by Rushiti's sister-in-law. If the emails had been sent on by Rushiti's sister-in-law, Rushiti's details and Australia Post details would have been attached to the forwarded emails.

The Full Bench weighed relevant matters to determine whether Rushiti's dismissal was harsh, unjust or unreasonable. The Full Bench noted in favour of Rushiti's dismissal being harsh, unjust or unreasonable:

- His length of service of some 12 years;
- His otherwise unblemished work records;
- His personal economic circumstances as he suffers from a physical workplace injury and has a limited skills set which are likely to make his obtaining alternative employment difficult;
- His remorse.

However the Full Bench was not persuaded that summary dismissal of Rushiti was harsh, unjust or unreasonable as:

- The pop up box which appeared on his computer screen whenever he turned on his computer warned that Australia Post may take disciplinary against an employee for misusing IT facilities;

- The training and information he had received about Australia Post's policies during his employment.

The Full Bench noted the Commissioner did not find there was a culture within Australia Post which tolerated and accepted the receiving and sending of inappropriate emails. Whilst it was apparent some other Australia Post employees, including some managers of Rushiti, were associated and knowingly engaged in the inappropriate use of Australia Post email system, the Full Bench did not consider that fact excuses or mitigates the conduct that Rushiti engaged in particularly in light of training, information and regular warnings given to him about inappropriate computer and email usage.

There was also an issue as to whether there had been unequal treatment of employees by Australia Post with respect to disciplinary action. The issue of differential treatment of employees in respect of termination of employment was considered by the Vice President Lawler in Sexton v The Pacific National (ACT) Pty Ltd. His Honour said:

> *"It is settled that the differential treatment of comparable cases can be a relevant matter under section 170CG (3) (e) to consider in determining whether a termination has been harsh, unjust or unreasonable".*
>
> *In my opinion the Commissioner should approach with caution the claim to differential treatment in other cases advanced as far as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of section 170CE (1) or in determining whether there has been a "fair go all round" within the meaning of section 170CA (2). In particular it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: The Commission must ensure that it is comparing "apples with apples". There must be sufficient evidence where the circumstances of the alleged comparable cases to enable a proper comparison to be made".*

Section 17 (CG) (3) (e) of the *Workplace Relations Act, 1996* (Cth) was relevantly similar to Section 387 (h) of the Fair Work Act.

The Full Bench concluded there was a valid reason for Rushiti's dismissal. The valid reason was notified to Rushiti and he had the opportunity given to him to respond. The fact that Rushiti received training and information in relation to inappropriate use of work email and regular computer pop up box advice regarding disciplinary action for using Australia Post's IT facilities in respect of pornographic images were all matters going against the conclusion that Rushiti's dismissal was harsh, unjust or unreasonable.

It was noted by the Full Bench when dealing with pornographic or inappropriate emails in the workplace, employers should be able to take firm action in dealing with employees who breach policies and the Court commented:

> *"As we indicated earlier, control of email traffic in inappropriate material is a matter of legitimate concern to employers. The Commissioner's approach might well be interpreted to mean that employees with long service ought be immune from termination of employment unless guilty of breaches of the policy involving large amounts of 'hard core' pornography. We think that an employer is entitled to take a firmer line than that. In this case the appellant went to great lengths to alert employees to the policy and to warn them that breaches would lead to dismissal. Despite this the employee breached the policy on a number of occasions in a substantial way...*

Those matters, including factors that constituted the valid reason for Rushiti's dismissal outweighed, in the Full Bench's opinion, matters to which that would favour a conclusion that dismissal was harsh, unjust or unreasonable. It was concluded that the sending of the 6 emails containing pornographic material looked at objectively was evidence of "flagrant and repeated breaches".

Lessons for employers from Rushiti

Rushiti had an unblemished employment record for 12 years with Australia Post. He had only sent 6 emails to his sister-in-law. Other employees, including managers, were also sending similar emails.

Employers should take comfort from the decision of the Full Bench in Rushiti when making decisions whether they can summarily terminate an employee where there has been flagrant and repeated if;

- they have in place reasonable policies in regard to safety, decency, and work processes;
- the policies are to protect the employer's reputation and its employees; and
- there has been proper education and training of the policies on a continuous basis.

Employers should take care in ensuring there is no discernible difference in the treatment of employees who have breached policies so as to avoid any risk of a discrimination claim or an adverse action claim.

Workers Compensation Roundup

Round One to WorkCover

The stakeholders in the NSW Workers Compensation Scheme have been anxiously awaiting the presidential decision in *Goudappel v ADCO Constructions Pty Limited & Anor (2012) NSW WCC PD 60.* This was the "test case" in relation to the interpretation of the 2012 workers compensation legislative amendments concerning claims for lump sum compensation.

The worker was employed as a manager and he suffered an injury when a bundle of steel fell from a forklift crushing his left foot and ankle on 17 April 2010. It was agreed that the worker made a claim for compensation on 19 April 2010 and on 14 July 2011 he was assessed by an orthopaedic surgeon with 6% whole person impairment (WPI). On 20 June 2012 (two days after the legislative amendments were passed) his solicitors made a claim for lump sum compensation pursuant to Section 66 of Workers Compensation Act 1987 ("WCA") for 6% WPI.

The amendments to the Workers Compensation Legislation provide that a worker who receives an injury which results in permanent impairment greater than 10% WPI is entitled to receive compensation from the worker's employer. Prior to the amendment, there was no impairment threshold limiting the entitlement of lump sum compensation under Section 66. Effectively, a worker could receive lump sum compensation for an assessment of 1% WPI and greater.

The contentious provision in the Workers Compensation Legislation Amendment Act 2012 ("the amending act") is the transitional provision found in clause 15 of Schedule 12. This clause provides that the amendment restricting lump sum claims to more than 10% WPI extends to a claim for compensation made on or after 19 June 2012 but not to a claim made before that date. The argument has been, that on one construction of the words "claims for compensation" in clause 15, the worker would only be entitled to bring a claim for compensation of permanent impairment after 19 June 2012 for less than 11% permanent impairment if he or she had a valid claim for lump sum compensation for permanent impairment before 19 June 2012.

On the alternative construction, a worker is entitled to bring a claim for compensation for permanent impairment after 19 June 2012 for less than 11% permanent impairment compensation if he or she had validly made a claim for any form of compensation in respect of the injury before 19 June 2012.

The resolution of whether it was the first or second construction would not only determine whether the worker in this matter was entitled to any lump sum compensation in respect of his injuries but would have wider application to many workers who have sustained compensable injuries before 19 June 2012 but for whatever reason have not made a claim for lump sum compensation for permanent impairment in respect of those injuries before 19 June 2012.

President Keating examined the original legislation, the amending legislation, the regulations, the objectives of the scheme and the Parliamentary speeches relevant to the introduction of the changes.

President Keating noted:

> *"A right to lump sum compensation is a right that only crystallises on a specific date in respect of a defined level of permanent impairment that has a dollar value attached to it. The foundation for it, the injury, exists but the claim for which clause 15 relates is the claim to which schedule 2 relates, namely, the claim for permanent loss of compensation. That claim must have crystallised and have been made in its terms, before 19 June 2012 to fall within the exception that clause 15 provides. As the worker had made no claim for permanent impairment compensation until after 19 June 2012, and as no such compensation was paid or payable to him before 19 June 2012, he has no entitlement to such compensation."*

Clause 15 forms part of an extensive range of amendments introduced to reduce the benefits payable to less seriously injured workers and in limited circumstances increased benefits payable to more seriously injured workers. In this context, the interpretation that the claim for permanent impairment compensation would have had to be made prior to 19 June 2012 is consistent with the overall purpose of the legislation that was introduced.

The worker submitted that a separate claim form is not required to initiate a claim for lump sum compensation and on that basis, providing a claim had been made generally prior to 19 June 2012, a separate claim for permanent impairment compensation could be made thereafter. However, President Keating noted there was merely a matter of form. In substance, a claim for lump sum compensation is not validly made until the requirements of the Workplace Injury Management Act 1998 and the particulars and supporting documents required by the guidelines were provided.

President Keating noted the worker's reliance on the Workplace Injury Management Act 1998 supported the proposition that the legislation operated so that a right of lump sum compensation is contingent upon a specific claim for such compensation rather than any claim for compensation.

Whilst it was noted the term "compensation" has a very wide meaning, the worker ignored the opening words of clause 15 wherein "an amendment made to Schedule 2" is a reference to the amendments to the WCA within a specific division of the WCA. That division was only concerned with compensation of non economic loss, that is, lump sum for compensation for permanent impairment.

The transitional regulations that were introduced on 1 October 2012 were commented on further by the President. He was of the view that the effect of clause 15 restricting the access to lump sum compensation did not depend on the introduction of those regulations.

This decision will restrict workers in bringing a claim for permanent impairment compensation less than 11% unless the claim has been specifically made prior to 19 June 2012. This decision is a huge win for the scheme overall. We estimate hundreds of claims are currently within the Workers Compensation Commission system awaiting the outcome of this decision and many more were pending. Although it is likely the worker will appeal the decision of President Keating to the Court of Appeal, the claims will now be dealt with by Arbitrators and pending claims may be abandoned however we expect that workers will strive to keep the claims on foot pending the outcome of any appeal.

The amendments to Section 66 have truly taken hold.

Insurers should now specifically cite this decision in disputing claims for whole person impairment less than 11% WPI if they had not been duly made prior to 19 June 2012. Further the reasoning adopted by President Keating in this decision can be applied to disputing claims for pain and suffering under Section 67 that not been duly made prior to 19 June 2012.

Reasonable and Effective Medical Treatment

Despite the recent changes to the Workers Compensation Legislation, which have removed the Workers Compensation Commission's' (WCC) power to deal with weekly compensation capacity disputes, the WCC retains its jurisdiction to determine disputes over proposed medical treatment. Such a dispute was determined by President Keating in *Sunrise T&D Pty Limited v Le (2012) NSW WCCPD 47*.

Mr Le suffered two injuries in the course of his employment. He injured his shoulder, neck and back. Mr Le's treating specialist recommended Mr Le undergo spinal surgery in the form of a posterior trans lumbar interbody fusion at L4/5 and L5/S1 with top dynamic stabilisation. It should be noted this is a reasonably unusual form of surgical treatment in Australia. Arbitrator Annemarie Nicholl originally determined that the surgery was reasonable and necessary and the employer appealed.

President Keating, following on from the Arbitrator's reasons, set out the tests that should be applied when determining whether proposed medical treatment is reasonable and necessary.

Firstly, the relevance and appropriateness of the surgery must be considered. The President commented that in order to be relevant and appropriate, the outcome of the surgery did not need to be certain as surgery outcome almost never are. Mr Le had already undergone decompressive surgery and a range of other unsuccessful treatment regimes. Provided that careful consideration had been given to the somewhat unusual surgery it was appropriate to accept the opinions of both a treating specialist and a medico-legal neurosurgeon.

The second test was whether there were any available alternatives to the proposed surgery. The only alternative open to Mr Le was to continue with his current treatment regime of physiotherapy and a range of medications. This treatment had not been particularly beneficial. The doctors had expressed concern that the amount of medication taken by Dr Le was also

causing reflux and other digestive tract problems.

In relation to relative costs, the third relevant criteria, it was noted the treatment would have been in the order of $30,000. Provided the medical treatment could produce results relative to the cost of the treatment, then it would be appropriate.

The fourth test was to examine the effectiveness of the proposed treatment. The President noted that doctors often express in percentage terms the likely effectiveness of the surgery. The employer had relied on opinion of Dr Bye that at least 30% of people who have that surgery may benefit from it but around 70% were still experiencing significant levels of disability two years post surgery. The President commented that effective treatment does not mean that all the symptoms would be relieved but provided research showed that there were positive outcomes for some of the patients it would be considered effective.

In this particular case, a final test was applied to look at the unusual nature of the surgery. Once again, provided the surgery had the prospect of alleviating the worker's pain the President noted it was correct to conclude it was reasonable to allow Mr Le to have the surgery, despite its unusual nature. Even though Mr Le would be unlikely to be in a position to return to his former employment, the surgery could lead to recovery sufficient for him to secure alternative work.

Ultimately President Keating agreed with the Arbitrator's conclusion that despite the unusual and expensive treatment, in the circumstances of the case, the worker should be allowed to undergo it. President Keating concluded that "whether any particular treatment is reasonably necessary as a result of an injury must be assessed on a case by case basis with the Commission exercising prudence, sound judgment and good sense. It is not solely a matter for statistical analysis, though that will often be relevant."

Utilising the same tests, Deputy President Kevin O'Grady examined whether physiotherapy, massage therapy or exercise therapy was reasonable and necessary medical treatment in *Ring v Eclectic Holdings Pty Limited*. Although the worker had 12% whole person impairment for spinal injuries, it was determined that such treatment was not appropriate. Simply, the treatment would not relieve the effects of her injury over time. The treatment would not prompt recovery and the cost of the treatment was not effective given the lack of recovery. Once again, the Commission whilst exercising the same prudence, sound judgment and good sense, determined a less favourable result for the worker.

CTP Roundup

Blameless Accidents

In 2006 the NSW Government introduced two pieces of legislation which significantly altered the Motor Accidents Compensation Scheme. The first was the *Motor Accidents Compensation Amendment Act 2006* which introduced the "blameless motor accident scheme" and the second was the *Motor Accidents (Lifetime Care and Support) Act 2006* which established a scheme to provide lifetime care and support for persons who suffered catastrophic injuries in motor vehicle accidents covered by the Act.

Whilst the two schemes have been operating for many years the operation of the blameless accident scheme has been clouded by some uncertainty as a consequence of decisions of the Court in *Axiac v Ingram* which had determined that even though a child was injured in a motor accident through no fault of the driver the fact that the child was found to have caused the accident in part by her negligence precluded her from succeeding in a claim under the blameless accident provisions.

Axiac's case has now been considered by the Court of Appeal which has confirmed that the blameless motor accident scheme is intended to apply to a claim of that nature.

Axiac commenced proceedings by her tutor, seeking damages for injuries sustained in a motor accident on 26 June 2008. She was 14 years of age at the time of the accident. Two family members also brought claims for psychiatric injury consequent to the accident.

Axiom lived in a rural area at Ebenezer. Axiac was returning home from school on the school bus when the school bus pulled up outside her home. The road at this point was a two lane road with double unbroken lines down the centre of the road. The bus pulled to a stop and three quarters of the bus remained on the bitumen surface of the road and one quarter on the dirt shoulder. A driver travelling in the same direction as the bus pulled up behind the bus as the driver could not pass without crossing the double unbroken lines.

The bus then pulled off after Axiac and her sister got off the bus. Axiac and her sister, aged 12, then darted between the back of the bus and the car which was stationary behind the bus. Axiac ran into the path of a vehicle travelling in the opposite direction of the bus.

The driver of the vehicle that struck Axiac had noticed the bus on rounding a curve in the road, slowed from a speed of 80 kmh to 40 kmh. His view of the girls was completely obstructed by the bus. There was insufficient time for the driver to brake when Axiac appeared from behind the bus.

It was conceded by all that the driver had not been negligent.

Section 7B of the Motor Accidents Compensation Act (the "Act") provides that a blameless motor accident is deemed to have been caused by the fault of the owner or driver of the motor vehicle in the use or operation of the vehicle.

Section 7A defines a blameless accident as a motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of a vehicle and not caused by the fault of any other person.

The issue for the Court was whether or not the contributory negligence of Axiac was fault of another person as contemplated by Section 7A of the definition with the end result that Axiac's accident was not a blameless accident. This was effectively the finding made by the trial judge who had determined that the accident was not a blameless accident.

However, even if this was a blameless accident there were provisions in the Motor Accident Compensation Act which came into play that could restrict the claim.

Section 7F of the Act provides that the blameless accident provisions do not prevent the reduction of damages by reason of contributory negligence of the injured person although Section 7P specifies special entitlements to damages which would not be reduced for contributory negligence. Those special entitlements were:

- hospital, medical and pharmaceutical expenses;
- rehabilitation expenses;
- respite care expenses;
- attendant care services expense.

If Axiac could establish her entitlement to a claim for a blameless accident, she could recover damages for non economic loss and future economic loss subject to a reduction for contributory negligence, however that be calculated, as well as a full measure of the special entitlements.

Axiac's injuries were catastrophic and she could have recovered the same special entitlements under the Lifetime Care and Support Scheme, however under that scheme she would have no entitlement to non economic loss or future economic loss.

Essentially, Axiac's claim was pursued for an award of damages for non economic loss and future economic loss.

In the unanimous judgment of Tobias AJA, with whom Sackville AJA and Beazley JA agreed, the Court of Appeal concluded that Axiac's claim was a blameless accident, and that the contributory negligence of the injured person does not preclude the operation of the blameless accident provisions. More importantly however The Court of Appeal determined that for the purposes of the blameless accident provisions contributory negligence must be assessed in a different way to a common law assessment of contributory negligence when determining a reduction of damages for contributory negligence in a blameless accident claim.

Tobias AJA noted that it was necessary to consider the second reading speech in relation to the introduction of the legislative schemes to glean the intent of Parliament when the legislation was introduced. The Court of Appeal noted there were difficulties in interpreting the language of the legislation as a consequence of apparent inconsistencies. In interpreting the legislation the Court adopted what is commonly known as "the Project Blue Sky principles" which provides that where conflict appears to arise in the language of particular provisions, that conflict must be alleviated, as far as possible, by adjusting the meaning of the competing provisions to give that result which will best give effect to the purpose and language of the provisions in question. The Court will construe provisions on the basis they are intended to give effect to harmonious goals.

Tobias AJA concluded that:

> *"Fault of any other person refers only to the tortious conduct of another person and cannot include the person whose "fault" in the form of non tortious contributory negligence is excluded from the definition of blameless accident."*

Tobias AJA noted that contributory negligence was not "fault of any other person" and contributory negligence of a child would not take an accident that would otherwise be a blameless accident outside the operation of the scheme.

However, the Court of Appeal's analysis of the effect of contributory negligence on blameless accident damages was very much in favour of Axiac.

Tobias AJA noted that Axiac argued that her contributory negligence should be no more than 33%, whereas Ingram (the not at fault driver) argued that the contributory negligence was 100%.

The Court of Appeal determined that consideration of contributory negligence in blameless accident cases falls into a different category to an assessment at common law. Tobias AJA noted that:

> *"The concept of "contributory negligence" in s.7F of the Act has to be applied in a different manner to the usual comparative analysis of responsibility undertaken in personal injury cases. This can be done consistently with the objectives of the legislation by enquiring how far the plaintiff has departed from the standard of care he or she is required to observe in the interests of his or her own safety"*

When considering the contributory negligence in this case, Tobias AJA noted:

> *"In my opinion the degree of the first appellant's (Axiom's) contributory negligence can, in a case such as the present, only be assessed on the basis of a value judgment as to the extent to which her conduct failed to conform to the standard of care expected of a 14 year old girl in her position. Although I accept the primary judge's findings as to the school and parental admonition that upon alighting from a school bus, no attempt should be made to cross the road until the bus drives off and it can be ascertained that there is no oncoming traffic, nevertheless, even looked at objectively, one cannot postulate that a 14 year old girl, no doubt keen to get home, would in every case adhere to the admonition referred to."*

The Court of Appeal noted there was no doubt that a determination of an appropriate percentage of contributory negligence should reduce the damages and the determination involved an evaluative judgment on which minds may differ. In this case the Court of Appeal determined that a 50% reduction for contributory negligence was appropriate. The Court of Appeal noted that it was inappropriate to find that Axiac was the sole cause of the accident and her injuries as that would have the effect of finding that in a blameless motor accident case where an injured person has been a contributory negligent, there will always be a finding of 100% contributory negligence. The Court of Appeal noted that could not have been the intended result for the scheme.

Accordingly, Axiac will now benefit from an award of damages of non economic loss and economic loss subject to a reduction of 50% for contributory negligence. In addition, she will be entitled to the special entitlements for children under the age of 16 years in blameless accidents which are:

- hospital, medical and pharmaceutical expenses;
- rehabilitation expenses;
- respite care expenses;
- attendant care services expense.

The Court of Appeal has removed the uncertainty that existed in relation to the blameless accident scheme. Children who are injured in blameless accidents will be entitled to recover damages for non economic loss and future economic loss subject to a reduction for contributory negligence although as can be seen from the decision in Axiac's case, the deduction will not necessarily be as large as the reduction that would have applied if the claim was not a blameless accident claim.

CTP Case Notes

Service and Construction of Section 110 Notices

CTP practitioners will recall Davis v Moss (unreported, August 2011), in which Charteris J decided that a notice issued pursuant to section 110 is not effective unless served on the claimant personally.

This requirement for personal service was revisited by Nielsen J on 17 October 2012 in Kalazich v Yang.

In Kalazich's case, an insurer's claims officer served a section 110 notice on a claimant's solicitor. The claimant relied on David v Moss and argued that service was ineffective, so the prescribed period did not operate.

The insurer observed that whilst the claims handing guidelines stipulate circumstances permitting direct contact with a represented claimant; section 110 does not enliven such a circumstance. His Honour concluded that a section 110 notice does not require personal service.

A further issue arose as to construction of the notice.

The notice purported to oblige the claimant to begin proceedings within 3 months of its issuance; the section requires compliance by a claimant within 3 months of the notice's receipt. His Honour found that this was a fatal flaw in the notice and he permitted the claim to proceed.

The existence of conflicting District Court judgments warrants a prudent approach to service of section 110 notices. Service should comply with one of 2 courses: service on the claimant's solicitor and on the claimant by process server (in circumstances where timely certainty is desired); alternatively, service on the claimant's solicitor of a notice that incorporates an express assumption that personal service will be assumed waived unless the solicitor advises otherwise within 14 days.

It is essential that section 110 notices mirror the language of the section: the 3 month period must run from date of receipt of the notice, not from the date it is issued.

MAS – more Court activity. Mitrovic v MAA [2012] NSWSC 1231

On 15 October 2012 Harrison AsJ determined that a MAS Proper Officer erred in not allowing a MAS further assessment pursuant to a section 62 application.

The plaintiff underwent MAS assessments for brain injury and psychological injury. The former assessment identified no TBI parameters and no diagnosis. Assessment of psychological injury diagnosed a condition but found that it was unrelated to the accident; the Assessor therefore certified that there was no assessable impairment.

The plaintiff lodged a section 62 application in respect of both assessments, relying on additional relevant information and clinical deterioration. The application rested on treating records created after the assessments.

The Proper Officer rejected the application on several grounds. Harrison AsJ opined that these grounds demonstrated vitiating error. The grounds and findings can be summarised succinctly.

- The Proper Officer observed that the additional evidence did not include any WPI ratings, therefore it was not possible to determine whether it could have a material effect on the assessments.

  This was an error: reliance on a failure to provide a WPI constituted "an irrelevant consideration". It was not necessary to ask whether the new evidence furnished impairment ratings that differed from prior ratings, merely whether it might bear an effect on the assessment of impairment.

- The Proper Officer opined that as the new evidence dealt with severity only and did not speak to causation (which had been assessed in a manner contrary to the claim), it could not affect the outcome of the assessments (irrespective of whether the condition had deteriorated).

  The plaintiff responded that the Proper Officer, by adopting an existing premise concerning causation, failed to make her own assessment of the new material and failed to exercise her power. The new evidence should not be assessed by reference to earlier assessments, which might be wrong or redundant [53]. The Court agreed and concluded that the Proper Officer "placed undue weight on the previous assessment, rather than considering the new material" [64]; this constituted a failure to exercise her jurisdiction adequately.

As a further issue, the defendant observed that the plaintiff's Form 4API cited 'degree of impairment' but failed to nominate 'causation' as issues in dispute. The Court noted that this was not relevant: it was obvious to the defendant that causation was disputed.

Causation – MAS versus court: whose call is it? De Gelder v Rodger [2012] NSWDC 191

MAS Assessors are obliged to decide whether injuries presented to them are caused by the subject accident. Self-evidently, they reach their decision via application of medical, not legal, methods. Their findings then bind a decision maker to the extent that a section 131 certificate operates.

At issue in *De Gelder v Rodger [2012] NSWDC 191* was whether crush fractures in the plaintiff's osteoporotic spine were caused by the accident. MAS Assessors concluded that they were not.

At the outset of the hearing the plaintiff's representatives asserted that the MAS decision was inadequate and foreshadowed an intention to ask Levy DCJ to return the matter to MAS. They opined that a decision as to causation "can only be reasonably arrived at after weighing the relevant evidence in order to reach a reasoned conclusion on the causation issue, on the balance of probabilities, and that this should await a consideration of the overall evidence in the proceedings." [13]

This is not the process adopted in a MAS assessment. The plaintiff therefore argued that the MAS process was inherently incapable of adequately assessing causation.

After 12 days of evidence his Honour adopted the course pressed by the plaintiff. He decided that the evidence "has led me to the interim conclusion that on the required standard of proof on the evidence adduced, on the balance of probabilities, the plaintiff has overwhelmingly proven that his thoracic compression fractures were caused by the subject accident. I conclude that it would be anomalous for that position to remain unrecognised by the MAS assessment process…" [21]

The hearing did not gather 'new evidence' – in the sense that section 62 normally construes that term. It allowed the evidence that had been placed before MAS to be ventilated in a different manner – most notably incorporating oral evidence from doctors.

His Honour applied litigation procedures and legal techniques to a relative weighing of the evidence. The MAS practitioner relied on clinical procedures and his medical training. Confronted with similar documentary evidence, but applying different approaches, the court and the MAS Assessor reached differing conclusions.

This case reveals the tension that can arise between analysis of causation by a MAS Assessor and the approach that could be adopted (if opportunity arises) by a court.

The next step in the matter will be interesting: if the same MAS Assessor re-assesses the plaintiff, equipped with similar documentary evidence, will he conclude that the court process has elicited evidence that was not presented previously? Or will the Assessor simply feel that he and the court reached different views concerning the same evidence? If the latter scenario prevails, can the clinical assessment remain self-contained and independent?

Mortgagee Loses Priority to the ATO

The recent decision of the Full Federal Court in *Commissioner of Taxation v Park [2012] FAFC 122* has significant ramifications for real property mortgagees, in particular a decision to allow a mortgaged property to be sold could convert the mortgagee's position to that of an unsecured creditor.

In Park's case the mortgagor owned a property subject to two registered mortgages, the first to National Australia Bank and the second to a company called Instyle Developments Pty Limited ("Instyle"). The property was sold in January 2010 and the total owing under both mortgages exceeded the sale price. Between the time of exchange of contracts and settlement, the Australian Taxation Office served a Garnishee Notice under Section 260-5 of the Taxation Administration Act 1953 (Cth). The notice required the purchasers to pay all moneys due from the purchaser to the taxpayer (i.e. the purchase price) to the Commissioner of Taxation to repay the mortgagor's tax debt and to pay that money in priority to any other payment due in relation to the purchase of the land.

Settlement did not proceed due to Instyle's refusal to discharge its mortgage and the Tax Office's insistence on receiving a cheque at settlement for the unpaid tax. In the end, a common procedure was followed whereby the money in dispute was paid into a solicitor's trust account pending resolution of who, as between Instyle and the ATO, was entitled to the money. Instyle agreed to discharge its mortgage to enable settlement to occur.

Proceedings were then commenced in the Federal Magistrate's Court to determine the issue and the disputed sum was paid into Court by consent while the proceedings were heard. At first instance the Federal Magistrate found that the purchase monies were not owed to the taxpayer and therefore there were no monies to which the Commissioner's Notice could attach. In reaching the decision the Federal Magistrate's Court compared the position of a mortgagee to that of a floating charge holder in a situation where a floating charge crystallises and the debtor is then required to pay the charge holder directly and the debt is no longer payable to the original creditor. In reality, the Court held that Instyle's mortgage over the property meant that there was never really any money owing to the taxpayer.

The Commissioner appealed and argued that the purchasers did not owe any money to the mortgagees but monies were only owed to the mortgagor as vendor and the mortgagees could claim no proprietary interest in the purchase money until it reached the hands of the mortgagor. The ATO's argument was that because the Garnishee Notice operated upon the purchase money held in the hands of the purchaser, the Notice was on its form was able to intercept the money sought by the Commissioner before it could reach the mortgagor and be subject to a claim by the mortgagee.

In response Instyle argued that that if the ATO were to succeed in this claim this would overturn the position with respect to priorities on securities in that a secured creditors claim would be defeated by an unsecured creditor in that a tax debt which is relatively unknown would then usurp the mortgagee. It was argued Section 260-5 of the Taxation Administration Act 1953 (Cth) should not be construed in the way that would deprive mortgages of their security. The majority of the Full Federal Court rejected this argument. In reaching this decision the Court held two to one that the security held by Instyle was a security over the property itself and not security over the proceeds of sale from the secured property. The minority judge rejected that view, taking the view that the mortgagee's interests in land was immediately converted as an interest on proceeds of the sale and therefore there was no time at which the mortgagor tax payer was beneficially entitled to the proceeds.

The majority decision however held that nothing the ATO did undermined Instyle's mortgage. Instyle could always have refused to discharge it and Instyle could have outmanoeuvred the ATO by taking possession of the property and selling it as mortgagee. In that case the monies would never be payable to the taxpayer. The decision by Instyle to agree to release its mortgage was fatal to its claim.

The decision does not mean that ATO garnishee notices will automatically defeat registered second mortgagees however the decision is likely to end the once-common practice by secured creditors of permitting settlement of a property to occur by releasing their mortgage (or caveat) on the basis that disputed funds are paid into a trust account pending determination of the dispute. The decision is also likely to lead to closer scrutiny by the tax office of securities over property. Lenders should therefore review the terms of those securities to ensure the secured property includes proceeds derived by the borrower from the sale of secured property as well as the secured property itself.

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