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.

Duty of Care Owed By Builders To Owners Corporations Of Commercial Property

Owners corporations of commercial buildings may now bring negligence actions claiming pure economic loss against builders in respect of defective building works– an action thought to be limited to subsequent purchasers of residential buildings - as a result of the recent decision of the NSW Court of Appeal in *The Owners – Strata Plan No. 61288 v Brookfield Australia Investments Ltd [2013] NSWCA 317.*

In 1995, the High Court in *Bryan v Maloney [1995] HCA 17*, found that a subsequent owner of residential property was owed a duty of care by the builder of the property where:

- a duty was owed to the original owner in the first instance;
- there is a close proximity between the subsequent owner and the professional in that the subsequent owner is reliant on the professional to perform their duty with care;
- the owner is unable to directly influence the outcome of professional's involvement in the project and therefore mitigate or reduce the risk of the loss, and
- the loss was reasonably foreseeable.

The circumstances in Maloney were unique to residential projects and the question remained whether the same reasoning would apply in commercial property situations where all parties would be considered more capable of bearing or confining risk. The High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515* refused to extend the duty of care in that case to owners of a commercial property.

However the NSW Court of Appeal has stepped up to the plate and has hit a home run for owner corporations of commercial properties confirming that where an owners corporation is sufficiently vulnerable it may bring itself within the principles established in *Bryan v Maloney*.

In NSW, the risk for the subsequent owner of a residential property of not being able to recover for loss due to a latent defect, is largely resolved through the imposition of implied statutory warranties in every residential building contract for residential building work *(Home Building Act 1989 (NSW)* ("the Act") section 18B). This is due to the fact that Section 18C of the Act provides that the implied statutory warranties are available to subsequent owners as if they were contracting with the builder.

The subsequent owner is therefore able to recover from the builder all of the loss resulting from structural defects for up to six years. If the builder has died, disappeared or is insolvent the subsequent owner is able to make a claim on the statutory home warranty insurance scheme for rectification of the defective building work.

However the recovery of loss by an owners corporation of commercial premises was thought to be more problematic as statutory warranties are not implied in building contracts for commercial properties.

Or at least that was the case until the decision in *The Owners – Strata Plan No. 61288 v Brookfield Australia Investments*.

In this case a developer contracted with Multiplex Constructions Pty Ltd, now known as

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Brookfield Australia Investments Ltd, to build a large 22 storey building with floor 10 to 22 being residential apartments and the lower floors being serviced apartments including some ground floor businesses such as a restaurant. The lower floors were found to be commercial premises for the purposes of the Act.

Two strata plans came into existence, one for the residential apartments and one for the lower floor commercial premises. Defects were found in the building and proceedings were commenced by both strata plans. The owners of the residential strata plan eventually settled with the builder however the action involving the commercial strata went to hearing where the primary judge found the builder did not owe a duty of care to the subsequent owners due to the fact:

- the building contract was negotiated at arm's length between parties of equal standing who were able to bargain for and obtain the benefits they seek,
- the NSW legislature did not extend the benefit of the statutory warranties under the Act to commercial properties which was as a deliberate choice by the legislature. In essence the court was being asked to go where legislature had not gone and it should not do so, and
- there was no authority which extended to such a case and the court was being asked to extend the law.

An appeal followed and ultimately the Court of Appeal overturned the primary judge's determination on the basis that:

- there was no provision in the contract to extinguish the general law duty of care in negligence,
- there was no bright line between residential buildings and other buildings in relation to extension of negligence, and
- authorities are available which show an extension of a duty of care to subsequent owners.

In other words the Court of Appeal found that despite the fact the parties were of equal standing there was no contractual provision limiting an action for negligence. If a party was able to show that a duty of care was owed to the original owner then a subsequent owner such as an owners corporation that was vulnerable was also owed a duty of care and entitled to recover damages for pure economic loss.

The NSW Court of Appeal has determined that there is no line between residential and commercial building works and case law in Australia has evolved to show that the predominant issue to be resolved to determine whether a builder owes a duty of care to a subsequent owner of property is the extent of the vulnerability of the subsequent owner and whether they had the opportunity or capacity to address that vulnerability at the time of the construction or purchase of the property.

In this case it was found that due to the fact the strata plan did not come into existence until the construction was finished, and the defects were latent, the strata plan was vulnerable to the cost of rectifying the defects and had no way to protect itself until the defects were manifest. Further, it was foreseeable that the strata plan would be reliant on the builder to construct a building free of defects and the builder was aware of this reliance.

However what is that duty?

As Basten JA noted:

> *"On the basis that the builder did owe a duty of care to the developer and to the body corporate in which the common property was vested on registration of the strata plan, the next question is the extent of that liability. The appellant (the owners corporation) not being party to the contract between the builder and the developer, it would not be correct to impose a tortious duty equivalent to the contractual obligations of the builder to the developer. For example, if the developer contracted with the builder to use particular materials or materials of a particular durability and quality, it does not follow that the duty of care imposed by law would extend to such matters. On the view adopted by La Forest J in Winnipeg Condominium, liability extends to defects which are "dangerous" and which therefore reasonably require rectification "to protect the bodily integrity and property interests of the inhabitants of the building". Liability for pure economic loss is seen as a corollary to the potential liability of a builder for physical damage to persons or property. Once the latter liability is recognised, it is appropriate to accept liability for economic loss, being the cost of steps reasonably taken to mitigate the risk of physical damage or personal injury.*
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> *The scope of liability so identified would extend to defective cladding or defects in other parts of the common property which could give rise to personal injury. It would also cover the expense of rectifying defects which could give rise to damage to property, including the property of the lot owners. Thus, if window frames are defective and tend to leak, or there are problems with the plumbing or other services, which may give rise to water damage within the property, such defects would fall within the scope of liability. On this approach, the liability of the builder in tort to the appellant (owners corporation) would include the kind of "special faults" identified in the contract ..., but might extend further. Thus, if a leaking*

window was liable to cause damage to carpets or other floor coverings, there is no reason to exclude such a defect from the scope of liability."

While each case will turn on its facts this judgment would appear to open the door for an increase in claims against construction industry professionals including builders, engineers, surveyors, certifiers and architects especially in the unique circumstances commercial strata plans provide.

Construction Site Accidents - The Duty of Care Owed to Experienced Tradesmen

The NSW Court of Appeal in *Minogue v Rudd* has delivered a judgment which highlights that the experience of a tradesmen must be taken into account when considering the duty of care owed by a builder to tradesman employed by contractors involved in a construction project and in some situations the duty owed is quite limited.

Minogue was an Irish carpenter on a working holiday in Australia, working on a building site. He fell three metres through the joists of an unfinished kitchen floor to the concrete floor below and was severely injured.

Minogue commenced proceedings claiming damages from Rudd, the builder and Tilden, the building supervisor and DMW Carpentry Services, a subcontractor which had engaged Minogue to perform carpentry work.

Work had progressed on the site to the extent that wooden joists had been installed on the ground floor including in the proposed kitchen area. There were timber noggins between the joists. The noggins acted as struts between the joists. However, there were no noggins in place between two joists near the middle of the room. There was no floor covering the joists as its installation was waiting on a decision to be made about air conditioning ducts.

Minogue was walking on the joists and he fell through the floor.

At first instance the primary judge rejected Minogue's claim, finding in favour of each of the defendants.

The primary judge considered it was a matter of speculation as to why Minogue fell. He may have slipped, tripped, fainted or simply missed his footing.

The Court did not accept the hypothesis that he lost his balance on a loose joist which rotated due to the absence of noggins. The primary judge concluded that possibility was no more probable than any other possibility and in those circumstances the case had not been made out.

The primary judge also noted that Minogue was a qualified carpenter who was not engaged to do any work associated with the construction of the kitchen area. The kitchen area had been isolated by hazard tape and a plywood barricade preventing access to the area and this was sufficient to discharge the duty owed to Minogue.

Minogue appealed. Minogue's case on appeal was that a noggin should have been in place which would have prevented the joist from rotating.

MacFarlan JA, in the leading judgment of the Court of Appeal, agreed with the trial judge's conclusions that there was insufficient evidence to demonstrate one cause of the accident was any more probable than another. The evidence did not reveal any likely cause of the accident, much less a realistic one to which the absent noggin had any causal relationship. There were conflicting inferences of equal degrees of probability and a choice between them was mere conjecture. However, the Court of Appeal also considered whether or not the builder had been negligent in not installing a temporary kitchen floor or barricading the area to prevent entry. MacFarlan JA noted that a tradesperson has a certain level of experience about the risks on a construction site and that bears upon the assessment of any claim brought by an injured tradesman.

MacFarlan JA noted:

"Tradespeople, especially those involved in building construction, can be expected to be able to safely traverse incomplete building sites. Unsurprisingly the appellant (Minogue) said in evidence that as a qualified tradesperson he was used to walking in partially constructed sites. All that was needed so far as he was concerned was notice that the works were incomplete. He undoubtedly had that."

MacFarlan JA noted in a decision of *Papatonakis v Australian Telecommunications Commission* the High Court observed:

"Where an independent contractor carrying on a particular trade is engaged by an occupier to work on the premises, the occupier is not under a duty to give warning of a defect in the premises if tradesmen of that class are accustomed to meeting and safeguarding themselves against defects of that kind."

MacFarlan JA noted a fortiori of this in this case was there were no defects as such and the building works were simply incomplete in an obvious fashion.

MacFarlan JA noted that the position may be different where there is a less obvious deficiency which may cause potential instability underfoot but here the evidence did not stack up to demonstrate the noggin was the cause of any instability. MacFarlan JA concluded that Rudd did not breach the duty of care he owed by not installing a temporary floor in the kitchen area. However, it was noted that did not mean that a duty of care could not be owed to some other person, such as a child. The duty would be different if a child was involved and the duty may extend to requiring a barrier or floor to be installed to ensure that a child could not enter the area and fall.

MacFarlan JA confirmed that any alleged breach of duty must be considered in the context of the particular plaintiff, bearing in mind what the defendant knew or should have known about the class of persons of which the plaintiff formed part.

Macfarlan JA noted:

"For someone such as the appellant (Minogue) the risk of falling whilst traversing the joists in the kitchen area was an obvious one which he could have been expected to handle. No question arises of a need for a warning to the appellant of the existence of the unfloored area as it was obvious to him; he plainly did not turn a corner and encounter it unexpectedly: he had traversed a significant part of it before he fell. Furthermore, no question of a less than obvious danger resulting from the absence of the subject noggin arises when considering the present question because, for reasons I have given, the appellant has not demonstrated that the absent noggin had any causative relevance to his accident."

At the end of the day the Court of Appeal concluded Minogue's claim must fail.

When considering what duty of care is owed by a builder to a tradesman or contractor or a tradesman employed by a contractor it is necessary to consider the experience the tradesman has to to risks on a construction site. When considering whether or not there is a breach of duty it is necessary to consider the particular plaintiff, bearing in mind what the defendant knows about that plaintiff or the class of persons of which the plaintiff forms, one of a number of experienced tradesmen on site.

Here the Court of Appeal concluded that there was no need to barricade off a risk that was obvious to a tradesman. The case also serves as a reminder that it is incumbent on a plaintiff to establish the facts necessary to support their case including causation. The plaintiff must lead evidence which establishes the cause of the accident and the competing inferences of equal probability will not permit the Court to make a finding as to causation. In this case the evidence did not stack up.

Obvious Risks & Dangerous Recreational Activities

In NSW the *Civil Liability Act 2002("Act")* provides that a defendant is not liable in negligence for harm suffered by a person as a result of the materialisation of an obvious risk of a dangerous recreational activity which was engaged in by that person. A recreational activity includes any pursuit or activity engaged in for enjoyment, relaxation or leisure.

A dangerous recreational activity is one which involves a significant risk of physical harm.

The Act also provides that an obvious risk to a person who suffers harm is a risk that in the circumstances would have been obvious to a reasonable person in the position of that person.

Obvious risks include risks that are patent, or a matter of common knowledge, including a risk of something occurring even though it has a low probability of occurring.

Local Councils are often targets for claims where persons are injured whilst they are engaged in leisure pursuits. Where Councils can establish that a person is injured as a consequence of the materialisation of an obvious risk where person was engaged in a dangerous recreational activity, no liability will attach to the Council by virtue of Section 5L of the Act.

Just how that all works can be seen in the recent decision of the NSW Court of Appeal in *Streller v Albury City Council. Streller's* case is an example of the effectiveness of section 5L of the Civil Liability Act and demonstrates that personal responsibility is a fact of life where a person engages in a dangerous recreational activity and those that are injured cannot always look for someone else to blame.

Streller was injured on Australia Day in 2008. He was at Oddies Creek Park which adjoined the banks of the Murray River. The park was located in the outskirts of Albury City. There was a tree in the park and a branch was overhanging the Murray River with a rope attached to it. Streller used the rope and attempted a back flip, using the rope as he swung into the river. As Streller swung out on the rope he moved in an arc over the river and released his grip and performed a 360 degree back flip in the air, landing feet first into the water. However he fell awkwardly, striking the riverbed and he suffered a C7 quadriplegia injury.

On the day of the accident the Local Council had arranged events in a nearby park and there were a lot of people in the area.

Streller brought a claim against the Local Council, alleging the Council had been negligent in its management of the park. The tree could be accessed from the river bank in the park which was controlled by the Council. The Council was aware that ropes were attached to trees in the park and had had a method of routine inspections of rope swings and structures in some recreational activities, removing rope swings when detected.

Essentially Streller argued that the rope swing should have been removed or if it was not removed, the Council ought to have supervised the swing or ought to have ensured that the water underneath the rope was deep enough to allow people to use the rope swing.

The primary judge ultimately held that the Council did not owe a duty of care of the nature alleged. There was no doubt the Council owed a duty but not a duty to act as Streller suggested it should act.

The primary judge concluded that there was an obvious risk of harm, there was no duty on the part of the Council to warn of that risk and that the injury was the result of the materialisation of an obvious risk of a dangerous recreational activity. Accordingly, the Council was not liable and Section 5L of the Civil Liability Act 2002 was an effective defence to the claim.

Streller appealed.

The Court of Appeal noted that it was not in issue that Streller was engaged in a recreational activity but he did challenge that the risk of harm was obvious.

Meagher JA in the leading judgment in the Court of Appeal, noted that the adjective "obvious" describes something which is clearly apparent or easily recognised or understood and that is the meaning which the Court has held is relevant when considering the Civil Liability Act 2002.

Meagher JA confirmed that the question of whether the risk of harm is obvious is to be determined by reference to the person that is injured. Meagher JA noted:

> *"Thus the subject of the forward looking enquiry called for by use of the language 'would have been obvious' is the risk of harm suffered by the particular plaintiff to whose claim the part applies. The reference to the 'reasonable person' posits an objective standard, namely the hypothetical real person. That person is assumed to be in the circumstances in which the harm was in fact suffered and had the knowledge and experience of the person who suffered it."*

Meagher JA noted that the risk of injury from diving or landing head first in water which is or could be too shallow would certainly be an obvious one to an adult exercising ordinary common sense and judgment. Meagher JA noted it would also be obvious to an optimistic but not foolhardy and athletic 16 year old with the life experience of Streller.

It was argued that a reasonable person of Streller's age would have concluded that the water was deep enough to attempt the back flip manoeuvre. Meagher JA noted that the circumstances must be addressed through the eyes of a reasonable 16 year old, the age that Streller was. At the end of the day Meagher JA concluded that the risk was an obvious one to a reasonable person in Streller's position.

Meagher JA also confirmed that when considering whether or not there is a dangerous recreational activity, it is necessary to

consider whether or not a risk of physical harm is significant and this requires an objective assessment of the activity, taking into account the probability of the harm coming to pass and the seriousness of the harm.

Here, the risk of injury was more than trivial, the risk of injury was real and present and the circumstances were potentially catastrophic.

The Court of Appeal confirmed that the activity was a dangerous activity and there was a significant risk of harm. Meagher JA also went on to consider whether or not the Council had acted negligently irrespective of the recreational activity defence.

Meagher JA noted that Streller had not shown that a reasonable person in the Council's position would have taken the precautions of posting a guard to prevent use of the rope on Australia Day.

At the end of the day the Court of Appeal concluded that Streller had not established breach of duty of care and that the defence in section 5L of the Civil Liability Act had been made out.

In this case the obvious risk that resulted in the injury was one that made the activity in which Streller engaged a dangerous activity.

Streller was injured as a consequence of the materialisation of that obvious risk.

Section 5L of the *Civil Liability Act 2002* ensured that the Council bore no liability for the loss as it was not liable in negligence for the materialisation of an obvious risk of a dangerous recreational activity. In addition the Council had not been negligent. Personal responsibility is alive and well and Local Councils can certainly rest a little easier as a consequence of Section 5L of the *Civil Liability Act 2002*.

Cycling Not A Dangerous Recreational Activity

In contrast to the decision in Streller the Supreme Court of NSW has recently determined that cycling on a road is not a dangerous recreational activity.

Alex Simmons sustained injury as a consequence of an accident that occurred at about 6.15 am on 11 April 2007 whilst he was riding his bicycle through a car park that was adjacent to the St George Sailing Club. Simmons struck the boom gate that had been closed across the entrance. As a consequence he sustained injuries which ultimately led to a below knee amputation of the left leg. Simmons sued Rockdale City Council and the St George Sailing Club.

Both the Council and the Sailing Club denied that they were liable for Simmons' injuries.

Quantum was agreed at $1,160,000 subject to apportionment and contributory negligence.

Simmons was 43 years of age at the time of the accident. For many years prior to the accident and in particular since 1997, Simmons had been a competitive cyclist and had participated in a number of cycling championships. Two weeks prior to the incident Simmons had competed in the National Masters Track Cycling Championships in Melbourne and also ran cycle safety sessions for new members of the Sydney Cycling Club.

On the day of the accident Simmons was on an early morning training ride and prior to the accident had been cycling in a general eastbound direction along Riverside Drive. The final section of Riverside Drive that is open to traffic extends past the front of the Club and the car park. The car park that is adjacent to the St George Sailing Club had a boom gate and other structures that were constructed in 2004 so as to restrict access following problems with "hooning" in the car park at night. The boom gate in question was a tubular steel gate that was about 7.5 metres long and was painted white. Its hinges were on a steel post on the eastern side of the intersection of Riverside Drive and Fraters Avenue. There was a length of red and white self adhesive reflective material on the horizontal cylindrical rail and after the accident a diagonal striped marker board was added.

After the boom gate was installed in 2004 the Council and the Club communicated in relation to the daily closing and opening times of the boom gate. Council ultimately agreed that the sailing club should have a discretion in relation to the closing and opening hours of the boom gate. There was no formal arrangement between the Council and the Club for manning and operation of the boom gate, nor a formal resolution by Council delegating specific responsibilities in relation to operation of the

boom gate on the Club. The Club however had assumed the task of operating the boom gate.

This was not enough in the eyes of the Court to result in liability on the part of the Sailing Club.

The Council was not so lucky.

Simmons' evidence was to the effect that he had ridden the same route literally hundreds of times over the previous decade and it was constantly used by cyclists. All he saw was a horizontal white line which he did not recognise was a closed obstruction. According to Simmons from the view of an approaching cyclist, the boom gate looked the same closed as when it was open. Simmons did not realise there was an obstruction until he was about to hit it.

A number of other members of the public who regularly use the cycle route gave evidence. One witness, John Crouchley, who had also been a competitive cyclist, had been using the same route for 25 years, several days a week and his evidence was to the effect that the boom gate had always been open and he had in fact only noticed the gate after the accident involving the incident involving Simmons.

The Court found that after the boom gate was fitted in 2004 a "No Exit" sign was placed near the boom gate, however the practice of cyclists continuing along the route continued which was well known to the Council. Further, on the evidence, the "No Exit" signs were in fact directed at motorists who were required to use the other exit that was constructed in 2004 and were not directed at cyclists. The Court noted that a Mr Unicombe had collided with the boom gate in 2006 and Daniel Smith, a fire brigade officer, had collided with the boom gate in January 2007. After the accident involving Smith a Council officer attended the site, however, no modifications were made.

Justice Hall noted:

> *"At all relevant times the Council was the Local Government Authority with legal authority control over Riverside Drive including the new boom gate. Given the high frequency of early morning cyclist's use of Riverside Drive, there was a need for a system that would ensure that the boom gate was placed in the open position in a timely manner. There was no evidence that prevented the fixing of 5.00 am, as proposed by Police (or between 5.00 am and 6.00 am) as the time at which opening of the gate was to occur. The need for flexibility for the Club related to closing the gate after its night functions.*
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> *The 'arrangement' between the defendant Council and the Club for the opening and closing of the boom gate ultimately was dependent upon the Club's cleaner being available to open the boom gate each day. In the absence of a secure alternative system the 'arrangement' was likely to fail whenever the Club's cleaner did not attend on time, which was the circumstance that arose in respect of the three accidents to which reference has been made above."*

Justice Hall accepted the evidence given by the plaintiff and expert evidence of Mr Jamieson and Professor Wenderoth that perception was affected by visual ambiguity as to the actual position of the gate.

The Court therefore found that the Council was prima facie liable.

The Council sought to invoke the defence in the *Civil Liability Act 2002* that relates to dangerous recreational activities. Section 5L of the *Civil Liability Act 2002* provides that there is no liability for harm suffered from obvious risks of dangerous recreational activities.

Justice Hall did not accept this argument, and stated:

> *"There was no evidence of the presence of circumstances rendering the plaintiff's cycling a dangerous recreational activity (apart from the fact that the boom gate had been left closed when it should have been open). In particular, there was no evidence of the presence of motor vehicles posing a risk to the plaintiff or of other circumstances rendering the plaintiff's recreational activities dangerous within Section 5K."*

Ultimately, His Honour determined that the Council was liable however 20% should be deducted for contributory negligence.

It will be interesting to see if the Council appeals the decision. One might think that cycling on a road is exactly the type of activity that the drafters of the legislation had in mind when coming up with the section, where "dangerous recreational activity" is defined as "a recreational activity that involves a significant risk of physical harm."

Employer Liability In Multi Party Claims

In NSW, the liability of employers is governed by the *Worker's Compensation Act 1987* and associated legislation. In order to bring a common law claim against an employer, an employee must have sustained at least a 15% whole person impairment. Once that threshold has been established, and the prerequisites to bring Court proceedings have been satisfied, an employee can commence Court proceedings in negligence. Sometimes such proceedings are complicated by the fact that another entity may also have liability. As the claim against the employer is limited to economic loss, and damages pursuant to the *Civil Liability Act 2002* are not limited in the same way, the injured person will look for other potentially liable parties and try and establish as great a liability as possible on the other non-employer defendant.

The NSW Court of Appeal has recently considered apportionment of liability between an employer and another defendant, the supplier of a faulty product. In the judgment the Court of Appeal also considered a number of other provisions of the legislation relating to claims against employers.

Phillip Collins sustained injury on 23 July 2001. At the time Collins was employed by Sydney Ports Corporation ("Sydney Ports") as a port officer, Grade II (engineer). During the course of his employment Collins was required to board vessels that were moored at Port Botany. In order to do so, it was necessary to walk across an emergency response jetty gangway. On the day of the accident Collins was walking along the gangway when it suddenly rotated and violently propelled Collins onto the wharf below. As a consequence Collins sustained significant injury.

Collins commenced proceedings against Sydney Ports and Australian Winch & Haulage Company Pty Limited ("AWH"). AWH had supplied a stainless steel D-shackle to Sydney Ports. That particular shackle had fractured and failed. The shackle was located under water and caused the sudden rotation of the gangway. Collins sued both Sydney Ports and AWH as a consequence.

At trial Justice Harrison in the Supreme Court apportioned liability 65% to Sydney Ports and 35% to AWH. Both AWH and Sydney Ports appealed. AWH sought to argue that it had not been negligent in supply of a defective shackle and there should be a judgment in its favour. Sydney Ports in a proposed appeal, sought to challenge His Honour's findings on the basis that any breach of duty of care was not causative of the plaintiff's accident and also challenge liability. Apportionment was also challenged.

It was noted by the Court of Appeal that the shackle that was used was made from a type of stainless steel that was unsuitable for use under water. As it was submerged in salt water for a period of time it developed corrosion and ultimately failed. The shackle was manufactured from CF-8M stainless steel which is not solution annealed and therefore not suitable for use under seawater. In fact, the shackle should have been manufactured from Grade 316 steel. AWH contended that the proper kind of shackle had been ordered from a supplier but the CF-8M steel shackle had been supplied and AWH was not aware of this.

The shackle in question was installed in about March 2000. There was no suggestion that there had been any inspection of it between its purchase and the date of accident. In fact, the evidence was that Sydney Ports did not have a system of inspection and maintenance in place to guard against the risk of failure of the shackle despite the fact that the gangway had repeatedly failed in the past. An operation and maintenance manual was in fact produced by AWH prior to the accident and that recommended that, having regard to an earlier failure in 1992, the D-shackle should be inspected regularly as it may need to be periodically replaced. Sydney Ports however took no action to implement the recommendation.

The leading decision of the Court of Appeal was handed down by His Honour Justice Sackville. His Honour Justice Sackville noted that at trial Justice Harrison awarded judgment against Sydney Ports for $1,141.238.00 and against AWH for $1,638,304.70. His Honour also apportioned liability 65% to Sydney Ports and 35% to AWH.

When considering apportionment, as in every case, it was necessary for the facts to be closely considered.

In his judgment Sackville J noted that shortly after the accident Sydney Ports in fact implemented a system of inspection and their general manager had also admitted that the corrosion that was evident on the shackle when it failed could have been detected upon inspection. Their liability was therefore greater than that of AWH. AWH's liability however was not minimal; as Sackville AJ stated "*AWH;s failure to order and install a shackle suitable for bearing a heavy load whilst immersed in seawater was instrumental in causing the accident that led to Mr Collins' injury.*"

The Court of Appeal agreed with the apportionment of the trial judge.

The decision also provided guidance for employers on further issues. The Court of Appeal went on to consider a number of issues relevant to employers including amendment of a Statement of Claim that is inconsistent with a Pre Filing Statement, costs of proceedings pursuant to the Workers Compensation Regulations 2010 and interest where there are multiple parties.

In a claim against an employer, as part of the pre-requisite for commencing Court proceedings it is necessary for a Pre Filing Statement to be served. That document should be in the same terms as the Statement of Claim that will ultimately be filed and should also annex all the documents on which the injured employee proposes to rely. An injured person can only rely on different pleadings and additional documents with the leave of the Court and if that material was not available at the time of service of the Pre Filing Statement. In this case, Collins sought to amend the Statement of Claim to make a claim for funds management. Sydney Ports opposed this and submitted that the claim was substantially different to the Pre Filing Statement. It was submitted by Sydney Ports that as a consequence of the operation of Section 318 of the Workplace Injury Management and Rehabilitation Act 1998 the amendment could not be made. The Court of Appeal disagreed and determined that the material was not available to Collins at the time of service of the Pre Filing Statement. The material available at that time was insufficient to have alerted Collins to the fact that he needed to make a claim for costs of funds management. The claim for costs of funds management was therefore allowed.

Collins also succeeded in an argument in relation to a claim for interest. Section 151M of the Workers Compensation Act 1987 allows for interest on past economic loss if an offer has not been made by an employer defendant that is more than 20% less than the judgment, if there was a reasonable opportunity to make an offer. Sydney Ports sought to argue that it could not make an offer as a consequence of the involvement of the other defendant. Sydney Ports also argued that as a consequence of the late amendment in relation to funds management, it did not have a reasonable opportunity to make a revised offer. The Court of Appeal found that Sydney Ports had a reasonable opportunity to make an offer of settlement and did not do so and the argument that because there were two defendants an offer could not be made did not succeed. Sydney Ports were therefore ordered to pay interest on past economic loss.

However, Sydney Ports succeeded in the argument that Collins was not entitled to recover any costs from Sydney Ports. This was because of the operation of Regulation 109 of the Worker's Compensation Regulation 2010. As the matter had not proceeded to mediation and Collins had not made an offer in the 28 day period thereafter, the offer was deemed to be the claim made in the Pre Filing Statement. As Collins did not exceed the claim for quantum in the Pre Filing Statement, he was not entitled to recover costs from Sydney Ports and each party was ordered to bear their own costs of that claim.

A number of issues for employers have therefore been clarified as a consequence of this decision. The Court has again confirmed that apportionment will vary from case to case depending on the facts. The Court of Appeal has provided guidance in relation to the operation of a number of provisions in the worker's compensation legislation where there is another defendant in addition to the employer defendant. Injured worker's will need to be cognisant of the fact that they need to make an offer to the employer even if there is another defendant; and employers will need to be cognisant of the fact that having another defendant will not protect them against a claim for interest on past economic loss if no offer, or an insufficient offer, is made.

Are You Ready For Workplace Bullying Reform?

According to Safe Work Australia, stress and depression due to job strain and bullying is costing Australian employers about $693 million each year in sickness, absence and presenteeism issues.

In an attempt to reduce this cost, the Federal Parliament has now passed the *Fair Work Amendment Act 2013 (Cth)* (Amendment Act). It remains to be seen whether these new laws will ameliorate or exacerbate the cost to society of bullying behaviour.

Until now, there has been no unified legislative regime protecting workers from bullying in the workplace. The provisions of the Amendment Act address that situation.

With a commencement date of 1 January 2014, it is opportune to review what constitutes bullying, and to consider the implications for employers with a view to minimising their exposure to civil penalties and other anti-bullying orders which made by made by the Fair Work Commission.

What is workplace bullying?

The definition of "bullied at work" is:

"A worker is bullied at work if:
(a) while the worker is at work in a constitutionally-covered business:
(i) an individual; or
(ii) a group of individuals;
repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
(b) that behaviour creates a risk to health and safety."

Repeated behaviour refers to persistent conduct and can involve a variety of acts over time. Unreasonable means behaviour that a reasonable person would consider unreasonable in all the circumstances and can include behaviour that is intimidating, humiliating, threatening or victimising.

It seems likely that the Code of Practice for Preventing and Responding to Workplace Bullying (the Code) prepared by Safe Work Australia will be the model to which the Fair Work Commission will have regard when dealing with complaints against workplace bullying. The Code gives the following examples of behaviour, whether intentional or unintentional, that may amount to workplace bullying if they are repeated, unreasonable, and create a risk to the health and safety of staff:

- abusive, insulting or offensive language or comments
- unjustified criticism or complaints
- continuously and deliberately excluding someone from workplace activities
- withholding information that is vital for effective work performance
- setting unreasonable timelines or constantly changing deadlines
- settings tasks that are unreasonable below or beyond a person's skill level
- denying access to information, supervision, consultation or resources such that it has a detriment to the worker
- spreading misinformation or malicious rumours
- excessive scrutiny at work

What is not workplace bullying?

The Code does set out that a single incident of unreasonable behaviour is not considered to be workplace bullying; however, caution should be taken to ensure that it does not have the potential to escalate and should therefore not be ignored.
The Amendment Act also recognises, and makes an exemption for, instances where persons conducting a business may take reasonable management action to effectively direct and control the way work is carried out.

The Code provides that it is reasonable for managers and supervisors to allocate work and to give fair and reasonable feedback on a worker's performance. Such conduct will not be considered to be bullying if carried out in a reasonable manner. Other examples of reasonable management include:

- setting reasonable performance goals, standards and deadlines;
- transferring a worker for operational reasons;
- deciding not to promote a worker where a reasonable process is followed and documented;
- informing a worker about unsatisfactory work performance when undertaken in accordance with any applicable workplace policies or agreements;
- implementing organisational changes or restricting; and
- rostering and allocating working hours where the requirements are reasonable.

The Code also distinguishes between bullying, discrimination and harassment. Harassment generally involves unwelcome behaviour that intimates, offends or humiliates a person because of a particular personal characteristic such as race, age, gender, disability, religion or sexuality. Discrimination generally occurs when someone is treated less favourably than others because they have a particular characteristic or belong to a particular group of people, such as age, race or gender. There are various laws governing discrimination and harassment that make it illegal to discriminate or harass a person on the workplace.

Whilst discrimination and harassment may be single incidents and are based on some characteristic of the affected person, it is also possible for a person to be bullied, harassed and discriminated against at the same time.

Who is subject to the Fair Work Commission's anti-bullying powers?

The new law applies both to employers and to workers.

Importantly, the term "worker" is much broader than merely "employee" and will include a contractor, sub-contractors and persons with other types of workplace arrangements. This mirrors the extended definition contained in the Workplace Health & Safety Act 2011 mandating a duty to take reasonable care for their own health and safety and to ensure that their acts or omissions do not adversely affect the health and safety of other persons.

The type of employers covered is essentially the same as for under the Fair Work Act generally – that is, constitutionally covered employers conducting a business or undertaking. Accordingly, workers engaged by unincorporated business (such as sole traders or partnerships), state public departments and agencies and certain State government business enterprises will not be able to bring a workplace bullying claim in the Fair Work Commission.

What will the Fair Work Commission be able to do?

If a worker applies to the Fair Work Commission, and the Commission is satisfied that bullying has occurred and there is a risk that it will continue, then the Commission may make an order to prevent the worker from being bullied at work. The order can apply to either the employer or worker(s) or both.

The Commission is required to deal with such applications within 14 days and has broad powers to make orders which require the individuals concerned to bring an end to certain behaviours, for employers to monitor such behaviour and implement anti-bullying policies and training.

Failure to comply with an order made by the Fair Work Commission will expose a person to a maximum penalty of $51,000. However, orders for reinstatement and compensation are not available.

Implications for employers

Employers can expect that there will be significant numbers of claims for stop bullying orders.

Given the relative ease with which a claim may be made to the Fair Work Commission, there is a risk of unmeritorious claims being made, in instances where employees seek to use the claim as a platform to vent unhappiness about being managed for underperformance or for misconduct.

The time frame under which the Commission will operate is tight - employers will have limited opportunity to investigate the claim, prepare for any hearing and take any remedial action.

Accordingly, it is essential that employers take care to ensure that appropriate control measures are implemented to remove the possibility of workplace bullying occurring and to ensure that appropriate documentation protocols are in place to address complaints of workplace bullying. Specifically, employers should:

- Seek advice about the new anti-bullying measures;
- Create a workplace where everyone is treated with respect and dignity;
- Design safe systems of work;
- Develop productive and respectful workplace relationships;
- Implement a workplace bullying policy;
- Implement hazard reporting and response procedures;
- Provide training to workers, including supervisors and managers;
- Monitor and review control measures including engaging in consultation with workers.

Hurdles For Work Health and Safety Prosecutions In NSW

NSW was one of the first States to pass legislation introducing the Federal Government's proposed nationally harmonised

work health and safety regime.

The new regime commenced on 1 January 2012 and a number of prosecutions have found their way to the District Court. Previously the Industrial Relations Court had jurisdiction to deal with prosecutions arising from breaches of the work health and safety legislation. However, as with all new regimes, there are bumps on the road which are encountered. As inevitably occurs, there have been challenges to the validity of parts of the new legislation.

In the case of Inspector *Brock v Empire Waste*, there was a challenge to the validity of prosecutions in the District Court where offences were committed when the previous legislation (the Occupational Health & Safety Act) was in place. That challenge failed. However an appeal followed which was heard in June 2013 and the decision in that appeal is yet to be handed down.

There was a further challenge in the case of Inspector *Walsh v Built (NSW) Pty Limited* with Built arguing that proceedings commenced by documents executed by a WorkCover legal officers were invalidly commenced as only an inspector may commence proceedings. That challenge was successful.

These cases present potential hurdles for WorkCover in pursuing prosecutions, particularly if the Empire Waste appeal is successful.

With the cloud hanging over prosecutions, the NSW Government has decided to smooth the way for future prosecutions and has introduced legislation to deal with the issues arising from the cases.

The *Work Health & Safety Amendment Bill 2013* has been introduced to Parliament to ensure that prosecutions can be commenced by legal officers of WorkCover and clearly vests jurisdiction in the District Court to deal with all work health and safety prosecutions. The Bill has passed through the Lower House and the Second reading in the Upper House has taken place.

If the Bill passes WorkCover legal officers will be entitled to execute documents commencing proceedings on behalf of inspectors and validly commence prosecutions without the need for the inspector to execute all documents and proceedings which had been previously executed by WorkCover legal officers will be valid.

WorkCover will also have a six month window to recommence any prosecutions which have been discontinued following the decision in Built.

The proposed amending legislation also makes it clear that the District Court will have jurisdiction to deal with offences under the old regime.

No doubt there will be challenges to the provisions introduced by the amending legislation, particularly the retrospectivity of the provisions.

Procedural challenges to work health and safety prosecutions will continue. However for NSW prosecutions under the Work Health & Safety Amendment Act are now back on track.

CTP Roundup

The Ramifications Of Smalley v The MAA

The recent decision of the NSW Court of Appeal in *Smalley v The Motor Accidents Authority of New South Wales [2013] NSWCA 318* has caused CTP insurers to revisit the stance which they adopt when issuing notices concerning disputed claims.

The Court of Appeal has determined that:

- a CTP insurer must issue a Section 81 Notice within 3 months of the receipt of a claim form otherwise there is a deemed denial of liability pursuant to s 81(3) of the Motor Accidents Compensation Act 1999 (the Act).
- the issue of a Section 81 Notice after the 3 month period does overcome the deemed denial that arises from the failure to issue the notice in the requisite time;
- the failure to issue a Section 81 Notice within 3 months of receipt of a claim will trigger a mandatory exemption from CARS;

- where a CTP insurer denies liability to pay compensation but admits a breach of duty of care there is a denial of liability triggering a mandatory exemption from CARS.

Michael Smalley was injured in a motor accident on 16 December 2005. A claim for personal injuries was lodged with Allianz, the relevant compulsory third party insurer, well outside the statutory 6-month timeframe.

Allianz received the personal injury claim form on 14 January 2010. Smalley provided an explanation for the delay in lodging the claim, however, Allianz rejected the explanation on the grounds that although it was 'full' it was not 'satisfactory' within the meaning of section 73 of the *Motor Accidents Compensation Act1999* (MACA).

The dispute was referred to the Claims Assessment and Resolution Service (CARS) wherein Assessor Wall determined that the late claim should be accepted. Notwithstanding that section 96(4) deems such determinations to be binding on the insurer Allianz provided written correspondence to Smalley that the determination was not binding, therefore maintaining its denial of liability.

The matter was referred to CARS on three occasions.

On the first occasion before CARS Smalley made an application for exemption on mandatory grounds. The application to CARS was made on the basis that the insurer denied "fault" of the owner or driver of the insured vehicle in its notice provided under section 81 of MACA.

The Principal Claims Assessor (PCA) relied on the principals established in *Gudelj v Motor Accidents Authority of New South Wales* [2010] NSWSC 436; (2010) 55 MVR 357 whereby a Section 81 notice was not required when the insurer rejected a late claim. Accordingly, in the absence of a denial of liability on behalf of the insurer a mandatory exemption was not granted.

The second application to CARS was for an exemption on discretionary grounds. The PCA once again refused exemption taking into account the objects of MACA.

Following the Court of Appeal decision overturning the decision in *Gudelj v Motor Accidents Authority of New South Wales* Allianz issued a letter entitled 'Section 81 Notice' to Smalley. The notice provided that liability was denied, however the insurer accepted fault on behalf of the insured driver.

The three decisions were subsequently challenged in the Supreme Court. Smalley was unsuccessful and the matter proceeded to the Court of Appeal.

The third application to CARS was put forward on the basis that the insurer should not be entitled to simultaneously admit fault and deny liability. Smalley submitted that if the insurer's Section 81 notice was found to be invalid for these reasons then in accordance with section 81(3) there is a 'deemed denial' and exemption should be granted. The PCA did not accept that the insurer's Section 81 notice was invalid. However, in light of the insurer admitting fault on behalf of the insured driver exemption was refused.

Leeming JA disagreed with the PCA and the primary judge's views in that the insurer's 'Section 81' notice could not replace the deemed denial pursuant to section 81(3). This decision was on the basis that a section 81 notice cannot be issued outside of the statutory 3-month timeframe. Leeming JA ultimately determined that the matter should have been exempted from CARS on the basis of the insurer's deemed denial.

Leeming JA deconstructed the meaning of the term "liability" within the context of the Act. Liability under section 81 of the Act refers to the insurer's obligation to indemnify the insured in circumstances where the insurance policy is invoked.

However, Leeming JA noted that an insurer's liability decision is more complex than a simple admission or denial. For instance, liability can be admitted for only part of a claim as opposed to being wholly denied.

In discussing a partial admission of liability Leeming JA referred to the decision in *The Nominal Defendant v Gabriel* [2007] NSWCA 52. In that case Basten JA noted that an admission of liability for part of the claim nonetheless invokes the insurer's pecuniary obligations to the claimant which include medical expenses in accordance with section 83 of MACA.

This was contrasted with a position taken by an insurer where it 'wholly denied' a claim but it admits an element of the claim, such as fault. The denial of the claim is such that an insurer denies that it is obliged to pay any money to the claimant. Leeming JA noted that the implications of this position are absurd and unjust especially in light of the trigger mechanism contained within section 82. This requires the insurer to make a reasonable offer of settlement after admitting an element of liability.

Leeming JA determined that in order for an insurer to be liable to a claimant the claim must satisfy each of the following four elements:

- there must be a death or injury;
- fault is established in that the insured driver breaches a duty owed to the claimant;
- causation is established; and
- the motor vehicle is operated within the Commonwealth.

Leeming JA noted that Allianz's correspondence to Smalley admitted one of the elements, namely fault, however not all of the elements necessary to trigger payments.

Leeming JA distinguished this position from a partial admission of liability as Allianz maintained that it was not liable to pay any money to Smalley despite its admission of fault.

Leeming JA's reasoned that if the insurer does not concede all of the above elements liability may be taken to be denied, and accordingly the claim should be exempted from CARS.
The decision highlights the circumstances where a matter should be mandatorily exempted from CARS.

Insurers must be mindful of the need to issue a Section 81 notice within 3 months that addresses each element of liability as identified above otherwise there will be a deemed denial with the result that there is a right to a mandatory exemption from CARS.

Where liability has not been admitted within 3 months of the Claim Form being served a mandatory exemption appears to be a fact of life for CTP insurers.

To avoid a mandatory exemption CTP insurers must ensure their position on liability is delivered within 3 months of receipt of the claim form, is clear, and address each element of the liability in the claim including:

- Whether the insurer admits it's insured breached their duty of care;
- Whether the insurer accepts the claimant suffered injury, loss and/or damage which gives right to an entitlement to compensation;
- Whether the insurer accepts it is liable to compensate the claimant.

Traps For Young Players – Procedural Requirements Of The Motor Accidents Compensation Act

This brief decision of the NSW Court of Appeal in *Millard V State Transit Authority [2013] NSW Ca 321* demonstrates the Court's strict interpretation of the procedural requirements under the *Motor Accidents Compensation Act 1999* ("the Act"). The decision concerned a motor vehicle accident which occurred on 21 August 2009 at Maroubra. Millard was a pedestrian who was struck by a State Transit Authority bus as he was crossing Anzac Parade.

Millard was unrepresented and filed a Statement of Claim in the Supreme Court. The underlying proceedings which concerned the motor vehicle accident never went to trial. Her Honour Justice Latham summarily dismissed the proceedings on the basis that Millard had not obtained a Certificate under Section 92 or Section 94 of the Claims Assessment and Resolution Service which is required prior to commencing proceedings.

Millard then filed a summons in the Court of Appeal to appeal Her Honour's decision, which was dismissed pursuant to the *Uniform Civil Procedure Rules 2005 ("UCPR")* under Rule 13.4 following his failure to appear.

Millard had a third attempt at instituting proceedings, filing a motion in the Court of Appeal seeking "leave to reopen the appeal" and also seeking leave to issue Subpoenas against STA, NSW Police and the law firm, Brydens.

The proceedings concerned some procedural complexities and, rather than treating Millard's motion as a review of the Registrar's decision to dismiss the proceedings for his failure to appear, after consulting with the parties, His Honour Justice Leeming elected to deal with the substance of the dispute between the parties rather than the procedural issues.

His Honour noted that given there was evidence before the primary judge that no certificate had been obtained under Section 92 or 94 of the Act, there could be no dispute by Millard given the terms of Section 108(1) of the Act, which states:

> *"A claimant is not entitled to commence court proceedings against another person in respect of a claim unless:*
>
> *The Principal Claims Assessor has issued a certificate in respect of the claim under section 92 (Claims exempt from assessment); or*
>
> *A claims assessor has issued a certificate in respect of the claim under section 94 (Assessment of claims).*
>
> *Millard asserted in his handwritten Summary of Argument that the claim was exempt from CARS but of course, that was an issue that needed to be dealt with via CARS through an Application for Exemption under Section 92 of the Act.*

It followed that the primary judge had no choice but to dismiss the proceedings for failure to comply with Section 108(1) of the Act.

His Honour Justice Leeming indicated therefore that there was no prospect of leave to appeal being granted if the Registrar's decision was set aside. It followed that Millard's application for leave to appeal and the motion to "reopen the appeal" were dismissed with costs. STA undertook to take no steps to execute the costs order pending the successful determination of Millard's claim.

So, back to CARS the claim will go. This decision is not surprising. It contains no new legal principle, nor does it go towards the interpretation of any controversial issue. However, it does show the Court's willingness to uphold the legislative intention that an exemption must first be obtained under the CARS process before any Court proceedings may be commenced, in accordance with the decision confirmed in Emad Trolley Pty Limited v Shigar [2003] NSW CA 231. The Court of Appeal will not determine whether a claim ought to be exempt from CARS, as this is a decision that can be made by CARS alone. It serves as an important reminder that compliance with the procedural requirements of the Act is paramount.

Conclusiveness of MAS Certificates in CARS Assessments

The recent decision in *AAMI Limited v Cirevska [2013] NSW SC 1438* highlights the need for insurers to complete their investigations on medical issues and obtain all relevant documents before a MAS assessment otherwise they may find themselves before a CARS Assessor with binding MAS certificates based on incomplete evidence.

Jordanka Cirevska was struck by a vehicle that failed to give way as she was driving along Forest Road in Bexley. At St. George Hospital she was found to have suffered fractured ribs on the left side, a chest injury to her left side and a pulmonary lung contusion. Two days after the accident whilst still in hospital she suffered a pulmonary embolism and an acute asthma attack which remained symptomatic after her discharge from hospital.

The CTP insurer admitted breach of duty of care.

MAS Assessor Dr Mark Burns assessed the claimant's respiratory injury including the embolism and aggravation of asthma as giving rise to 30% whole person impairment.

MAS Assessor Klug assessed the psychological injury of Cirevska to give rise to 15% whole person impairment.

The claim proceeded to a CARS assessment.

Subsequent to the assessment AAMI filed a Summons seeking judicial review of the assessment of damages issued by CARS Assessor Goudkamp.

The issues agitated by the insurer were whether or not the CARS Assessor had erred in law by accepting the certificate of Dr Burns as conclusive evidence of the fact that Cirevska's asthma was exacerbated by the accident. The insurer also contended that Assessor Goudkamp had committed a jurisdictional error by relying on Sections 62 and 63 of the *Motor Accidents Compensation Act 1999* (the Act) and not referring the claimant for further medical assessment.

AAMI argued that Assessor Goudkamp failed to exercise his statutory power to refer the matter for further medical

assessment where there was additional medical evidence obtained by the insurer evidencing pre-accident hospital admittance due to symptoms caused by pre-existing asthma.

AAMI also contended that it was denied procedural fairness, on the basis that the CARS Assessor failed to take into account relevant material and also erred in his reasoning in his award for gratuitous assistance.

At the end of the day, Justice Hulme was satisfied that there was an error of law in Assessor Goudkamp's conclusion that it was open to him to find in his assessment of economic loss that the exacerbation of the asthma was not caused by the accident, however, His Honour held that this error was not material to the ultimate conclusion of the Assessor.

Justice Hulme held that the conclusiveness of Dr Burns certificate in the context of an incomplete medical history was relevant only to the assessment of non-economic loss and not to the other heads of damage. Accordingly, AAMI failed to convince the Court that the Assessor's reference to the conclusiveness of Dr Burns certificate was not a material error or irrelevant consideration.

In respect to the Assessor's alleged failure to exercise his statutory power to refer the matter for further assessment pursuant to Section 62 of the Act, the Court determined that this was a discretionary power and there was no positive duty on the Assessor to refer the matter for assessment in the absence of any application made by either party.

AAMI also argued that Assessor Goudkamp failed to take into account the opinion of Dr Desai (being the qualified respiratory expert of the insurer) when reaching the conclusion that the motor vehicle accident exacerbated the asthma of Cirevska however there was sufficient objective evidence to allow the Assessor to conclude that there might be an alternative explanation for Cirevska's low spirometry results which afforded the Assessor a rational basis for not preferring the view of Dr Desai. Therefore, it was open to the Assessor to make such a finding on balance.

Finally, in respect of AAMI's argument that the Assessor had erred in his assessment of gratuitous assistance Justice Hulme noted that the insurer in its submissions conceded that the claimant would have required six hours of assistance per week for six months of gratuitous care being the absolute minimum threshold required by Section 141B of the Act. , Assessor Goudkamp allowed 12 hours of gratuitous care per week for 171 weeks post-accident totalling $45,144.00 and Hulme J concluded it was open to Assessor Goudkamp to make a finding in respect of past gratuitous care and assistance given that the insurer had conceded that the Section 141B threshold had been satisfied.

Overall, this case highlights the importance of obtaining all pre-accident medical records and ensuring that they are provided to the relevant MAS Assessor in order to minimise the risk that a MAS or CARS Assessor will make findings that do not include consideration of all relevant medical evidence.

It is also important to note that any referral for a further medical assessment ought to be agitated by a party to the CARS Assessor at the earliest opportunity given this is a discretionary statutory power.

Workers Compensation Roundup

Workers Compensation Journey Claims – Simply Travelling To And From Work Is Not Enough

The NSW Workers Compensation Commission has published the first decision in relation to the amended journey provisions introduced in the legislative amendments that commenced on 18 June 2012. The journey provisions were amended to remove the rights to compensation whilst on a journey unless the journey had a real and substantial connection with employment. The amendments are contained in Section 10(3A) of the Workers Compensation Act 1987 ("Act").

In *Ana Filicia Vina v ISS Property Services Pty Limited (2013) NSWWCC 328*, Arbitrator Sweeney examined whether a routine journey to and from work is sufficient to be considered a real and substantial connection with employment.

Ms Vina routinely drove a motor vehicle to and from her place of employment. She was employed as a cleaner and worked a split shift whereby she undertook three hours of cleaning at a school before the school day commenced and a further three hours after school finished for the day. On 27 July 2012 she was driving a motor vehicle from the Guildford West Public School to her home in Fairfield Heights when her vehicle was involved in a collision with another vehicle in Fairfield. Ms Vina suffered injuries to her neck, back and arms in the accident and could not return to her employment as a cleaner.

Ms Vina submitted that the injury was compensable as it was a personal injury arising out of employment and Section 10(3A)

did not have the effect of excluding the entitlement of a worker to compensation for an injury sustained on a relevant journey "per se".

Ms Vina also submitted that her employment required her to have a driver's licence and as she commenced work early and worked a split shift, it was necessary for her to drive to and from work. She also provided additional evidence that there was no train station near the Guildford West Public School and there was no direct service between the public school and her home. She claimed that as she had to drive to work every day to commence at 5:30am and then drive home from work and then drive again in the afternoon, this was sufficient for a real and substantial connection.

It was further submitted that as the sole purpose of the journey as to convey Ms Vina from her place of work to home, then it clearly arises out of the employment.

Arbitrator Sweeney rejected this submission and determined that an injury on a journey, between a worker's place of abode and place of employment, does not arise out of employment unless there is some greater connection with the employment than simply having to get to and from the place of employment. He further commented that Ms Vina was not in the course of her employment and her obligations under her contract of employment did not expose her to injury at the scene of the accident. It could not be said that employment brought her into the locus of the injury and in that sense caused her injury.

He also rejected the submission that the absence of a convenient bus or rail service to convey Ms Vina to and from work demonstrated a causal connection between her injury and her employment. The requirements that she worked a split shift were obviously important aspects to the contract of her employment but were not causative of her injury. The mere fact Ms Vina had to make two journeys to and from work in the course of a day placed no greater weight on a causal relationship between each journey and the employment.

The Arbitrator noted if the mere fact that a worker was travelling to and from their place of employment at the time of the accident was sufficient to establish a real and substantial connection between the employment and the accident, the amended Section introduced in June 2012 would serve no useful purpose. Arbitrator Sweeney was of the opinion that the legislation was clear and there was no ambiguity. Accordingly, he did not need to take into account various decisions under the South Australian legislation which has an almost identical journey provision.

Arbitrator Sweeney's decision is consistent with the unreported decision of Arbitrator Douglas in Kellie Ann Mitchell v Newcastle Permanent Building Society Pty Ltd delivered on 19 July 2013. Ms Mitchell suffered her injury when she tripped over tree roots whilst walking to her car after work. She was unsuccessful in her claim for compensation as Arbitrator Douglas determined that there was no link between her employment as a loans processing officer and tripping over the tree roots. In order for a claimant to be successful on a journey claim it must be demonstrated that "the relationship or association or link between the worker's employment in the particular job and the accident or incident is actual and of substance. The link must be more than remote or tenuous." Walking to her car on her way home from work was merely a consequence of her being employed not a real and substantial connection to employment.

Both decisions are not surprising and we suspect they will not proceed to an appeal. It is clear the simple fact of travelling to and from work is not a real and substantial connection to employment. We watch with interest to see if future decisions focus on dual purpose journeys whereby workers are undertaking employment tasks such as taking work home, making work related phone calls whilst in transit etc. Whether these factual scenarios will be enough to demonstrate a real and substantial connection remains to be seen.

Honorary Club Positions – Do They Satisfy The Criteria For Employment?

Deputy President Bill Roche recently considered whether a volunteer pension officer for an RSL Club would be considered to be an employee for the purposes of the NSW Workers Compensation Act 1987. In *Cabra-Vale Ex-Active Servicemen's Club Limited v Thompson (2013) NSWWCCPD,* the Deputy President was required to determine whether the club's pension officer (who was also one of the directors) could be considered a worker for the purposes of the *Workers Compensation Act 1987* ("the Act").

Mr Thompson was elected as director of the employer in 1996 and had been re-elected each year since that time. As a director he initially received an "honorarium" of $3,000 per annum which was later increased to $3,500 per annum. In 2000, the club's board appointed Mr Thompson as its pension officer to act on behalf of war veterans in their dealings with the Department of Veterans Affairs and to advise members about obtaining information from local authorities and the department. That appointment was renewed each year. As part of that position he received training in the form of two week long courses

with the Department. In addition to his honorarium for his activities as director, Mr Thompson received an honorarium for $2,500 for his activities as a pension officer. This was paid at the end of the financial year.

Mr Thompson injured his right shoulder and back on 25 April 2008 when he fell at the club's premises. A claim for workers compensation was brought but it was declined by the club on the basis there was no contract of employment between Mr Thompson and the club and he was not a worker for the purposes of the Act.

It was noted by Deputy President Bill Roche there were four central features for a contract of employment. These were summarised as being:

- there could be no employment without a contract;
- the contract must involve work done by a person in performance of a contractual obligation to a second person;
- there must be a wage or other remuneration otherwise there will be no consideration;
- there must be an obligation on one party to provide and on the other party to undertake work.

The Deputy President noted there was no evidence that Mr Thompson undertook the duties as a pension officer in return for payment. There was no work done by Mr Thompson in performance of a contractual obligation to the club. He had no obligation to perform the duties of a pension officer and he was simply appointed. The payment of an honorarium to Mr Thompson was a "voluntary payment of a gift" and was not a payment under a contractual obligation. Furthermore, the honorarium was not consideration from the club in return for a promise for Mr Thompson to undertake work. Accordingly the four criteria evidencing a contract of service were not met and the claim failed on that basis.

The Deputy President took a further step to examine the situation if there was a contract between Mr Thompson and the club, as to whether the contract could be characterised as a contract of service. Citing the long held control test as outlined in *Stevens v Brodribb Sawmilling & Company Pty Limited (1986)* it was noted that control was significant factor but not the sole criteria to judge whether a relationship was one of employment. Other criteria included:

- the lack of any fixed or regular hours;
- the lack of any right in the club to dismiss or suspend Mr Thompson;
- the lack of any regular remuneration that was related to or was commensurate with the duties performed;
- no uniform was worn while acting as a pension officer;
- the lack of any obligation on Mr Thompson to undertake any activities;
- the absence of tax deductions or superannuation contributions; and
- the absence of leave entitlements.

On balance, whilst not determinative, these indicia pointed strongly to Mr Thompson not being a worker.
In relation to control, the evidence was such that the role of the pension officer was "autonomous" and Mr Thompson did not report to anyone. The contention by Mr Thompson that he underwent training to perform the duties of a pension officer simply indicated it was a specialised activity and did not indicate an exercise of control by the club over Mr Thompson.

This decision contrasts many of the employment cases in the Workers Compensation Commission in that neither a contract of service nor a contract for services were determined not to exist in the first instance. Nevertheless, the Deputy President's further examination of the purported employment circumstances reinforces that a combination of the control test and the now regularly cited indicia such as the fixed hours, regular remuneration, the provision of leave entitlements and the deduction of tax remain the valid considerations in determining whether an employment relationship exists.

Complying Agreements Revisited

The binding effect of a Complying Agreement has been the subject of a recent Presidential determination in *Campbelltown Tennis Club v Lee. [2013] NSW WCC PD 50.*

Ms Lee injured her back on 24 June 2003 whilst employed by Campbelltown Tennis Club Limited ("the Club") as an office supervisor when she was moving boxes of financial records.

In 2006 Ms Lee's solicitors made a claim for lump sum compensation pursuant to Section 66 based upon the report of Dr Weisz which assessed the applicant as suffering 27% whole person impairment which he reduced by 10% to take account of a pre-existing condition under Section 323. The Club's insurer obtained an opinion from Dr Machart who also accepted the 27%

whole person impairment. However he assessed a one-third reduction to take account of a pre-existing condition pursuant to Section 323, to produce a final assessment of 18% whole person impairment.

The parties entered into a Complying Agreement under Section 66A reflecting Dr Machart's assessment of 18% whole person impairment together with agreed compensation pursuant to Section 67. The agreement recited that the reports of Dr Weisz and Dr Machart had been relied upon to assess the degree of permanent impairment.

On 1 August 2012 Ms Lee made a further claim for lump sum compensation pursuant to Section 66 based upon a report of Dr Bodel dated 2 July 2012. Dr Bodel confirmed the applicant suffered 27% whole person impairment which he reduced by 10% to take account of a pre-existing condition under Section 323 to produce a final whole person impairment of 24%. She also claimed additional compensation pursuant to Section 67.

Proceedings were commenced in the Commission and the Club sought to dispute that there had been any increase in the degree of permanent impairment since the Complying Agreement was entered into in January 2007.

At first instance the arbitrator determined the dispute in Ms Lee's favour finding there had been an increase in the degree of permanent impairment and she ordered that the matter be remitted to an approved medical specialist for assessment.

The Club appealed. An initial matter considered by President Keating was whether the issues between the parties were merely a medical dispute or whether there was a legal or liability dispute falling within the jurisdiction of an arbitrator. The President found that the issue was a legal dispute that required the Commission to interpret the terms of the Section 66A Agreement by applying the usual roles to construction of contracts.

The Club argued that unless one of the three circumstances set out in Section 66A(3) applied, the Commission had no power to award further lump sum compensation. In particular sub-section 66A(3)(c) provided jurisdiction to award further lump sum compensation if it was established that "since the agreement was entered into there had been an increase in the degree of permanent impairment beyond that so agreed". It was argued the sub-section clearly envisaged the situation where there had been a deterioration in the worker's condition which had led to an increase in permanent impairment resulting from an injury after the Section 66A Complying Agreement was entered into. It was held that as the degree of whole person impairment was precisely the same as it was at the time the original claim was compromised and such compromise was recorded in the final and binding Section 66A Complying Agreement, there had been no relevant change.

Construing the earlier agreement by what a reasonable person would understand by the terms of the agreement and having regard to the purpose and object of the transaction in taking into account the nature of the dispute, President Keating concluded that the objective intention of the parties was to record the resolution of the only matter remaining in issue at the time the agreement was entered into, namely the extent of any deductible proportion under Section 232.

The President observed that it is clear the Commission has jurisdiction to award further lump sum compensation following a Section 66A Complying Agreement if it can be established that since the agreement was entered into, there has been an increase in the degree of permanent impairment beyond that so agreed or if any of the other circumstances in Section 66A(3) are satisfied.

The decision highlights the need to clearly specify in a complying agreement the medical evidence which was relied upon in reaching the agreement reflected, particularly where there is an element of compromise as in the factual circumstances of this case.

In interpreting whether a complying agreement precludes a worker from making a further claim for additional lump sum compensation, each case will turn upon its particular facts in determining whether there has been an increase in the degree of permanent impairment beyond that originally agreed.

The decision also makes it clear that in order to succeed in making a claim for additional compensation over and above that allowed for in a Complying Agreement one of the three provisions of S66A(3) needs to be established.

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