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.

Proportionate Liability Laws On The Move

National consistency in proportionate liability laws is on the way with the release by SCAG (Standing Committee of Attorney Generals) of draft model legislation designed to introduce consistent proportionate liability legislation throughout Australia.

The Commonwealth and all States and Territories have legislation providing for proportionate liability for claims for economic loss and property damage. The legislation however differs from jurisdiction to jurisdiction. The model legislation once finalised is intended to be rolled out in all Australian jurisdictions to provide a consistent approach across Australia to proportionate liability.

Accompanying the draft model legislation is a consultation paper inviting comments from stakeholders on the draft model legislation and the operation of the proportionate liability in Australia. Submissions must be provided by 7 October.

The proportionate liability regime applies to claims for pure economic loss and property damage where there is a claim arising from a failure to take reasonable care. Before the proportionate liability regime was introduced each person or entity that breached its duty and failed to take reasonable care (wrongdoers) was liable for damages for the full amount of any loss. Where multiple wrongdoers were to blame claims could be made against one or all the wrongdoers with each wrongdoer being liable for the total loss leaving the wrongdoers to sort out liability by contribution claims between each other. Plaintiffs could sue 'deep pocket' defendants who had only been marginally liable, but who would be liable for the whole of the loss suffered by the plaintiff.

Proportionate liability requires the Court to consider what is just and apportion liability amongst wrongdoers. Wrongdoers are only liable to compensate a claimant for that proportion of the damage for which they are responsible. Proportionate liability transfers the risk of being unable to recover damages from an insolvent or impecunious or unidentifiable wrongdoer from a defendant to a claimant. The proportionate liability regime applies whether or not the claim is brought in contract, under statutory provisions or under the laws of negligence.

Currently the Commonwealth and each State and Territory has its own legislation governing proportionate liability and there are significant differences in the legislation. Various States permit persons to contract out of the proportionate liability provisions and where that occurs a person partially responsible for the loss will be liable for the totality of the loss irrespective of the extent of contribution to the loss. Contracting parties that exclude the application of the proportionate liability regime effectively assume a liability under contract. This can have significant consequences for a person's insurance program where contracts of insurance contain exclusions that limit an insurer's liability for claims that arise from liability assumed under contract.

SCAG has noted that:

> *"The central arguments presented for proportionate liability that persuaded Ministers to adopt the proportionate liability reforms were:*
>
> - *restoring certainty to insurers in relation to professional indemnity and public*

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Renee Sadler rmb@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
Nicholas Dale nda@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
John Renshaw jbr@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
Michelle Landers mml@gdlaw.com.au
Belinda Brown bjb@gdlaw.com.au

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Inside

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

liability insurance and thus improving accessibility to and affordability of insurance cover

- *greater fairness to defendants*
- *addressing the 'deep pocket' defendant syndrome.*

The purpose of the proportionate liability reforms was to ensure that insurance, particularly professional indemnity insurance and public liability insurance, remained available and affordable and to ensure that defendants are only liable to the extent that they have contributed to the plaintiff's economic loss."

Under the proportionate liability reforms the then existing rules in relation to joint and several liability for property damage and pure economic loss were replaced by proportionate liability legislation.

The proportionate liability reforms were part of a wide range of tort law reforms that were introduced between 2003 and 2005 and despite a relatively long period since the changes were introduced uncertainty about the application of the proportionate liability regime in some areas remains, particularly where contractual arrangements between wrongdoers attempt to shift risk. For example, arguments still arise as to whether or not the proportionate liability regime displaces an indemnity obligation found in a contract.

Any changes to the proportionate liability regime will have far reaching ramifications and will require a revised approach to risk allocation in contracts and potentially changes to rating models for premium calculation for insurers.

Whilst the SCAG consultation paper calls for general submissions on the application of the proportionate liability regime, including comments on the potential abolition of the proportionate liability and a return to the old days of coordinate liability where each party at fault is held responsible for the totality of a loss, the real focus of the consultation paper is the draft model legislation proposed. Once consensus is reached on the model legislation the Commonwealth and each State and Territory will amend the existing legislation to incorporate the provisions found in the model legislation.

So what would be the regime if the draft model legislation came into effect?

Apportionable Claims

A claim for property damage or pure economic loss arising from a failure to take reasonable care is called an apportionable claim.

The intention is that:

- a concurrent wrongdoer will include a person who has ceased to exist (e.g. an individual who has died or a company that has been wound up)
- even if a plaintiff has released a concurrent wrongdoer from liability, settled with an alleged concurrent wrongdoer or allowed its right of action against a party to lapse and become statute barred, that the concurrent wrongdoer's responsibility can still be taken into account in apportioning liability.

Provision Of Information About Other Wrongdoers

The intention is to impose a requirement on a defendant to provide information to a plaintiff in a reasonable time about the identity and location of other possible concurrent wrongdoers, as well as the circumstances for believing the person is a possible concurrent wrongdoer. The approach is intended to prevent defendants delaying the provision of information concerning the existence of other alleged concurrent wrongdoer until the latter part of the limitation period. A wrongdoer will also be expected to notify other suspected wrongdoers if possible, as well as the court. If a defendant fails to comply with the notification provisions they may be held severally liable for any award of damages made and ordered to pay costs thrown away as a result of the failure to comply with the notice obligations.

Apportioning Liability

The proposed approach is that there should not be a requirement for all concurrent wrongdoers to be parties to legal proceedings. The model provisions provide that in apportioning responsibility/liability the court must take into account the responsibility/wrongdoing of a notified concurrent wrongdoer, and a concurrent wrongdoer who is a party, and may take into account the contribution of persons who are not parties or notified concurrent wrongdoers.

It is proposed that any loss caused by the contributory negligence of the plaintiff is to be taken into account before the court apportions responsibility between the defendants and that in apportioning liability among defendants, the liability of any one defendant should be what the 'court considers just and equitable…'

Contracting Out

Currently Queensland expressly prohibits contracting out of proportionate liability and Western Australian, New South Wales and Tasmania expressly permit contracting out. The ACT, Northern Territory, South Australia, Victoria and the Commonwealth do not expressly allow or prohibit contracting out of proportionate liability and it is uncertain whether or not contracting out is permitted.

The draft model legislation if adopted will permit parties to contract out of the application of the proportionate liability regime provided the contract exceeds a threshold. A final threshold has not been determined and figures of $5,000,000 or $10,000,000 have been proposed.

Indemnity Provisions in Contracts

The draft model legislation proposes that proportionate liability will not effect an agreement by a concurrent wrongdoer to contribute to the damages recovered or recoverable from, or to indemnify, another concurrent wrongdoer for an apportionable claim.

Where a claim arises as a consequence of a failure to take reasonable care, a party's liability will be assessed under the proportionate liability regime however if an indemnity provision in a contract shifts responsibility for a loss to one party irrespective of that party's contribution to the loss the obligation to indemnify will be enforceable. The party that has assumed the obligation to indemnify will have assumed a liability under contract for that part of the loss which it would have avoided by virtue of the proportionate liability regime.

Statutory Schemes

The NSW Supreme Court has determined that the proportionate liability scheme applies to statutory warranty claims under the *Home Building Act 1989 (NSW).* The NSW government is considering legislative reforms to stipulate that the proportionate liability provisions do not apply to the statutory warranty and insurance schemes in the *Home Building Act 1989 (NSW).* The consultation paper invites comments on whether the proportionate liability scheme should apply to home warranty claims and other statutory warranties. No definitive approach is found in the draft model legislation.

Conclusion

A consistent national approach to proportionate liability is a good thing as is certainty in contractual arrangements. The model legislation if enacted will go a long way towards eliminating the uncertainties that currently exist concerning the application of indemnity provisions in contracts where there is an apportionable claim. However no matter what happens risk allocation in contracts will continue to thwart the application of the proportionate liability regime unless contracting parties are not entitled to contract out of the proportionate liability regime by indemnity provisions or express contracting out provisions. There is no timetable for the proposed changes however with a fairly short timetable for submissions it appears that the changes will not be far away

Wear And Tear Exclusions In Insurance Policies

The Victorian Supreme Court has recently delivered a judgment in *JSM Management Pty Limited v QBE Insurance (Australia) Ltd* that provides guidance on the way that a "wear and tear" exclusion in an ISR Policy will be interpreted by the court. The decision also provides guidance on the approach adopted by the Courts when considering the alleged breach of a condition in a policy that requires an insured to take all reasonable precautions to pre

JSM leased a Trucking Depot/Warehouse Distribution Centre to a company known as Gaffneys Logistics Pty Limited. The premises included a substantial hardstand area adjacent to the warehouse. Gaffneys were advised by the owner's representative that the hardstand area had a load bearing rating of 40 tonnes and the owner's agent advised Gaffneys that they could not use a container forklift with a potential weight in the order of 100 tonnes under load on the hardstand area. Despite that direction Gaffneys used the forklift for 8 months for unloading containers on the hardstand area. JSM knew the

forklift was being used despite the direction not to use the forklift. The hardstand area was damaged through the weight of the container forklift.

JSM had taken out an Industrial Special Risk Insurance Policy with QBE Insurance (Australia) Ltd. The Policy provided indemnity in the event of physical loss, destruction or damage to property. There were a number of exclusions in the Policy and the wear and tear exclusion excluded cover for the following:

> "*Physical loss, destruction or damage occasioned by or happening through:*
>
> *(a) wear and tear, fading, scratching or marring, gradual deterioration or developing flaws, normal upkeep or making good."*

QBE declined to indemnify JSM for the claim on the basis of the wear and tear exclusion as well as a purported breach of a condition in the Policy that provided:

> *"The insured shall take all reasonable precautions to prevent loss, destruction or damage to the property insured by this Policy."*

JSM challenged the insurer's declinature in the Victorian Civil and Administration Tribunal which appealed QBE's denial of indemnity. An appeal followed to the Supreme Court.

In the appeal JSM argued that the Tribunal erred in interpreting the wear and tear clause and also fell into error when it determined that the damage was caused by the weight of the forklift rather than its operation.

Osborn J concluded that:

> "*In my opinion, the ordinary meaning of the phrase 'wear and tear' is that given as its primary meaning by both the Oxford English Dictionary and the Macquarie Dictionary, namely damage due to or sustained during ordinary usage.*
>
> *This is because the word 'wear' is coupled with the word 'tear'. The concept unifying both words is damage caused by ordinary, as against extraordinary, events. 'Wear' is concerned with the result of usage taking place in respect of a thing. 'Tear' is concerned with the impact of ordinary natural causes such as weather upon a thing. "*

Osborn J noted there is case law that has determined in the context of all risk insurance that the concept of wear and tear is conventionally regarded as one concerned with the consequence of ordinary usage and weather events and wear and tear is regarded as a consequence of ordinary usage and ordinary weather.

The Court noted that the principles of interpretation require the insurance policy to be given a businesslike interpretation and that an ordinary meaning should prevail unless the context requires otherwise. The Court noted that the objective on-looker in this case would expect the words used in the exclusion clause to have their ordinary natural meaning and that the concept of wear and tear should not apply to extraordinary damage.

The Court noted when the Policy was read as a whole there was no contextual reason for giving the phrase "wear and tear" other than its usual meaning. Whilst the insurer argued that use of the container forklift constituted ordinary usage that argument was rejected.

Osborn J concluded use of an overweight container forklift on a hardstand area for eight months could not be described objectively as ordinary use. Accordingly the exclusion clause was not engaged.

The Court then turned to consider the argument that JSM failed to take reasonable precautions to prevent loss or damage. Osborn J noted that such a clause must be construed extremely narrowly. The Court noted:

> *"If the reasonable precautions condition was interpreted as imposing a duty upon the insured to avoid damage to the property by perceiving such risks as would be foreseeable by reasonable care, and taking such care as would be preventable by reasonable action, such a requirement would be repugnant to the commercial purpose of the Special Risks Policy ...".*

Olsen J noted that "reasonable precaution clauses" has been read down by the Courts and a failure to take reasonable precautions will only occur where there is deliberate course of actions or inactions which the insured realises exposes him to the risk of injury or damage from the danger which has been recognised. Effectively it is a deliberate decision to court the danger that will attract a breach of the condition.

The Courts have held that an insured may be able to establish compliance with the condition by showing one or more of the following things:

- There was no recognition of the damage or the extent of the danger;
- Particular precautions would not have been reasonable in the circumstances;
- No particular precaution was considered or it was not regarded as reasonable or practicable in the circumstances;
- The failure to take precautions was not due to the lack of desire and concern to prevent damage.

Osborn J relied on a previous decision that concluded:

> *"the test is whether the insured deliberately caused the danger by refraining from taking any measures or by taking measures which he knows to be inadequate to avert it." The word 'deliberately' indicated intentional considered action or inaction and the word 'court' suggests action or inaction which invites the danger of the accident."*

As can be seen an insurer relying on a breach of the reasonable precautions clause must show that the insured recognised the danger and failed to take any measures or any measures known to be adequate to avert it. It requires that this be due to a deliberate decision to court the danger.

The owner in this case was entitled to take out insurance to protect itself against damage to property stemming from its own accidental defaults even if they involved a want of reasonable care when analysed with hindsight. An Industrial Special Risk Policy provides indemnity for loss, damage or destruction of the insured property unless caused by an event specifically excluded. The question of what are reasonable precautions must be construed in light of the commercial purpose of the policy.

QBE argued that JSM had full knowledge of what was happening at the premises and the power to terminate the lease if it had wished to do so. The continued use of the forklift over eight months demonstrated that the owner permitted the usage for a substantial period of time.

Osborn J noted that the owner elected to keep receiving the rent knowing that damage was occurring but hoping to reach a new commercial agreement as to the construction of further improvements as to the premises. Osborn J noted that the Tribunal did not reach conclusions on a number of facts which were necessary to determine whether there was a deliberate decision to court the danger and if there was damage resulted. The Court determined it was necessary to remit the case to the Tribunal as the Tribunal was responsible for findings of fact.

However Osborn J was clear in his findings that there was an arguable case that there was a breach of the reasonable precautions clause. Osborn J concluded:

> *"The terms of the Tribunal's primary finding that the owner had full knowledge of what was happening at the premises and the power to terminate it, if it had wished to do so, necessarily raise the question of whether the reasonable precautions clause was satisfied.*
>
> *"First, it follows from the Tribunal's findings that this is a case concerned with damage which was in fact foreseen as distinct from foreseeable by the owner. It was foreseen from the commencement of the lease that if the forklift was used upon the premises the hardstand would in all probability be seriously damaged. Further the Tribunal found that the owner knew that the forklift was significantly greater in axle weight than that allowed for by the design of the hardstand and the owner was sufficiently concerned by 26 October 2007 to obtain information from PTL Engineering confirming that 12 tonnes was the maximum axle load for the hardstand.*
>
> *Secondly, the Tribunal found that the owner knew that the forklift was in fact being used on a continued basis throughout the lease.*
>
> *Thirdly, by February 2008 the owner knew that serious damage was in fact eventuating, and that the tenant was continuing to fail and refuse to stop using the forklift.*
>
> *Fourthly, the owner elected not to stop the damage as it could have done by terminating the lease, but to negotiate with a view to reconstructing the hardstand by agreement on commercial terms. It did this knowing that the damage was continuing.*
>
> *On the face of the Tribunal's findings there was at least from February 2008 deliberate course of inaction which the insured realised would result in continuing damage to the property, while negotiations were directed not to the*

cessation of that damage but to the potential commercial redevelopment of the hardstand"

Osborn J concluded:

> *"that the proper application of the reasonable precautions condition may result in only a partial defence to the claim. First, it is open to conclude that the insured's conduct was not reckless in the relevant sense until February 2008 or some other point during Gaffneys eight month occupation. If it were proven by the insured that at least some part of the loss was incurred prior to any reckless omission by it, s 54 of the Insurance Contracts Act 1984 (Cth) may operate to prevent the insurer from refusing to pay that part of the claim. Secondly, if only part of the claim succeeds not only will the extent of the insured's liability involve questions of fact and degree, but difficult issues of quantum may also arise. "*

Accordingly the case was remitted to the Tribunal.

In this case whilst the wear and tear provision did not apply as the use of the 100 tonne forklift did not amount to ordinary use, the owner's knowledge of the use of that equipment over an eight month period and their failure to take action may be in breach of the reasonable precautions condition although this issue will considered on another day when the Victorian Civil Administration and Tribunal reconsiders the claim.

Whether not the deliberate decision to allow Gaffney to continue to use the forklift caused the entirety of the damage will be a difficult issue to determine and no doubt the case has some legs to go.

The case serves as a reminder that wear and tear exclusions will not be effective in claims unless damage arises from ordinary usage but where there is unusual usage of the property which causes damage which the insured knows is likely to cause damage and the insured permits that usage to continue, the insured may well be in breach of conditions in the Policy that require the insured to take reasonable precautions to prevent loss. However where there is a breach of the reasonable precautions clause by virtue of Section 54 of *the Insurance Contracts Act* the insurer will only be entitled to reduce its liability for the claim by an amount that reflects the contribution of that breach to the cause of the loss.

New Advertising Guidelines for Advertising of Financial Products & Financial Advice

On 30 August 2011 ASIC released a consultation paper and draft regulatory guide containing best practice guidelines for the advertising of financial products and financial advice. ASIC is seeking feedback from stakeholders on the public proposal for good practice guidelines which are designed to help promoters and publishers present advertisements that are accurate and balanced and that help investors and financial consumers make decisions that are appropriate. Submissions on the draft regulatory guide must be lodged before 25 October 2011.

Regulatory guides explain how ASIC interprets the law and when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act), describe the principles underlying ASIC's approach and provide guidance to AFS licence holders.

ASIC notes that the new guidelines cover issues of good practice in advertising, and may also help promoters and publishers comply with their legal obligations to not make false or misleading statements or engage in false or misleading conduct.

ASIC is proposes that guidelines will apply to promoters of financial products and financial advice services as well as publishers. The guidelines will apply to all types of financial products including investment products, risk products, non cash payment facilities and credit facilities. Relevantly the guidelines will apply to insurers and insurance brokers.

The guidelines identify the need for accurate and balanced information to be provided to financial consumers in relation to:

- the nature of the product;
- returns, benefits and risk;
- warnings, disclaimers, qualifications and fine print;
- fees and costs;
- comparisons;
- past performance and forecasts;
- use of certain terms and phrases;

- the advertisement's target audience;
- consistency with disclosure documents;
- photographs, diagrams, images and examples; and
- the nature and scope of advice.

The guidelines will apply to advertising in magazines, newspapers, radio, television, outdoor advertising, websites, social media and discussion sites on the internet, brochures, direct mail outs, telemarketing and at presentations to groups and advertorials.

With a focus on the internet the guide note that internet advertisements should to be self contained and a consumer should not need to click through from an online advertisement to additional information to ensure they are not mislead.

The guide highlights that ASIC may take greater interest in advertisements that do not meet their good practice guidelines when considering whether to make further enquiries or exercise regulatory powers. ASIC's powers include:

- information gathering powers, such as issuing a substantiation notice,
- issuing a stop order or seeking an injunction to stop continued advertising or to stop an associated disclosure document;
- issuing a public warning notice;
- cancelling the promoter's AFS licence.

When it comes to fees and costs, ASIC believes advertisements should give a realistic impression of the overall level of fees and costs a consumer is likely to pay including any indirect fees or costs. When it comes to fees or costs referred to in an advertisement, the promoters will be required to give a realistic impression of the overall level of fees and costs a consumer is likely to pay. When a headline claim about a fee or cost is used in an advertisement, any exclusions or qualifications should be contained within the headline claim or be clearly and prominently noted within the advertisement.

Further, there is a warning that advertisements should not suggest that an advice service is free or low cost where the consumer would pay for the service indirectly through the fees and costs of any products they place (eg where advisor commissions are derived from product fees and these are not rebated back to the consumer).

In addition, comparison advertising will be regulated and a comparison may be misleading if it ignores other key features. This will impact on the insurance industry where insurers or brokers attempt to distinguish products through price comparisons with competitor's policies where the benefits offered by the policies differ, for example the guide notes:

> *"An insurance policy that offers a reduced premium but has an increased excess, should not be compared with another policy on the basis of the premium without considering the excess on each policy."*

All insurers and brokers will need to come to grips with the new regulatory guideline which will come in to effect later this year after the consultation process concludes.

The Home Owner's Liability For Injuries Sustained By Visiting Contractors

All residential premises contain hazards. Some of those hazards are easily identified and others are not. Most homes can be made safer. When a visitor to residential premises is injured, a question will arise as to whether or not the home owner has failed to take reasonable care for the safety of the visitor and whether steps should have been taken to reduce the risk of an accident.

A home owner does not owe a duty to visitors to make their home absolutely safe. The High Court noted in *Jones v Bartlett*:

> *"There is no such thing as absolute safety. All residential premises contain hazards to their occupants and to visitors. Most dwelling houses could be made safer, if safety were the only consideration. The fact that a house could be made safer does not mean it is dangerous or defective."*

A recent decision of the NSW Court of Appeal in the *Bader v Jelic* provides useful guidance on the approach the Courts adopt when considering a claim for damages for injuries sustained when an accident occurs at a residential dwelling.

Jelic was a telecommunications mechanic. He attended the home unit of the Bader to undertake some work. Mr Bader escorted Jelic to the upper floor of the unit and Jelic returned downstairs to receive something from his vehicle. On the way he slipped or tripped near the front door and stumbled into and broke a large plate glass window next to the door suffering serious injury.

Jelic commenced proceedings in the District Court alleging that the occupiers owed him a duty of care which they breached. The Trial Judge in the District Court found in favour of Jelic and awarded him damages of $243,250. An appeal followed.

From the perspective of a person descending the stairs, the front door was not directly in front of the stairs. It was offset to the left of the centre line of the descent by about half the width of the front door. Immediately in front of the stairs was a large floor to ceiling plate glass window which was approximately the same size as the front door. There were no decals or visual cues on the plate glass window to draw attention to the window to ensure it was not mistaken for an open space. There were no pot plants on the outside of the window.

The floor entry area was tiled and there was a rug near the window which Jelic alleged he stumbled on. The rug had a sheet of adhesive material under it to stop the rug moving but the material did not cover the complete underside of the rug and there was a gap of about 12 inches at the edges.

The glass was not safety glass. The unit was constructed in 1968 and there was no legal requirement at the date of the accident for the window in question to be made of safety glass. Requirements came into force after the unit was built that required new dwellings to install safety glass. However, there was no requirement to replace existing structures with safety glass or mark the glass in such a way as to give notice of its presence where full length glass is in place.

The NSW *Civil Liability Act 2002* ("Act") sets out a number of factors which must be considered when determining a claim of negligence. Section 5B of the Act provides:

> *"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) under the circumstances a reasonable person in the person's position would have taken those precautions."*

In the Court of Appeal the home owners argued that the Trial Judge should have attached more significance to the fact that the rug had been in place for ten years, five years before and five years after the accident and there had been no other accidents.

Jelic did not argue that there should have been decals or decoration on the panels of glass rather he argued that curtains should have been drawn across or a blind pulled down.

MacFarlan JA in the majority judgement concluded that the Trial Judge did not properly consider the factors relevant to the assessment of a negligence claim and the judgment did not make specific reference to the factors found in Section 5B of the Act. It was therefore necessary for the Court to reconsider the facts.

It was conceded by the Baders that the risk of an accident was foreseeable and it was not argued on the appeal that the risk was insignificant. The real issue was whether a reasonable person in the position of the Baders would have taken the precaution of lowering the blind to ensure that the window was not mistaken for the front door.

The Court noted that Section 5B of the Act requires the Court to assess the probability that the harm would occur if care were not taken when determining the response of a reasonable person.

MacFarlan JA noted:

> *"The weight that will attach to an accident – free history involves a question of fact to be determined in the light of the relevant circumstances. In my view, the accident-free history of five years preceding Mr Jelic's accident is of some significance in assessing whether a reasonable person in the position of the appellants (Bader) would (at the date of Mr Jelic's accident) have regarded it as necessary to have the blind pulled down over the window."*

The Court of Appeal ultimately concluded that a reasonable person in the position of the Baders would have regarded the risk

of a serious accident occurring as low. The Court of Appeal also noted Section 5B of the Act also requires the Court to consider the likely seriousness of the harm and in this case it would have been obvious to a reasonable person that there was a real prospect that if a person fell on to the window it would shatter resulting in severe lacerations to the person however a reasonable person would not necessarily have foreseen that if an accident occurred the injuries would be likely to be of a high level of seriousness.

The burden of taking precautions to avoid the risk of harm was not seen by the Court of Appeal as great as it simply involved pulling down a blind.

The Court of Appeal accepted that a cautious and observant home owner might have identified a significant risk resulting from the existence of the window and the rug in close proximity and the fact that the glass was not made of safety glass. However the Court of Appeal did not consider that a reasonable person would necessarily have appreciated all of those matters and put them together to reach to the conclusion that the blind should be pulled down to avoid persons such as Jelic having an accident.

The Court of Appeal concluded that:

> *"Mr Jelic did not establish that a reasonable person in the position of the appellant (Bader) would, for the purpose of ensuring that the relevant window was not mistaken for the front door, have pulled the blind down over the window. A reasonable person might have done this, or (which was not part of Mr Jelic's case in the proceedings) have taken other steps to reduce the risk of an accident such as placing decals on the window or fixing the edges of the rug with adhesive material but I do not consider that it can be concluded that a reasonable person would have pulled down the blind for that purpose."*

Accordingly the Court of Appeal found that there was no breach of duty of care. The comments of MacFarlan JA suggest that a case which was based on an argument that Bader should have placed a decal on the window or fixed the edges of the rug with adhesive material may have resulted in a different outcome. However, that was not the argument at the original trial and therefore that argument could not be raised on the appeal.

In this case the plaintiff failed to convince the Court of Appeal that a reasonable response to the risk was to pull down the blind.

The absence of prior accidents will be of significance in the assessment of the risk of harm but will only be one factor in the assessment of knowledge of a foreseeable risk. One must remember there is no duty on a homeowner to make a home absolutely safe for visitors. The real issue will be what would be the response of a reasonable person to the risks that are present.

HIH Rescue Scheme Cannot Recover Under Double Insurance Principles

The High Court has closed another door on the saga surrounding the collapse of HIH Insurance after it ruled that the rescue scheme cannot recover equitable contribution under the principles of double insurance.

Following the collapse of HIH the Federal Government set up a scheme which assisted HIH policy holders affected by the collapse of HIH. Subject to certain qualifying conditions, HIH policy holders could apply to HIH Claim Support Limited for coverage and if the application was successful, the scheme would pay the policy holder 90% of the claim. The policy holder was then obliged to assign its rights under the HIH policy to the Scheme which would then lodge a proof of debt in the winding up of HIH in the amount of the payments made by the scheme.

In *HIH Claim Support Limited v Insurance Australia Limited*, the High Court was called on to consider a claim for equitable contribution made by The Scheme against Insurance Australia Limited("IAL") pursuant to the principles of double insurance.

HIH were the insurers of Mr Steele, who was contracted to erect scaffolding to support a large video screen for use at the Australian Grand Prix. The structure collapsed and the screen was destroyed. Steele was found to have been negligent and was ordered to pay $1.4 million in damages. He made a claim on his HIH policy and subsequently the HIH Rescue Scheme. The Scheme made payment to Steele and he assigned his rights under the HIH policy to the Scheme.

The Australian Grand Prix Corporation held a separate policy with an insurer for whom IAL is now responsible. IAL's insurance

policy provided cover to Mr Steele for damages awarded against him. IAL made no payment to Steele as his claim had been paid by the Scheme. The Scheme sought contribution from IAL, arguing that IAL were liable to contribute equally to the claim made by Steele.

The claim for equitable contribution had been rejected in the Supreme Court of Victoria and the Court of Appeal in Victoria and the High Court dismissed the appeal that challenged the Victorian Court of Appeal's findings.

The Scheme argued that there was double insurance. It was not disputed that the HIH policy and the SGIC policy for which IAL was liable involved coordinate liability, however the High Court noted that equity would only recognise and enforce a duty to contribute if a co-insurer, against whom such relief was sought, were solvent.

The High Court confirmed that:

> *"the basic concept of contribution was long standing and was accepted by both law and equity as one of natural justice expressed by ensuring equality between persons obliged in respect of a common obligation … persons who are under coordinate liabilities to make good the one loss … must share the burden pro rata."*

The High Court noted that coordinate liabilities are not limited to circumstances involving co-sureties or double insurance where two insurers each have a secondary liability in respect of the same risk however what underpins the right to contribution is the coordinate liability of each entity. What is important is that the liability be of the same nature and to the same extent.

The High Court provided an example to demonstrate where double insurance would not apply. Where there is an obligation of an indemnifier under a contact of services and the obligation of an insurer which may cover the same event, it has been held that those obligations are not of the same nature and the same extent because liabilities incurred in tort, deceit or contract are generally primary whereas the liability of an indemnity insurer to an injured party is generally secondary.

The High Court determined that the liabilities of the rescue scheme and IAL were not coordinate. The assignment of Steele's rights did not place the Scheme in the same position as HIH, either effectively or in substance. The Scheme L did not step into the shoes of Steele, who had assigned his rights to the Scheme under the policies issued by HIH Rather, the Scheme stepped into the shoes of Steele, who had assigned his rights to them, thereby entitling the Scheme to be an assignee creditor and lodge a proof of debt in HIH's liquidation. The obligations of the Scheme and IAL were not of the same nature and to the same extent as IAL in its capacity as co-insurer of HIH in respect of Steele's liability.

The High Court held there was no common burden between the Scheme and IAL. If IAL had made a payment under its insurance, Steele would not have been an eligible person for the purposes of an application under the Scheme as he would not have satisfied the eligibility criteria. Steele and the Scheme would therefore never have entered into contractual obligations and the possibility of double indemnification would not have arisen. The High Court determined that in this case there was not a "common burden" and the liabilities were not coordinate.

The decision of the High Court is sure to be bring a smile to some insurer's faces, particularly those who arranged policies that included HIH policy holders as third party beneficiaries as those insurers are not liable to contribute to any payments made by the Scheme.

Those insurers who held policies that provided policy coverage to HIH policy holders who were third party beneficiaries under their insurance policies can now close their files on any claims made by the HIH Rescue scheme against them.

The HIH rescue scheme did not create an insurer that replaced HIH. The equitable right of contribution does not exist. However, the knife cuts two ways. Insurers that had paid out on claims under their policies to third party beneficiaries who also had a HIH policy are not entitled to seek equitable contribution from the Scheme pursuant to the principles of double insurance.

Responsibilities When Supervising Learner Drivers

Taking a seat next to a learner driver can be a harrowing experience for mums and dads. Sometimes that experience can be equally frightening for professional driving instructors and friends who offer to help out whilst the learner driver clocks up the time behind the wheel necessary to secure a licence.

One joy for the supervisor of the learner driver is the responsibility they assume for control of the vehicle and potentially for accidents that occur whilst they are in the vehicle.

However responsibility cuts both ways and a learner driver owes a duty of care to their supervising passenger and other road users. The High Court in the case of *Imbree v McNeilly* confirmed that a sixteen year old driver without even a learner's permit owed the same duty of care to the passengers including passengers supervising his driving as an experienced driver.

However not all accidents involving a learner driver will be the result of a breach of duty of care by the supervising instructor as was seen in the recent decision of the New South Wales Court of Appeal in Sweeney v Thornton.

Sweeney was a sixteen and half a year old learner driver being supervised by a friend, Thornton who was twenty one and held an unrestricted driver's licence.

Sweeney lost control of a vehicle whilst she was driving through a bend on a secondary road on the mid North Coast. It was not raining at the time but the roadway was damp or wet. The vehicle fishtailed along the road before leaving the roadway on the left hand side and collided with a tree. Sweeney suffered catastrophic injuries.

Sweeney commenced proceedings against Thornton claiming damages for the injuries she suffered and the Trial Judge concluded that the supervisor had been negligent.

The Trial Judge found that Thornton failed to properly supervise, instruct and direct Sweeney as to the appropriate speed at which to negotiate the bend on the roadway having regard to the geometry of the road and the prevailing wet conditions. Essentially, it was accepted that a speed of 70kmph on entering the bend was not a safe or reasonable speed for an inexperienced driver in wet conditions since it provided no contingency to safely accommodate the steering and speed adjustments the driver would likely have needed to employ to negotiate the bend in wet conditions.

Sweeney obtained an award of damages of $5,000,000. An appeal followed.

In a unanimous judgment the Court of Appeal overturned the Trial Judges findings on negligence and set aside the award in favour of Sweeney.

The Court of Appeal confirmed that:

> *"The following general principles can be stated in relation to the duty of care owed to a learner driver by a voluntary supervisor (as distinct from a licensed instructor):*
>
> - *the duty extends to taking the precautions that a reasonable person in the position of the voluntary supervisor would take to prevent harm to the learner driver arising out of his or her driving the vehicle (Civil Liability Act , s 5B(1)(c));*
> - *what precautions are reasonable depends on the circumstances of the case, including the matters identified in the Civil Liability Act, s 5B(2);*
> - *although the question of reasonableness depends on the circumstances, it is a material factor that the Licensing Regulation, cl 12(5)(b), requires the supervisor to take reasonable precautions to prevent the learner driver contravening the road transport legislation; and*
> - *in assessing the reasonableness of precautions it is a material factor that a voluntary supervisor need not possess any qualifications (other than an unrestricted licence) and that the driving of the vehicle is primarily in the hands of the learner driver"*

Section 5B(1)(c) of the Civil Liability Act provides that a person is not negligent in failing to take precautions against a risk of harm unless in the circumstances a reasonable person in the person's position would have taken those precautions.

The Court of Appeal confirmed that the question to determine was whether the supervisor exercised the care that a reasonable person in his position as a voluntary supervisor would have taken in the circumstances.

Having regard to the evidence before the original Trial Judge, the Court of Appeal concluded:

> *"In my opinion the evidence did not support a finding that the appellant(supervisor) breached his duty of care to the respondent (learner driver) by failing to instruct or guide her to reduce the speed of the vehicle below 70 kph when*

entering or traversing the bend. The evidence does not establish that a voluntary supervisor, acting reasonably, would have considered that the configuration of the bend or the driving conditions posed such a risk that instructions or guidance should have been given to the respondent at any stage of the journey to slow down below 70 kph as she approached the bend. The requirement of s 5B(1)(c) of the Civil Liability Act is not satisfied. "

A supervisor of a learner driver does owe a duty of care but the supervisor is not vicariously liable for the acts of the learner driver and situations can arise where accidents caused by the inexperience of the learner driver are not a result of the negligence of their supervisor.

A person who takes the chair next a learner driver does owe the learner driver a duty of care and that duty extends to taking the precautions that a reasonable person would take to prevent harm to the learner driver. However, when assessing the reasonableness of the precautions it is a material factor that a person is a voluntary supervisor.

After all there is the concept of personal responsibility and someone else is not always to blame.

Employer's Suspension Of Employee During An Investigation Did Not Amount To Constructive Dismissal

In *Davidson v The Commonwealth of Australia (represented by the Department of Climate Change & Energy Efficiency)*, the Full Bench of Fair Work Australia has confirmed an employer's right to suspend an employee during an investigation.

The proceedings came before the Full Bench of Fair Work Australia as an appeal by the employee after Commissioner Deegan dismissed his application for an unfair dismissal remedy.

Background facts

The employee was employed as an Executive Level II Officer in the Department of Climate Change & Energy Efficiency. On 9 December 2010 the employee commenced a period of pre-arranged sick leave. During the period of sick leave, the Department launched an investigation into leaks of information on the social website www.crikey.com. The applicant was to return from sick leave on 10 January 2011. However, he was given a further period of leave by the employer until 25 January 2011 to enable the investigation to take place. On 14 January 2011 the employee was formally advised that he would be subject to an investigation into potential breaches of the Departments Code of Conduct. He was requested to return his Blackberry and action was subsequently taken to suspend his access to the building and the employer's computer system.

The allegations against the employee concerned outside employment, misuse of IT facilities and emailing documents to external email accounts.

It was proposed to suspend the employee from his duties with pay pending the investigation. There was correspondence between the employee's representative and the Department. As a result, the employee's representative asserted that the Department had repudiated the contract of employment. As such, on 30 January 2011 an unfair dismissal application was lodged with Fair Work Australia.

The Department in early February 2011 advised the employee's representative that the employee's employment had not been terminated and that he should discontinue the unfair dismissal proceedings.

The Department requested confirmation from the employee by 10 February 2011 that he wished to continue to be treated as an employee of the Department. As a result of further communications, the Department advised the employee's representative that as the employee was not willing to act in accordance with its proposal that the employee continue his employment with the Department, it accepted that from 30 January 2011 the employee ceased to be an employee of the Department.

At first instance, Commissioner Deegan found that the Department had not dismissed the employee and, as such, Fair Work Australia had no jurisdiction to hear the claim. The Commissioner considered the relevant test was whether the Department had engaged in a course of conduct that left the employee with no option but to resign. The Commissioner found that the revoking of IT privileges was not a repudiation of the contract. The removal from the employee of access to the Department's building was also not found to be a repudiation of the contract. It was found that the Department was entitled to institute a Code of Conduct investigation and the commencement of such an investigation was not inconsistent with the employee's status as an employee.

Consequently, the suspension of the employee from his duties during the investigation was not a repudiation of the contract of employment as suspension was not uncommon when such an investigation is being conducted. The Commissioner also noted that the employee was given an opportunity to put forward reasons why he should not be suspended.

Section 386(1) (b) of the Fair Work Act 2009 states that a person has been dismissed if the person has resigned from his or her employment and was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer. The Full Bench stated that the enquiry as to whether the conduct of an employer has "forced" an employee to resign necessarily requires consideration as to the appropriateness of the employee's response so that the employee was left with no reasonable choice but to resign as a result of the conduct of the employer.

The employer in this matter was found to have properly suspended the employee by denying him access to the premises, his computer system and his Blackberry whilst on "full pay".

Recommendations in suspending employees

Employers who are considering suspending an employee from their duties should take into the account the following factors in deciding whether suspension is necessary during an investigation;

- The seriousness of the issues to be investigated. The more serious an issue the more likely it is justified that an employer suspending an employee where termination of employment could occur will be a justified step in investigating conduct;
- Whether access should be continued to the employers premises and computer systems where the integrity of records could be compromised if the employee continues to have access;
- Whether other employees who may be requested to assist in the investigation could feel uncomfortable or compromised if the employee who is being investigated sees them or has access to those employees at work;
- An employee should be suspended on full pay during the investigation.

Employer Properly Dismissed An Employee By Text Message

In the matter of *Martin v DecoGlaze Pty Limited*, Commissioner Raffaelli of Fair Work Australia found that an employer text messaging an employee's termination was not grounds for unfair dismissal in circumstances where:

- the employee had engaged in intentional actions which resulted in the employer incurring substantial costs to repair damaged goods; and
- the employee was absent on annual leave at the time the decision was made to terminate the employee's employment.

Background facts

Martin had been employed as a foreman with the employer. Part of his duties in the production of glass products was to add Silane to the glass products which enabled paint to adhere to the glass. Part of Martin's responsibilities also included maintaining an appropriate level of stock of Silane.

The factory ran out of Silane. However, Martin chose to continue the production of the glass products without adding Silane. As a result, the factory produced defective goods which needed to be replaced at significant cost.

The Managing Director sent a text message to Martin complaining that Silane had not been used and, as a result, the company had incurred expenses to replace defective products of up to $74,000.

The Managing Director sent another text message advising Martin that he had been summarily dismissed. At the time both text messages were sent by the Managing Director, Martin was on annual leave.

At the end of the employee's annual leave, he was advised that he had been dismissed by the Managing Director in the text message he received whilst on annual leave.

Martin lodged an application to Fair Work Australia pursuant to Section 394 of the Fair Work Act 2009 claiming his termination

was unfair because:

- he was not given the opportunity to respond to the allegations raised by the Managing Director; and
- the notification of dismissal was sent by text message; and
- he was on annual leave at the time he received the notice of termination.

The Commissioner accepted the employee had deliberately proceeded with the manufacture of the glass products without the Silane added, in circumstances where the employee knew or ought to have known it would cause damage to the employer's reputation and business, as well as the cost of rectification.

The Commissioner found the employee's actions amounted to misconduct and, as such, the employer had a valid reason for his dismissal.

The Commissioner also found that the use by the employer of text messaging to notify the dismissal was appropriate as:

- the outcome of an investigation or due process for the employee would have resulted in the same outcome, ie the employee would have been dismissed for misconduct; and
- the seriousness of the offence warranted immediate notification to the employee of his dismissal and text messaging whilst on annual leave was an appropriate method of communication.

OH&S Roundup

Size And History Matters

The Roads and Traffic Authority of New South Wales ("RTA") was recently convicted of an offence under Section 10(1) of the Occupational Health & Safety Act 2000 ("OHS Act") which relates to duties of controllers of work premises, plant or substances.

Mr Hocking and Mr Robinson, employees of the RTA sustained injuries whilst performing maintenance work on a suspended work platform on a bridge in Corowa, which ultimately fell as a result of some work which had previously been carried out on the bridge by RTA employees in 2007.

A number of tops to bolts on a monorail on the bridge had been cut as part of works carried out in 2007. It was not obvious that some of those bolts secured the monorail attached to the underside of the bridge and that one of those bolts was responsible for holding the monorail in place. The fact that the bolts had been cut was obscured by the kerbing of the bridge. The work platform was attached to the monorail.

Before commencing the maintenance work in 2008, the RTA obtained an opinion from an engineer which recommended that certain modifications be made to the monorail to ensure that it was secure before work platforms could be hung from it. Mr Hocking and Mr Robinson were in fact about to carry out these modifications when the incident occurred. The weight of the work platform was inherently unsafe because of the state of the monorail and because the defendant was not aware of the defect created by the cutting of the bolt and its concealment.

The RTA had a work method statement however, it lacked sufficient detail and it did not require RTA personnel to take remedial steps prior to Hocking and Robinson working on the platform.

The Court considered that the work to be carried out was inherently dangerous given it comprised work at an elevation on a bridge. It also noted the incident might be seen as the manifestation of an act of carelessness on the part of the worker that cut through the bolts in 2007 and his or her failure to realise that the bolts held the monorail secure. That was considered against the background of a defendant who had a comprehensive and extensive system in place to ensure work carried out by its employees was done safely and with adequate training.

The penalty imposed was determined having regard to, amongst other things, the RTA safety systems, the commitment of the RTA to discharge its OH&S obligations, its early plea, co-operation with the WorkCover Authority and its good citizenship.

In considering its 15 prior convictions for offences under the OH&S Act, the Court favourably viewed the fact that the last conviction occurred in 2003 and that there was an 8 year period during which no convictions were recorded. The large volume

of persons performing work for the RTA together with a large number of contractors, namely, about .9,000 persons and the extent and nature of the work undertaken by the RTA was also taken in to account.

The maximum penalty was $825,000 and the Court held that the appropriate penalty in all the circumstances was $175,000.

$300,000 In Fines

In *Inspector McGrath v Gould Bros & Co Pty Ltd*, the defendant, Gould Bros & Co Pty Ltd ("Gould Bros") was charged with 3 breaches of the Occupational Health & Safety Act 2000 ("the Act").

The three sets of proceedings related to one state of affairs at the construction site, namely, the failure of the defendant to take measures to preclude persons from falling from the exposed and unprotected edge of a mezzanine floor whilst construction works were proceeding.

Gould Bros undertook construction of a new retail trade facility. It did not appoint a principal contractor but rather, engaged a range of contractors to complete the works. It appointed a Manager within its company as site co-ordinator for the project. That Manager was assisted by a Store Manager of Gould Bros and who was appointed as site-co-ordinator caretaker in the Manager's absence. Neither individuals had any prior experience as a site co-ordinator of commercial constructions works, had not completed the general construction induction course and did not receive any appropriate training in relation to the construction industry or responsibilities to subcontractors that were under their supervision.

As part of the construction works, one of the subcontractors proceeded to install a staircase leading to a mezzanine level. The mezzanine level did not have any fall protection or railings to eliminate the risk of a fall. The stairs installed by the subcontractor required a barrier to prevent use and access to the mezzanine level. Notwithstanding that it was the requirement of the subcontractor to construct temporary railings or utilise fall prevention equipment on the mezzanine level, the subcontractor requested Mr Moran to barricade around the staircase to prevent any unauthorised access. Mr Moran did not do this but merely closed and locked any doors allowing access to the relevant area at the conclusion of the day.

The following morning, a walk through was undertaken by the General Manager of Gould Bros together with Mr Moran and others. The General Manager undertook a risk assessment of the premises and identified that subcontractors faced a risk of falling whilst work was being undertaken on the mezzanine level and he asked Mr Moran to arrange for the area to be secured and to prevent entry until a fence or railing had been installed. That evidence was disputed by Mr Moran.

Ultimately, whilst liaising with another subcontractor on the mezzanine level, Mr Moran lost his balance and fell to the ground floor sustaining injury.

The 3 charges related to the risks caused by the failure to install fencing and railing to 2 subcontractors and to Mr Moran.

In assessing the penalty, the Court noted that although the defendant had been intimately involved with the construction industry by reason of its supply of products to the building and construction industry, it did not directly engage in the construction of premises. the Court was satisfied that Gould Bros had both prior and subsequent to the incident, a comprehensive commitment to its OH&S obligation with respect to its usual business operations and that the incident arose out of an activity not usually undertaken by the defendant.

In determining the penalty, the Court had regard to the principle of totality in order to reflect the total criminality involved. This principle involves a sentencer or penalty fixer imposing a penalty appropriate to each contravention and then as a check, considering whether the aggregate is appropriate for the total contravening conduct.

The Court was of the view that each charge was objectively serious and would each attract a penalty of $250,000. However, as each of the charges arose out of the identical course of conduct, the penalty was reduced for each offence to $100,000 reflecting in the aggregate what the Court considered appropriate for the defendant's culpability. There were 3 offences committed and fines totalling $300,000 imposed.

The importance of competent personnel

The case of *Inspector James v Paul (No 2)* involved an appeal by the prosecutor against the dismissal of a charge pursuant to s 8(1) of the Occupational Health & Safety Act ("OHS Act") against Paul, a director of Dekorform Pty Ltd ("Dekoform"). The

charge was brought as a result of risks arising from defective machinery which manifested in the death of an employee.

At hearing, the Trial Judge ordered the director to pay a fine of $5,000 but ultimately dismissed the charge having applied the provisions of s 10 of the *Crimes (Sentencing Procedure) Act 1999* which enables a Court to dismiss a charge having regard to factors including antecedents, character and the nature of the offence. In dismissing the charge, the Trial Judge considered that Paul, having vested the day to day management of business to a Manager of Dekoform was not as culpable as that Manager in failing to ensure that the defective machine was free of risk to employees.

Further, the Trial Judge had regard to the fact that prior to the incident, Paul arranged regular inspections, safety audits and maintenance of the machinery by external contractors and otherwise paid careful attention to his OH&S responsibilities and had an employee with specific OH&S skills, thereby demonstrating a commitment to and significant allocation of resources to OH&S.

At appeal, the Court found that Paul's failure was to have in place a system that would have enabled managers with the necessary knowledge and training to properly assess the safety of the machine and determine if it was missing any safety components or was defective in any way. The appeal Judges acknowledged that a director cannot be expected to have detailed awareness of day to day activities (ASIC v Healey [2011] FCA 717) but found Paul to be directorially responsible for the absence of competent personnel and that his reliance upon local management for day to day activities of Dekaform was not exculpatory.

This judgment demonstrates that a director will not avoid penalty by outsourcing the risk assessment of plant or machinery to others in the employ of a company. A director must ensure that a safe system of work is implemented and maintained by competent personnel.

The appeal Judges upheld the Prosecutor's appeal and convicted Paul and imposed a fine of $15,000.

Workers Compensation Roundup

NSW Work Injury Damages Claims -Fund Management Expenses Are Recoverable

In New South Wales the *Workers Compensation Act 1987* provides that the only damages that may be awarded to an injured worker as a consequence of the negligence of the employer are damages for past and future economic loss. A worker's rights to compensation for permanent impairment and pain and suffering are satisfied by way of statutory payments pursuant to Section 66 and Section 67 of the *Workers Compensation Act 1987.*

However is it only past and future economic loss that is recoverable? The NSW Court of Appeal in the *Workers Compensation Nominal Insurer v Gary Luke by his Tutor Matthew Charles Luke* was recently called on to consider whether or not an injured worker who can no longer manage his financial affairs can also recover costs for fund management in a work injury damages claim.

The *Workers Compensation Act 1987* provides no entitlement to this head of damage and Section 151G of the Act provides that the only damages that may be awarded are damages for past economic loss due to loss of earnings and damages for future economic loss due to the deprivation or impairment of earning capacity.

Gary Luke was injured whilst working as a roof tiler for an uninsured employer. He fell three metres on to a concrete surface and suffered head and back injuries. As a result of his head injuries Luke suffers from short term memory loss and is unable to manage his own financial affairs. At the original trial the defendant argued that the cost of fund management was contrary to Section 151G and that no allowance should be made for costs that Luke would incur in obtaining assistance managing his funds following an award of damages.

The Court of Appeal noted that Section 151G of the Act provides that "the Act does not affect any liability in respect of an injury to a worker that is independent of this Act, except to the extent that this Act otherwise expressly provides".

The Court of Appeal noted the cost of fund management was a well recognised component of an injured plaintiff's future economic loss prior to the 2001 amendments to the Workers Compensation Act 1987. The Court of Appeal noted that Section 151G did not expressly provide for that right to be taken away and did not deny recovery for this form of future economic loss. The Court of Appeal noted that the deprivation of the plaintiff's earning capacity created or caused a need for fund

management with its attendant cost which did not exist while the earning capacity was intact and he was receiving wages. The award of a substantial lump sum created or caused that need.

The loss was seen as "due to" the deprivation of the plaintiff's earning capacity.

Accordingly the Court of Appeal determined that it was appropriate to award the cost of managing the lump sum.

Campbell JA noted:

> "*It will often happen that, before being injured, a plaintiff was not in the fortunate position of having a substantial lump sum from which investment income could be earnt. Even so, if a plaintiff is injured in a way that results in him or her becoming mentally incapable or less capable of earning money by investment, the plaintiff's earning capacity has, in that respect been lost or reduced. Such a plaintiff sustains a "future economic loss" if the plaintiff loses money through having to pay an expense. An expense of funds management is "due to the deprivation of or impairment of earning capacity" if it is caused by the plaintiff being unable, or less able, to earn money for himself or herself through investment."*

Accordingly workers who suffer injuries which result in an inability to manage their fund will be entitled to recover the cost of fund management in work injury damage claims.

A Question Of Incapacity

When a worker carries out employment under a rehabilitation program, can this employment be used to demonstrate that a worker has a realistic earning capacity on the open labour market?

The recent Presidential appeal of *Bi-Lo Pty Limited v Burns* examined this concept. Prior to the injury, the worker had been a permanent part-time employee at Bi-Lo working approximately 28 hours per week. She was the victim of an armed hold-up by three men t and following her initial period of treatment had been certified fit for suitable duties for six hours per week provided she worked with a "buddy" at all times. The worker had claimed despite this suitable duty certification, for all intents and purposes she was total incapacitated for employment. The Arbitrator who originally heard the claim agreed with that submission. The employer subsequently appealed on the grounds that given the worker had maintained some part-time employment under the auspices of the rehabilitation program, she could not be totally incapacitated and a finding of partial incapacity should have been made.

Deputy President Bill Roche commented that the compensation to be paid to a worker was measured by the disability caused by the injury sustained and that compensation was to be assigned a monetary value according to the state of normal market without taking into account "abnormal or ephemeral conditions". A total incapacity finding can be made when capacity for earning has gone, except for the chance of obtaining "special employment of an unusual kind". The normal market is commonly known as the open labour market and any special employment of an unusual kind is to be excluded unless it can be shown that such employment is available in the labour market readily accessible to the worker. The type of employment where the worker was assigned to a job that was artificial or in a theoretical situation such as in this case was of an unusual kind. It had been provided purely as part of the rehabilitation program pursuant to the employer's obligations and that type of employment was not available in the open labour market. Accordingly it should not be a consideration as to whether she possessed a capacity for employment.

The Deputy President commented further that even if the special employment with a buddy was part of the open labour market, the Arbitrator's original finding of total incapacity was open on the evidence. In determining a capacity, there was a need to consider more than just the medical evidence. The Deputy President noted the workers evidence of continuing difficulties even with the "buddy" and the difficulties in transporting herself to work provided strong support to the Arbitrator's conclusion that the worker was totally incapacitated for employment. The Deputy President specifically made reference to the psychological evaluation which placed the worker as a "Class 4" (with Class 5 being the worst) in terms of employability. This was an assessment of severe impairment where a person could not work more than one or two days a week or less than 20 hours per fortnight with reduced pay due to an erratic attendance. In practical terms, no job would fit that description and the worker was totally incapacitated.

Although this decision is in line with previous decisions of the WCC it does highlight issues for rehabilitation programs which are "artificial". Rehabilitation programs may be instituted by employers to avoid adverse impacts on premiums, on the basis

the worker would be entitled to weekly compensation if they were not engaged in that rehabilitation program. Whilst this is an effective strategy in the short term, a rehabilitation program that provides additional skills or provides viable employment readily accessible on the open labour market will assist in ultimately securing a finding of partial incapacity and in all likelihood a reduced ongoing entitlement to weekly compensation.

Top-Up Lump Sum Compensation Claims For Bowel Dysfunction

There is a growing trend for workers to submit claims for permanent impairment for bowel dysfunction (upper and lower digestive tract). These claims are not the result of a primary injury to the digestive system but are caused through the use of analgesia and other pain relieving medication used in the treatment of their primary injury. Generally, in the absence of evidence to show a break in the causal chain between the original primary injury and development of bowel dysfunction, workers have been successful in demonstrating both injury and impairment.

Recently in *Rhodes v St Luke's Hospital Complex (2011),* Deputy President Bill Roche was called on to determine one of these types of claims where injury and impairment to the digestive tract had been denied by the scheme agent.

Rhodes suffered an injury to her neck, left shoulder and back on 24 June 2003 whilst employed with St Luke's Hospital. She originally received 14% whole person impairment due to the injury to the cervical spine and left shoulder. She then alleged impairment of her lower digestive tract due to the result of the consumption of medication for those injuries. The Section 74 dispute notice had pleaded that Rhodes had not established the need for pain relieving medication had arisen from her injury and furthermore the worker had consumed similar medications for pain relief due to a constitutional endometriosis condition. There were some medical records demonstrating similar lower digestive tract symptoms prior to the workplace injury. Rhodes was initially unsuccessful and lodged a Presidential appeal.

Deputy President Bill Roche noted the test of causation in a claim for compensation for a consequential loss of impairment was the same as in a claim for weekly compensation. That is, the loss or impairment resulted from the relevant work injury. Consequential losses or impairment are not subject to the usual test for injury under Section 9A, namely employment was a substantial contributing factor to the injury and are generally easy to demonstrate on the balance of probabilities. Nevertheless, the worker was unsuccessful in her appeal as her medico-legal evidence was based on a false history that the worker commenced analgesic medication purely as a result of her work injury. The employer had produced medical evidence challenging the assumed history recorded by the medico legal urologist and the Arbitrator had been to conclude an inaccurate history reduced the weight attached to the medico legal expert's opinion. The true medical history included the consumption of other medication for endometriosis and a prior bowel problem in 1998.

This decision certainly gives some hope that the ever increasing number of these types of top-up permanent impairment claims can be resisted. The key aspect of resisting these types of claims is to focus on the prior medical history of the worker and secure evidence of prior consumption of painkillers due to some other condition or problem. This can be used to either discredit the expert opinion of the worker's medico legal expert or at the very least, reduce the weight placed upon that report by the Arbitrator. Given many claims are brought on the basis of a single medico legal report provided by doctors that routinely provide reports on the issue and those reports are surprisingly similar, there is ample scope to defeat the claims where a proper medical history is not provided to the doctors. The success of the worker in these claims of whole person impairment (ranging from 2% to 6%) for digestive tract injuries often results in the worker t reaching the 15% whole person impairment threshold to give rise to an entitlement to work injury damages.

The small amounts claimed for whole person impairment claim in this type of claim does not represent the ultimate cost to the scheme if the worker is successful.

CTP Roundup

Delay in Bringing Claims – Full and Satisfactory Explanation

Motor accidents compensation claims in NSW are governed by the Motor Accidents Compensation Act, 1999. That Act specifies the time limits in which to bring claims and provides that late claims may only be brought subject to the leave of the Court and the Court must not grant leave to bring a late claim unless a claimant has provided a full and satisfactory explanation for the delay.

In addition the Act provides that an insurer of a person against whom a claim is made may give the claimant notice requiring the claimant to commence court proceedings if the claimant has been entitled to commence proceedings for at least six months and eighteen months have elapsed since the date of the accident. If the claimant does not comply with the Notice within three months, the claimant is taken to have withdrawn the claim and the claimant must apply to the Court to allow the claim to be reinstated before they can pursue the claim. When the Court considers the application for reinstatement it may only reinstate the claim where it is satisfied that the claimant has a full and satisfactory explanation for the failure to comply with the Notice.

It is therefore important to consider what amounts to a full and satisfactory explanation. In both of these circumstances the concept of full and satisfactory explanations takes particular significance as a failure to provide a full and satisfactory explanation for the delay or failure to comply with the Notice will prevent the claim proceeding.

A decision of the District Court of New South Wales in Mortimer v Moon provides guidance on the approach that will be adopted by the Courts when considering the explanation provided by a claimant.

In the proceedings Mortimer sought an order that his claim be reinstated and he be granted leave to commence proceedings out of time pursuant to Section 109 of the Act. Affidavit evidence was tendered in support of the application and after considering that evidence Johnston J concluded:

> *"The solicitor never once said why he did not commence proceedings apart from one piece of evidence that, despite the Application for Exemption, he believed the insurer was continuing to assess the claim 'under its general duty to resolve a claim'."*

Johnston J also noted that the evidence:

> *"Never once mentions the limitation period and the Court is uninformed as to whether to this day he even knows there was one and when it expired".*

The Court went on to conclude that:

> *"The material put before me was hopelessly inadequate … whether a reasonable person in the position of the plaintiff would have been justified in experiencing the same delay cannot be evaluated because it was never explained whether he even knew there was a delay."*

The explanation that a claimant must provide, must include the knowledge and belief of the claimant. An explanation completely silent on whether a claimant even knew of the limitation period cannot be full nor satisfactory.

When a Court comes to consider whether an explanation is full and satisfactory it is incumbent on claimants to put evidence before the Court that is directed to their own knowledge and belief as well as the reasons for any delay, including those put forward by their lawyers. The Court cannot grant leave for the claim to be reinstated or leave to commence proceedings out of time without being satisfied that there is sufficient evidence to demonstrate an adequate explanation for the delay

Administrative Decisions – Irrational Or Illogical Findings And Inferences - Error Of Law.

When administrative decisions are made by the Claims Assessment and Resolution Service ("CARS") of the Motor Accident Authority, insurers are bound by the decision (unless liability is in issue) and to challenge a decision need to seek judicial review based on an error of law. Similar considerations will arise from an Appeal pursuant to Section 353 of the Workplace Injury Management and Workers Compensation Act 1998.

In *Tisdall v Webber [2011] FCAFC 76*, the Full Federal Court was called on to determine whether an irrational or illogical finding of fact or inference constituted an error of law.

Dr Tisdall was accused of engaging in inappropriate practices on 66 separate days in the referral period (twelve months) when he rendered 80 or more professional attendances. A Professional Services Review Committee was called on to determine whether Dr Tisdall had engaged in inappropriate practice in relation to his rendering of professional attendances by engaging in a pattern of service provision prescribed by the Act; and that "exceptional circumstances that affected the rendering of [those] services which may have excused the pattern did not exist. The Committee determined there was an inappropriate practice on the part of Dr Tisdall. The Committee claimed it was at liberty to decline to accept evidence provided by Dr Tisdall and that their decision to reject this evidence was a finding of fact.

Dr Tisdall challenged that finding in the Federal Court. In the absence of any evidence which demonstrated Dr Tisdall's patients required disproportionate medical services, the trial Judge agreed with the Committee's decision in determining that no "exceptional circumstance" existed and there was an inappropriate practice. A further appeal followed.

The Full Court confirmed that the question on review of a decision based on irrational or illogical reasoning was "whether there was no foundation for the conclusion reached."

The Full Court referred to what it said in the case of Wecker [2008] FCAFC 108;

> *"….at common law, want of logic is not synonymous with error of law …… and as to inferences, "so long as there is some basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place" …. On the other hand, where a statute requires the decision-maker to discharge particular duties, "irrationality …… may involve non-compliance with the duty….. the critical question is whether the determination [by the Tribunal] was irrational, illogical and not based on findings or inferences of fact supported by logical grounds" and "inadequacy of the material before the decision-maker concerning the attainment of that satisfaction is insufficient in itself to establish jurisdictional error".*
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> *In Minister for Immigration and Multicultural Affairs v Epeabaka Black CJ, von Doussa and Carr JJ observed that want of logic in drawing an inference will not of itself constitute an error of law. Their Honours also noted, however, that a want of logic "may sound a warning note to put one on inquiry whether there was indeed any basis for the inference drawn":"*

The Full Court followed the test in Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; where a "reasonable person" test was applied for illogicality or irrationality to constitute a jurisdictional error "*the decision in which the Tribunal came to …is one at which no rational or logical decision maker could arrive on the same evidence*."

The Committee had rejected the evidence of Dr Tisdall and the Full Court determined that the Committee failed to provide sufficient reasoning for the rejection of the evidence. Specifically, the Full Court criticised the Committee in their finding that not being bound to accept evidence is not a basis itself for disregarding evidence of probative value.

The Full Court agreed with Dr Tisdall that the "*willingness of doctors to see Dr Tisdall's patients was a question of fact*." and of probative value to be considered for the statutory question.

The Full Court determined that the Committee's decision did not take into account probative evidence and was therefore based on an error of law and the Appeal was allowed.

When administrative decisions are made under the NSW CTP legislation by a CARS Assessor, a claimant has the right to seek a remedy by not accepting the decision when an insurer can only challenge a decision based on an assertion that there was an error of law. Accordingly insurers need to consider whether a finding of fact or inference was "irrational" or "illogical" and "whether it lacked an evidentiary basis" as this may amount to an error of law.

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