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.

Defining the Nature of the Risk and the Activity Takes Precedence over Causation

Surgery often carries inherent risks and a bad outcome for a patient can lead to litigation with a doctor being blamed for the outcome even though the patient was warned about the potential risks. However the Civil Liability Act in NSW provides that a person is not liable in negligence for the harm suffered by another person as a result of the materialisation of an inherent risk.

The impact of the inherent risk defence was recently examined by the Court of Appeal of NSW in *Paul v Cooke [2013] NSWCA 311. In this case* the Court considered a plaintiff appeal against a verdict entered in favour of a medical practitioner who had failed to diagnose an aneurysm in 2003 that was later diagnosed in 2006. Upon receiving medical advice to have surgery to remove the aneurysm, having been warned of the risks involved, and in the absence of any lack of skill or care by the surgeons, the aneurysm ruptured causing Ms Paul to have a stroke and suffer serious injuries.

Had the diagnosis been made in 2003, Paul would have undergone a different surgical procedure to that which she had in 2006. However, the risk of stroke following a ruptured aneurysm in either surgery was statistically the same and the aneurysm did not change in size or shape in the intervening three years.

The trial judge determined the issue in favour of the medical practitioner on the basis that causation under s5D(1)(b) of the Civil Liability Act 2002 (NSW) ("CLA") had not been made out. That is, it was not appropriate for the scope of the medical practitioner's liability to extend to the plaintiff's injuries. The medical practitioner had argued the case ought fail due to the materialisation of an inherent risk under s5I of the CLA. This was rejected by the trial judge.

Ms Paul appealed against the finding on causation. The medical practitioner filed a Notice of Contention in which the findings of the trial judge concerning s5I of the CLA were challenged.

The Court unanimously dismissed the appeal. Leeming JA gave the leading judgment with which Ward JA agreed. Basten JA wrote a separate judgment agreeing in the outcome but for slightly different reasons.

While this decision was given in the context of a medical negligence case, the reasons expounded by Leeming JA will have far-reaching consequences for all cases in which the Court must decide the defences under the CLA which, if established, operate to defeat a claim for damages - including s5I (inherent risks), and 5L (dangerous recreational activities).

Leeming JA considered Part 1A of the CLA as a whole and the subtle differences in the language used by the legislature in various sections. His Honour stated that:

> *"Part 1A applies only to claims for damages for harm resulting from a failure to exercise reasonable care and skill. Within that class, the issue of causation will be decided in favour of the plaintiff in the circumstances stated by s 5D and in accordance with the onus in s 5E when particular harm is found to have been caused by the failure to exercise reasonable care and skill. However, there are classes of harm resulting from the failure to exercise reasonable care and skill which are stated not to give rise to liability."*

It is on this last issue to which his Honour gave much attention in his reasons concerning the

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appropriate way in which those sections, which provide that no liability exists in certain circumstances, ought to be interpreted.

His Honour concluded that, once it is established that the particular harm has been suffered either as a result of the materialisation of an inherent risk (s5I) or the materialisation of an obvious risk of a dangerous recreational activity (s5L) then there is no liability for such harm. As such, those sections not only act to defeat causation under s5D but they provide a complete answer to any claim falling within Part 1A of the CLA.

Further, his Honour (with whom Ward JA agreed) held that if a case can conveniently be decided under s5I, it should be. For, at that point the entire inquiry under Part 1A comes to an end.

Importantly, Leeming JA (again, with whom Ward JA agreed) held that s5I is not confined to the cases where the reasonable care and skill in s5I(2) is that of the defendant.

Put simply, s5I applies to defeat a claim for damages in circumstances where the risk of harm pre-dates any failure to exercise reasonable care and skill, and that the failure to so exercise reasonable care and skill has not created or increased that risk.

His Honour nevertheless proceeded to determine the questions arising in the appeal under s5D of the CLA relating to causation and maintained a firm position that the section requires not only a finding that the harm would not have occurred but for the negligent act but that it is also a requirement to find that it is appropriate to extend the scope of the negligent person's liability to the harm so caused. His Honour held that it would not be appropriate in this case because the risk pre-dated the negligent failure to diagnose and her condition did not worsen between 2003 and 2006.

All three judges agreed that causation was not made out in any event.

The significance of this decision is important for all claims falling under Part 1A of the CLA. In every case, the Court of Appeal has now clarified that if defences are raised which, if established, operate to defeat the claim, the trial judge ought to determine those issues once it has been established that there has been a failure to exercise reasonable care and skill - before determining causation.

To that extent, the available defences under s5I and 5L of the CLA which both operate to defeat a claim for damages under Part 1A of the CLA are likely to be given more prominence than has been seen in past cases which have tended to focus on the ingredients necessary to establish causation under s5D of the CLA, rather than determining as a matter of greater priority whether those sections which operate to defeat a claim for damages are applicable to the facts of the case.

One can expect to see a greater emphasis made by defendants and their insurers on the inherent risk and dangerous recreational activity sections of the CLA.

School Liable For Harm Caused By Bullying

The New South Wales Court of Appeal has recently confirmed a decision of Justice Schmidt in the Supreme Court who found St Patricks College liable to a student as a consequence of bullying by other students.

Jazmine Oyston was a student at St Patricks College in Campbelltown from 2002 to February 2005. In 2007, Oyston had commenced proceedings against the school alleging that she had suffered psychological harm as a consequence of bullying by other students at the College.

Those proceedings were heard in the Supreme Court in 2011. Her Honour Justice Schmidt found in favour of Oyston and awarded damages in the sum of $116,296.00.

Both Oyston and the College appealed. Oyston contended that the damages awarded were insufficient and the College contended that Oyston's claim should fail in its entirety.

Oyston contended that the College was negligent in that it had failed to devise, implement and maintain an adequate anti-bullying program and also failed to act upon the complaints of bullying made by Oyston. The College had also failed to investigate and prevent the bullying by supervising, disciplining and counselling the perpetrators.

Expert evidence was available at the trial and the experts agreed that the College's policies constituted an acceptable anti-bullying program. Two of the experts also agreed in relation to the action that should have been taken in response to complaints about bullying. However, the experts could not come to agreement in relation to the effectiveness of the implementation of the written policies. It was accepted that a bullying register was not kept.

Oyston's evidence was to the effect that in the second half of 2002, she began to be bullied by the girls in the "popular group". The bullying was described as taking "the form of giggling and sniggering directed at Oyston, name calling, nudging and jostling".

The Court considered a large amount of evidence of the events that occurred over the years when Oyston attended the College including Oyston's referral to a counsellor in relation to a potential eating disorder. In 2003 Oyston contends that she was subjected to name calling daily as well as physical bullying, both at school and on the school bus and occasionally in public places. Oyston contends that in 2004 she experienced the most severe bullying and became depressed and suicidal during that year.

The College argued on appeal that on the basis of contemporaneous records, there was no basis for concluding that Oyston had been bullied and that although there was some evidence in relation to specific incidents, they were appropriately dealt with. The College also argued that Oyston was not a reliable witness and if Oyston was bullied, then the bullying never came to the attention of the College. Not only did Oyston not complain of bullying, but when it was raised with her she in fact denied it and referred to other problems.

Justice Tobias, who delivered the leading judgment, concluded:

> *"Furthermore, the College was aware from February 2004 that the appellant was vulnerable in that she suffered from anxiety and panic attacks. Whether or not those attacks were brought on in whole or in part by bullying, it should have been clear to the College that the appellant was likely to be susceptible to psychological harm caused by such conduct. Indeed, .. Mrs Ibbett acknowledged that bullying, if unaddressed, could occasion a depressive condition in some people suffering from anxiety. The risk of psychological harm to the appellant was both foreseeable and not insignificant within the meaning of Section 5B of the Civil Liability Act. The College was clearly required to take such active steps as were reasonable in order to prevent that risk from eventuating. Those steps were reduced in its own policies.*
>
> *In my view, the steps, such as they were, taken by Mrs Ibbett during 2004, did not provide a reasonable response to the not insignificant risk of harm to students such as the appellant if the bullying of them continued. In accordance with the College's own policies, it was insufficient merely to request teachers to keep an eye for bullying; once a complaint of bullying was received, it required investigation and, if substantiated, action against the perpetrator. So far as the appellant was concerned, the evidence established that she was regularly bullied by JP and LM and to a lesser extent, AM. Reasonable steps should have been taken by Mrs Ibbett to carefully investigate the appellant's allegations and to act on them if she was satisfied that they were justified".*

The Court of Appeal therefore upheld the Trial Judge's conclusion that the College had breached its duty of care to Oyston. Oyston had been subjected to ongoing bullying and the College was aware of this and had failed to take reasonable steps to bring the bullying to an end. The Court of Appeal did not comment on the steps that could have been taken by the College.

Not only did the Court of Appeal rule in Oyston's favour, they in fact increased her damages, with those damages to be determined.

It is not sufficient for a school to simply have anti-bullying policies in place. Bullying is an issue that must weigh heavily on the minds of a school where it has knowledge of a vulnerable student and the school must take action to deal with the issue otherwise it is at risk of a damages claim. It is not enough to have anti- bullying policies, they must be followed and appropriate action taken if necessary.

Workplace Bullying – The Damages Mount

If there is one thing certain in these troubled times, it is that bullying claims are poised to skyrocket.

Elsewhere in this newsletter we examine bullying in a school context. This note deals with bullying in the workplace.

The Supreme Court of Victoria has recently awarded a claimant in excess of $500,000 in damages for pain and suffering and pecuniary loss for psychiatric injury caused from exposure to an unsafe workplace in which she was the subject of bullying, harassment and intimidating conduct.

The claimant was employed as a part time assistant in a university bookshop for several years. Her immediate supervisor was responsible for the "bullying, harassing and intimidating" conduct.

There was no issue in the case that her employer owed the claimant a duty of care. The real issues for the Court were: did conduct which constituted bullying or harassment take place; if so, was that conduct a breach of the employer's duty of care to

take reasonable care for the safety of the claimant; and, if so, in what particular respect did the defendant fail to exercise reasonable care?

As to the particular conduct at the heart of the claimant's action, the Court accepted that the essence of the complaint was the supervisor's conduct and the demeanor used, the vocal tone employed and the body language that accompanied the stated words or activities, rather than the words and activities themselves. In isolation many of the matters complained of appear relatively innocuous. The Court, however, took the view that when seen together they were sufficient to constitute bullying.

Specific elements of the conduct were:

- on occasions when the supervisor rearranged the furniture, the claimant was annoyed and upset because it made her feel ignored;
- the supervisor was regularly unnecessarily sarcastic towards the claimant in conversation;
- the supervisor made offensive remarks in the claimant's presence;
- the supervisor used offensive language, both in conversation with the claimant and in her presence;
- the supervisor often made lewd, demeaning, hostile or sarcastic statements;
- the supervisor was 'nitpicking' of the plaintiff's work;
- the supervisor had a discouraging and disapproving tone in conversation with the plaintiff.

The Court accepted a definition of workplace bullying in these terms:

> *"Workplace bullying is repeated, unreasonable behaviour directed toward an employee, or group of employees, that creates a risk to health and safety. Within this definition 'unreasonable behaviour' means behaviour that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten; 'behaviour' includes actions of individuals or a group, and may involve using a system of work as a means of victimising, humiliating, undermining or threatening; 'risk to health and safety' includes risk to the mental or physical health of the employee."*

In light of that definition the trial judge was satisfied that the supervisor had engaged in an established pattern of workplace bullying.

In turning to look at the question of breach of duty, the judge drew a distinction between cases concerned with psychiatric injury arising from overwork or workload circumstances on the one hand, and those cases relating to psychiatric injury stemming from bullying and employee behaviour circumstances on the other hand. His Honour said:

> *"There are material distinctions between stressful situations that are a consequence of accepted working conditions or work overload and those that are a consequence of unreasonable behaviour in the form of workplace bullying by a work colleague."*

In this case the Court found that the risk of injury was apparent and was observed by the defendant employer at an early stage of the claimant's employment. Board Minutes and communications from the Chairman of the Board demonstrated a plain anticipation of a risk of a psychiatric injury to the claimant if the supervisor's conduct continued.

In its initial response to some of the claimant's allegations, the Board indicated to her that detailed employment contracts with position descriptions, a detailed reporting structure, and workplace policies would be implemented in an attempt to address and control some of her concerns. As it happened, none of these steps were taken by the employer.

In the circumstances the Court found it unnecessary to assess, in any detail, what the appropriate response of the employer should have been to the claimant's allegations because the employer had done nothing at all.

The Court was satisfied that the defendant employer did not exercise the standard of care reasonably expected of an employer in the circumstances.

Importantly, the Court listed a series of matters which supported the finding of liability. These can readily be translated to any workplace:

- the employer failed to properly define the relations between it and its employees, and as between employees amongst themselves. It failed to articulate its expectations concerning conduct in the workplace between employees, by way of job descriptions, employment contracts and workplace behaviour policies.
- The employer had no formal system enabling employees to seek the assistance of the employer when bullying conduct occurred.
- It was inappropriate for a reasonable employer to rely on choices made by its employee as to the employer's proper response to the employee's complaints. In other words, the duty of the employer was to take control of the situation,

rather than leave resolution in the hands of the employee.
- The employer failed to arrange for or conduct for itself, any risk assessment, either generally or of the particular circumstances raised by the employee's complaints.

In this case the judge found that had the employer acted reasonably then the claimant, in all probability, would not have suffered any of the significant psychological injury that she did. In those circumstances it was liable to her for damages.

In the present case this included damages for her loss of capacity to work to age 65, discounted for vicissitudes and for her pain and suffering. The Court thought an appropriate figure for pain and suffering damages was $300,000.

The case is remarkable for a number of reasons. First, the "bullying" behaviour is, objectively viewed, well towards the lower end of the scale. Many workplaces, every day, would give examples of similar conduct.

The second remarkable aspect of the case is the willingness of the Court to accept the claimants subjective description of the effects of the alleged bullying behaviour.

Third, and finally, the readiness of the Court to award very, very significant damages, both for pain and suffering and for ongoing pecuniary loss, must ring alarm bells for all Australian employers.

Can An Insurer Take An Assignment Of Rights From An Insured

When an insurer settles a claim against an insured the insurer is subrogated to the rights of the insured and is entitled to pursue an action in the name of the insured against third parties that may have caused the loss. However there are circumstances where an insurer may seek an assignment of rights of an insured in consideration of payments made and a question will arise as to whether there is a valid assignment and whether proceedings should be brought by the insurer in the name of the insured, the insurer or both.

In *Hazard Systems Pty Limited v Car-Tech Services Pty Limited (In Liq),* the Court of Appeal of NSW considered whether choses in action in tort, contract and statute vesting in Car-Tech against Hazard were validly assigned to Car-Tech's insurer, CGU in compliance with Section 12 of the *Conveyancing Act 1919 (NSW).*

The Court held unanimously (per Basten JA; with whom Meagher and Barrett JJA agreed) that two Deeds entered into between Car-Tech and CGU which purported to assign rights to CGU did not comply with the *Conveyancing Act* highlighting firstly the need for insurers to carefully craft documents that purport to assign rights and secondly the obligation to give notice of any assignment to those affected by the assignment.

Car-Tech, pursuant to a contract with State Contracts Control Board undertook the stripping and fitting of NSW Police Service Vehicles. That work was undertaken at Car-Tech's premises at Enfield. In July and September 2004, fire broke out at the Enfield premises which damaged 14 cars owned by the State Board. The damage to those cars was covered by an Industrial Special Risk Insurance Policy issued by CGU to a holding company of which Car-Tech was a relevant subsidiary.

A claim was made under the ISR policy for the value of the damaged cars less salvage parts which was agreed at a figure in excess of $500,000.

The 2005 Deed entered into by CGU, Car-Tech and the State Board provided an agreement for CGU to pay that amount. The Deed also contained an assignment clause in the following terms:

> *"On the occurrence of the payment referred to under heading 5 of this Deed, Car-Tech and the State Contracts Control Board will assign their rights and interests in respect of recovery in respect of the Losses to CGU Insurance and CGU Insurance shall be entitled to pursued any party liable for the losses. CGU Insurance's entitlement to pursuant to the recovery of the Losses shall not be construed so as to effect or limit the entitlement of any of the parties to recover in their own right any other losses arising from the Fires, which are not otherwise covered by this agreement."*

CGU made the payment pursuant to that Deed on 13 September 2005.

The State Contracts Control Board subsequently commenced proceedings in the Local Court against Car-Tech which settled pursuant to the second deed executed in June 2009. CGU on behalf of Car-Tech agreed to pay to the State of NSW the sum

of $60,000 with a Consent Judgment to be filed. The 2009 Deed also contained an assignment clause in the following terms:

> *"Upon receipt of the payment referred to in clause 4.2 of this Deed, each of Car-Tech and the State of New South Wales agrees to assign, to the maximum extent permitted by law (but the State of New South Wales does not warrant, and it is not a condition of this Deed, that any such assignment will be effectual in law for any, or for any particular, purpose), their respective rights and interests in respect of recovery in respect of the Losses to CGU Insurance."*

Having settled the two claims made under the CGU policy, proceedings were instituted in the District Court naming Car-Tech as plaintiff and Hazard as defendant. The substance of the claim was that goods supplied by Hazard were defective and had a propensity to catch fire and those goods were the cause of the fire that damaged the vehicles..The claim included the payments made pursuant to both Deeds as well as uninsured losses resulting from damage to Car-Tech's own property in the fires and a claim for legal costs incurred in settling the proceedings brought by the State against Car-Tech which settled pursuant to the 2009 Deed.

However, Car-Tech's rights and interests in recovering those additional amounts were not assigned pursuant to the Deeds.

The Statement of Claim contained a pleading that the action against Hazard was a subrogated action by Car-Tech Services insurer, CGU in the name of its insured.

Hazard subsequently filed an Amended Defence which alleged (in part) that because of the assignments pursuant to the two Deeds, Car-Tech had no standing to bring the proceedings with respect to rights and interests which had been assigned to CGU. CGU accepted this proposition and sought to amend the pleading to substitute CGU for Car-Tech as the sole plaintiff.

Hazard objected to the amendment resulting in an interlocutory application being filed on behalf of Car-Tech seeking orders substituting CGU as the plaintiff and deleting Car-Tech pursuant to Sections 64 and 65 of the *Civil Procedure Act 2005 (NSW).*

The primary judge made those orders, upholding the interlocutory application. Hazard filed an Application for Leave to Appeal which was heard by the Court of Appeal of NSW concurrently with the appeal hearing.

In the leading judgment of Basten JA, His Honour identified two issues for determination:

- Did CGU's rights of subrogation provide that insurer with an available remedy to bring the proceedings in the name of its insured - Car-Tech?
- Was the purported assignment of rights under both the 2005 and 2009 Deeds effective in law to confer title to the various rights and interests on CGU.

In respect of the first question, His Honour held that Hazard correctly conceded that payments made by CGU in respect of the damage suffered by the State Board and Car-Tech gave rise to an entitlement vesting in CGU to rely upon subrogation. It therefore followed by the subject matter of the purported assignments, although in part a right of action in tort, was assignable to the insurer because it supported and enlarged the existing right acquired by way of subrogation.

However, on the second question, His Honour found that the language in both Deeds failed to comply with the requirements set out under Section 12 of the *Conveyancing Act 1919 (NSW)* which is in the following terms:

> *"Any absolute assignment by writing under the hand of the assignor (not purporting to be way of charge only) of any debt or other legal shows in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or shows inaction, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed). To pass and transfer the legal right to such debt or shows in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor …"*

Basten JA considered that an "absolute assignment" usually requires language which clearly expresses that the assignor "hereby assigns" any relevant right or interests. The 2005 Deed contained the wordings "will assign" which was contingent upon a payment made by CGU. His Honour held this to be language inconsistent with an absolute agreement due to its contingency upon the CGU payment being made.

Further, His Honour considered that, in respect of the 2005 Deed, there was no evidence that "express notice in writing" had been given to Hazard prior to the commencement of the proceedings, rather, such notice was given to Hazard during the

course of the proceedings.

The consequence, His Honour held, was that even if an absolute assignment had been given to Hazard before the proceedings were commenced, the failure to word the assignment correctly in the Deed rendered CGU a mere equitable assignee with only an equitable interest. CGU was not the proper party to bring the proceedings against Hazard. Basten JA concluded that CGU, at no stage, became the legal assignee of Car-Techs rights against Hazard, therefore the amendment to the Statement of Claim substituting CGU for Car-Tech was unnecessary. His Honour held that the appropriate course was for CGU to sue Hazard in Car-Tech's name which is what had occurred from the outset.

Basten JA made the same findings in respect of the 2009 Deed.

Meagher JA wrote a short statement agreeing with His Honour's reasons and the Proposed Orders.

Barrett JA, also agreeing with the reasons and orders proposed by Basten JA, provided additional brief reasons for judgment which emphasised that the title to sue at law remained at all times with Car-Tech. His Honour stated that CGU, acting alone, was never in a position to prosecute to judgment any common law action maintainable by Car-Tech against Hazard, though recognising the insurer by virtue of the Deeds (and separately from its subrogation rights) enjoyed a claim maintainable in equity against Car-Tech for any amounts recovered by Car-Tech in its action against Hazard.

This decision is a helpful reminder for insurers who seek to enter into a Deed with its insured containing an Assignment clause in which the intention is to have the insured assign all rights including choses in action available to the insured over to the insurer.

The court reminds us that compliance with Section 12 of the Conveyancing Act 1919 (NSW) is necessary to establish that a legal assignment has occurred; an equitable assignment will not be sufficient because an insurer, pursuant to its subrogation rights, already enjoys the position of an equitable assignee thus enabling an insurer to commence recovery proceedings in the name of its insured against a common law third party.

This case involved a purported assignment of common law rights against a third party in tort. Arguably, a different situation would arise if an insurer entered into a Deed with its insured where the insured assigned over to the insurer any rights vesting in the insured that were not common law rights. An example of this may include the assignment by an insured over to its insurer of a right to claim indemnity under another policy of insurance for loss and damage suffered by the insured. That scenario was not determined by the court; however, it provides a helpful analysis of important matters that should be considered when drafting assignment clauses within a Deed of Release or Deed of Assignment which includes the requirement to give written notice, prior to commencing proceedings, to the party against whom relief will be sought.

Liability Of A Dog Owner For Personal Injury

A dog owner can be personally liable for personal injury caused by their dog either under the common law principles of negligence or under the Companion Animals Act 1998 (NSW) ("the Act"). The NSW Court of Appeal in *Sarkis v Morrison (2013) NSWCA 281* recently examined the elements required for liability to be attached to a dog owner under the Act in an accident caused by a dog running out onto a road.

Morrison had been riding a motor cycle on a country road when a dog owned by Sarkis ran out from the driveway onto the road and collided with Morrison's motor cycle. There was no suggestion that the dog attacked Morrison in any way but nevertheless as a result of the collision Morrison was injured.

Morrison initially brought proceedings in the District Court alleging firstly that Sarkis was negligent in allowing his dog to run onto the road and, secondly, as an owner of the dog, he was strictly liable under the Act.

The Trial Judge, Truss DCJ, found there was no negligence on the part of Sarkis as there was no lack of reasonable care exercised on his part in allowing the dog to run onto the road.

Nevertheless, Truss DCJ made a finding that the actions of the dog had wounded Morrison, even though the wounding did not result from any act of aggression on the part of the dog. Truss DCJ found that Sarkis was strictly liable under Section 25 of the Act. Section 25(1) of the Act provides:

"The owner of a dog is liable in damages in respect of:

(a) bodily injury to a person caused by the dog wounding or attacking that person, and

(b) damage to the personal property of the person (including clothing) caused by the dog in the course of attacking that person".

Morrison was entitled to damages. However, an appeal followed.

Sarkis argued that the injury to Morrison was not the consequence of the dog's act but the action itself and liability should not attach to all forms of bodily injury caused by the dog but only in circumstances where the dog wounded or attacked the injured person.

Surprisingly Morrison did not challenge the finding that Sarkis had not been negligent however maintained that Morrison had a liability under the Act.

Basten JA delivered the leading judgment of the Court of Appeal. After examining the historical cases and the earlier versions of the Act the Court of Appeal concluded the Act did not create strict liability on the part of the owner for the actions of their dog.

Basten JA noted Section 25(1)(a) of the Act referred to "wounding" which is a form of "attacking" and one must consider the meaning of wounding when considering any claim. Basten JA concluded the expression in Section 25(1)(a) of the Act should be limited to conduct involving an element of aggression or other deliberate conduct directed towards a person by the dog. Simple inaction on the part of the dog would not be sufficient.

Without any aggressive or deliberate act by the dog, there could be no liability to the owner under the Act.

This was despite the NSW Parliament's modification to the Act in 1998 which inserted the words "or attacking" to expand the scope of the liability of the owner beyond that which would be achieved by "wounding" alone.

Noting it was common ground that the unfortunate dog involved in the accident had no aggressive or other intent but ran blindly across the road and there was no fault on the part of Sarkis, there was no liability on the part of Sarkis for the injury suffered by Morrison.

Whilst this decision makes it clear that where a dog causes bodily injury without any aggression or other intent on its part the owner of the dog will have no liability under the Act arising as a consequence of actions of the dog. However it must be remembered that a dog owner may still be liable under the common law principles of negligence. If an owner has failed to exercise reasonable care and this failure contributed to the cause of an accident, the injured party would still have an action against the owner.

It will be interesting to see whether in future cases that are brought under the Act in similar factual circumstances whether the injured party will focus their attention on adducing evidence demonstrating an element of aggression in the dog in order to attract liability under the Act

Wet Floors- Warning Signs Not Enough

In a somewhat surprising judgement the NSW Court of Appeal has concluded that placing warning signs near water on a floor in a supermarket was not enough when it came to the duty of care owed by a supermarket to a customer that was confronted by water on a floor.

In *Fitzsimmons v Coles Supermarket Australia Pty Ltd [2013] NSWCA 273* the Court of Appeal of NSW heard a plaintiff's appeal from a District Court Judgment in which a verdict for the defendant was entered by the trial judge in respect of a personal injury case.

Fitzsimmons slipped and fell on a wet floor in the Coles Supermarket at Gorokan on the NSW Central Coast which allegedly caused back and right ankle injuries. The trial judge found that Coles had not breached its duty of care owed to customers but then proceeded to assess damages for a mere $1,773.00 that would have been awarded, had Fitzsimmons' claim been successful, being the agreed amount for out of pocket expenses.

The Court of Appeal comprising Basten & Emmett JJA and McDougall J dealt with the primary challenge to the trial judge's finding that the defendant was not negligent. However, the Court also determined issues regarding whether leave to appeal was necessary, the appropriate assessment of contributory negligence and whether, if Fitzsimmons succeeded in respect of liability, the Court of Appeal should re-assess damages or remit the matter to the District Court for a retrial.

All three judges agreed that leave to appeal was necessary and that the filing of an affidavit of the appellant's solicitor purporting to show the appeal involved an issue of at least $100,000.00 by simply annexing a schedule of damages handed up to the trial judges was not sufficient. However, Coles took no issue with that matter and, due to the flaws ultimately found in the trial judge's reasons regarding liability, the Court unanimously agreed that leave to appeal should be granted.

On the question of liability, the three judges reached a different outcome in relation to questions of primary liability and contributory negligence.

Basten JA and McDougall JA accepted there had been a breach of duty of care by Coles, highlighting errors in the trial judge's reasons where the judge relied on the obvious risk provisions of the Civil Liability Act 2002 (NSW) in finding that Fitzsimmons ought to have seen warning signs that were placed by Coles staff around the wet floor thus making the risk obvious.

Emmett JA, on the other hand, concluded the trial judge was not in error and would dismiss the appeal.

The fundamental difference between the judges was that although they each accepted the findings that Coles had placed warning signs around the wet floor thus raising the existence of a danger to persons who were paying sufficient attention, the majority judges held that this by itself was insufficient to warn those who were not paying proper attention. Both Basten JA and McDougall J therefore concluded that a member of staff ought to have remained in the vicinity to alert persons to the existence of the wet floor, in addition to having placed the warning signs surrounding the wet floor.

In relation to contributory negligence, Emmett JA concluded Fitzsimmons was entirely responsible for her injuries. However, Basten JA assessed 25% to be an appropriate reduction whereas McDougall J assessed contributory negligence at 50%. With no clear majority on that issue, Basten JA was guided by an earlier judgment in which his Honour participated where a similar situation arose. His Honour concluded that it was appropriate for him to follow the assessment of McDougall J, it being the intermediate position when assessing the final outcome assessed by Emmett JA and Basten JA.

All three judges were critical of the parties having tendered medical evidence containing conflicting opinions but leaving the trial judge to determine those conflicts in the absence of any cross-examination of the medical experts. Emmett JA, given his conclusions on liability did not reach a concluded view. On quantum Basten JA would have ordered a retrial, highlighting flaws in the findings of the trial judge that the Court of Appeal could not determine having not seen the appellant give evidence.

McDougall J, however, concluded that as it was the decision of the parties at trial, including Fitzsimmon's legal team, not to require medical experts for cross-examination, Fitzsimmons had failed to discharge her onus to prove her injuries were caused by her fall. His Honour therefore stated that a retrial was not necessary and ordered the appeal be allowed with a damages awarded representing the agreed out of pocket expenses reduced by 50%.

Basten JA adopted his reasons for following McDougall J's approach regarding liability in relation to damages and the ultimate orders. Accordingly, the appeal was upheld but Fitzsimmons was awarded damages of just $886.50 plus interest from the date of the District Court Judgment.

The case presents a common set of circumstances involving a slip and fall case but with peculiar results with all three judges reaching different conclusions on primary liability and contributory negligence.

Importantly, the Court of Appeal emphasised that the nature of an "obvious" risk is not whether a person might slip and fall, but that a person might slip and fall because a floor surface was wet. It is the water on the floor that creates the obvious risk.

However, it is curious for the majority judges to find that although Coles had put three warning signs in place thus surrounding the wet floor, this was insufficient to warn persons who were not paying attention, such that a member of staff ought to have remained in the vicinity of the warning signs as well. This seems to be contrary to recent decisions in which the Court has emphasised the response by a defendant to the existence of a risk of harm is not to do that which is ideal but that which is reasonable.

The decision highlights that in slip and fall personal injury cases, an appellate court will decide each case on its own facts, but the outcome is never certain when it is determined on divergent opinions that affect both primary liability and contributory negligence and where no clear majority view exists.

Damages Awards - Back to Basics

In *Nemeth v Westfield Shopping Centre Co Management Pty Ltd [2013] NSWCA 298* the Court of Appeal of NSW comprising a bench of two (Meagher & Barrett JJA) unanimously dismissed a plaintiff's quantum appeal in which challenges were made against the trial judge's assessments for non-economic loss, future economic loss and future domestic assistance.

Mrs Nemeth sustained a fractured ankle when she fell in a carpark of the Westfield shopping centre at Liverpool. She sued both the owner and manager of the shopping centre as defendants in the District Court. Primary negligence was admitted by the defendants, leaving contributory negligence and the quantum of damages in issue at trial.

The trial judge held there was no contributory negligence and assessed damages at $78,290.00. His Honour assessed non-economic loss pursuant to s16 of the Civil Liability Act 2002 (NSW) at 25% of a most extreme case. Nominal amounts were awarded for past and future out of pocket expenses. Some past and future domestic assistance was awarded but only on the basis of gratuitous care, refusing to award future care on commercial rates. No award was made for future economic loss.

Due to the total damages award being less than $100,000.00, the plaintiff sought leave to appeal to the Court of Appeal. The application for leave was heard concurrently with the appeal hearing.

In relation to non-economic loss, it was contended for Mrs Nemeth that the 25% assessment was flawed. It was argued that the trial judge impliedly made two findings when considering the reasons for judgment about the likely duration of her ankle injury and whether the aggravation of her psychological injury had ceased as at the date of judgment.

The flaw was said to arise by reason of his Honour having awarded future domestic assistance for a five year period which suggested his Honour also approached the assessment of non-economic loss on that basis. Further, as his Honour referred to the aggravation of her psychological injury in past tense, it was submitted for Mrs Nemeth that his Honour had impliedly found that condition had ceased.

In relation to future economic loss, Mrs Nemeth contended the trial judge incorrectly applied s13 of the Civil Liability Act 2002 (NSW) by accepting on the one hand that she suffered from ongoing pain in the ankle but on the other hand refusing to award anything for future economic loss. The trial judge found that the injury would not be productive of financial loss.

On the third challenge to his Honour's damages award, Mrs Nemeth argued that his Honour ought to have awarded future domestic assistance on a commercial basis for three hours per week or on a gratuitous basis for seven hours per week. His Honour's award was for a five year period only but on a gratuitous basis at three hours per week.

The Court of Appeal rejected all three challenges to the trial judge's damages awards for non-economic loss, future economic loss and future domestic assistance.

In a joint judgment, Meagher & Barrett JJA dealt with each challenge by reverting to long-established legal principles which continue to be applied by the Court of Appeal.

In relation to non-economic loss, their Honours reminded us of a statement made nearly 40 years ago by Mason J in the High Court case of *Wilson v Peisley (1975) 50 ALJR 207*:

> *"The settled rule, then, is that an appellate court will not disturb a primary judge's award of damages for personal injury unless it is convinced that he has acted on a wrong principle of law or that he has misapprehended the facts or that the amount of damages awarded is so inordinately low or so inordinately high as to be a wholly erroneous estimate of the damage suffered."*

Their Honours observed the last part of this passage has been oft-quoted in subsequent decisions of the Court of Appeal such that the principle has not changed. An appellate Court will not disturb a damages assessment unless there is a wholly erroneous estimate of the damage suffered.

The Court rejected Mrs Nemeth's challenge to the trial judge's assessment of 25% of a most extreme case. Their Honours held the trial judge had not made the implied findings that were contended for and that the assessment was not a wholly erroneous estimate. The trial judge was permitted to accept some opinions of one doctor and not others when favouring that doctor over another. A judge is not required to accept all of the opinions of one doctor.

In relation to the challenge to future economic loss, their Honours observed that while his Honour's reasons could have been expressed better when articulating his findings under s13 of the Civil Liability Act 2002 (NSW) concerning Mrs Nemeth's most likely future employment circumstances, the Court of Appeal agreed with the trial judge's conclusion. Namely, because the plaintiff was able to work for ten months after the accident in a job which required her to stand on her feet all day from which she resigned due to financial reasons, it followed that her injury would not be productive of any financial loss, applying the long-established principle enunciated by the High Court in *Graham v Baker (1961) 106 CLR 340*.

The challenge to the award for future domestic assistance was also rejected based on fundamental principles. The Court of Appeal agreed with the trial judge that there was simply no evidence that the level of gratuitous assistance provided by her husband and daughter for about three hours per week at the time of judgment would not continue into the future on that basis, nor was there any evidence that commercial care would be sought and obtained.

This relatively straightforward damages appeal in a personal injury case highlights that although the legal principles governing awards of damages have to a large extent been codified in the *Civil Liability Act 2002 (NSW),* those principles are of a fundamental nature, developed at common law over a long period of time. The Court has emphasised that it will continue to reach back into history, where appropriate, to remind litigants that these basic principles continue to be good law and that damages assessments will rarely be overturned on appeal.

Reinstatement Available to Dismissed Injured Workers

In our September 2012 newsletter, we provided an account of the decision of *Bindaree Beef Pty Limited v* Riley a decision of the Full Court of the NSW Industrial Commission concerning the rights of an injured worker to seek reinstatement if they are terminated.

The Court of Appeal has recently handed down its judgement dismissing an appeal from that decision confirming the reinstatement provisions for injured workers in the Workers Compensation Act ("WC Act") impose a burden on employers to maintain the employment of an injured worker and a dismissal of an injured worker can lead to a reinstatement application and compensation orders. That compensation will not be payable by the workers' compensation insurer.

In NSW the WC Act contains provisions that permit an injured worker who is dismissed because he is not fit for work because of a work injury to apply to the Industrial Relations Commission to be reinstated. Section 241 of the WC Act provides that:

"(1) If an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of a kind specified in the application.

(2) The kind of employment for which the worker applies for reinstatement cannot be more advantageous to the worker than that in which the worker was engaged when he or she first became unfit for employment because of the injury.

(3) The worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement."

If section 241 of the WC Act is engaged the Industrial Relations Commission may order the employer to reinstate the worker in accordance with the terms of the order. The Industrial Relations Commission may order the worker to be reinstated to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), but only if the Commission is satisfied that the worker is fit for that kind of employment.

If the employer does not have employment of that kind available, the Industrial Relations Commission may order the worker to be reinstated to employment of any other kind for which the worker is fit, being:

- employment of a kind that is available but that is less advantageous to the worker, or
- employment of a kind that the Commission considers that the employer can reasonably make available for the worker (including part-time employment or employment in which the worker may undergo rehabilitation)

If the Industrial Relations Commission orders the worker to be reinstated, it may order the employer to pay to the worker an

amount that does not exceed the remuneration the worker would, but for being dismissed, have received after making the application to the employer for reinstatement and before being reinstated in accordance with the order of the Commission.

Section 244 of the WC Act provides that in proceedings for a reinstatement order it is to be presumed that the injured worker was dismissed because he or she was not fit for employment as a result of the injury received. That presumption is rebutted if the employer satisfies the Industrial Relations Commission that the injury was not a substantial and operative cause of the dismissal of the worker.

Employers are often concerned about the risk of further injury to an injured worker and the employers' obligations under occupational health and safety legislation. However those concerns are not enough to support a dismissal of an injured worker and resist a reinstatement application made by the injured worker as was seen in Riley's case.

Riley was employed by Bindaree Beef as a slicer. He sustained a repetitive strain injury as a result of the heavy nature of his duties. Following the injury Riley continued in employment in a lesser paid job and received make-up pay pursuant to the WC Act. Riley subsequently underwent bilateral shoulder surgery and surgery for carpal tunnel syndrome. He returned to work on restricted duties following the surgery and after a short period returned to his normal pre-injury duties as a slicer.

Bindaree Beef informed Riley that they were concerned that he would injure himself and were concerned about liabilities that would result from any further injury. Bindaree Beef subsequently terminated Riley's employment.

Riley pursued a claim for re-instatement in the Industrial Commission and succeeded. The Commissioner recognised that it was a precondition to the making of a reinstatement order that the injured worker was dismissed because of unfitness for employment as a result of the injury received. He concluded that the precondition was satisfied. The Commissioner also determined that Riley could succeed in his claim where the reason for dismissal included the employee's injury as well as other factors.

On appeal the Full Bench of the Industrial Commission concluded that the Commissioner did not fall into error in his approach however the Commissioner was clearly wrong in stating that for s 243 of the WC Act to apply the reason for dismissal only has to include the employee's injury. The Full Court concluded that the Commissioner's statement was only "a slip or loose language". The Full Court then went on to provide an analysis of the legislation and its effects.

However a further appeal followed and now we have the NSW Court of Appeal's views on the legislation. Whilst the appeal was dismissed as the Court of Appeal concluded the Full Court did not fall into jurisdictional error the judgement is instructive as it has clarified the way in which the Commission must approach reinstatement claims.

Bathurst CJ in the leading judgement of the Court of Appeal noted:

> *"In the present case the purpose of the provisions of Pt 8 of the Act is relatively clear. It is to provide a mechanism to assist an injured worker to return to work either in his or her previous position or such other position for which he or she is fit.*
>
> *Thus, s 241(1) enables the worker if dismissed because of unfitness for employment as a result of the injury received, to apply to the employer for reinstatement. Section 242 entitles the worker if not reinstated by his or her employer, to apply to the Commission for a reinstatement order.*
>
> *Section 243 confers power on the Commission to make an order, but only if the Commission is satisfied that the worker is fit for the employment in question.*
>
> *The presumption in s 244(1) has the effect of placing the onus on the employer to demonstrate that the reason for dismissal was not because of unfitness for employment as a result of the injury received. Section 244(2) provides the mechanism by which that presumption can be rebutted.*
>
> *It should be noted that the fact that the employer is unable to rebut the presumption is not of itself sufficient to enable the worker to be reinstated. It remains necessary for the worker to satisfy the Commission as to fitness under s 243(2). The Commission has power under s 245 of the Act to order a medical assessment to assist in its determination.*
>
> *The reason for the presumption, in my opinion, is to overcome the difficulty a worker might otherwise have in establishing that the cause of dismissal was unfitness for employment as a result of the injury. To avoid that difficulty the onus is on the employer to prove that the dismissal was not connected with the worker's injury in the sense described in s 244(2). In those circumstances, it would be a misconstruction of the Act to conclude that the actual reasons of the employer for dismissal of the worker should not be taken into account in determining whether or not the presumption is rebutted. The question in effect is why the employer dismissed the worker. That can only be considered in the context of the actual reasons for doing*

so.

.....

The question of whether the injury was a substantial and operative cause of the worker's dismissal is a question of fact to be decided by reference to all the circumstances including the employer's evidence as to such cause.

Bathurst CJ confirmed the inquiry inevitably involves consideration of the reasons of the decision-maker.

Bathurst CJ examined Section 244(1) noting there is a presumption imposed when an injured worker is dismissed and to rebut the presumption the employer has to establish that the injury was not a substantial and operative cause of dismissal. The question of fitness for employment is irrelevant to that inquiry. If the presumption is not rebutted then the question of fitness for employment arises under s 243(2), as it is a precondition for the making of an order under that section that the Commission is satisfied that the worker is fit for employment.

Bathurst CJ noted section 244(2) recognises that there could be more than one cause for the dismissal and the presumption under section 242(1) will be rebutted if it is shown that the injury is not a substantial cause and one that is operative on the decision-maker at the relevant time. The word "operative" was seen as emphasising that the dismissal must have been a matter which actuated the employer to dismiss the employee.

Bathurst CJ concluded:

"The inquiry in the present case is directed to the reason for the dismissal of the worker for the purpose of considering whether he or she has a valid claim for reinstatement. Once that is recognised the actuating purpose of the employer is relevant."

The Court of Appeal confirmed that the occupational health and safety risks referred to by Bindaree Beef as reasons for dismissing Riley were relevant to the question of potential reinstatement. However that was not the sole consideration that was relevant.

Bathurst CJ noted:

"The presumption in s 244(1) of the WC Act does not of itself lead to the conclusion that the injured worker was fit for the kind of employment in which he or she was engaged at the time of dismissal. It remains for the Commission to consider in the exercise of its jurisdiction under s243(2) whether the worker is fit for the kind of employment in question. In considering this question the Commission would, in my opinion, be required to take into account the question of whether or not the worker could safely perform that type of employment. Failure to do so, in my opinion, would constitute error."

It is the reasons for the termination that must be examined and not some objective assessment of those reasons. Pursuant to Section 241 of the WC Act, if an injured worker is dismissed because he or she is not fit for employment as a result of an injury the worker may apply for reinstatement.

In proceedings for a reinstatement order it is presumed that the injured worker was dismissed because he or she was not fit for employment as a result of the injury received.

That presumption may be rebutted if the employer satisfies the Industrial Relations Commission that the injury was not a substantial and operative cause of the dismissal of the worker.

The onus will be on the employer to demonstrate that the dismissal was not actuated by the workers unfitness for employment as a result of the injury received. That evidence will be viewed subjectively.

Even where the workers dismissal is actuated by the workers unfitness for employment it remains necessary for the worker to satisfy the Commission they are fit for work and concerns over the risk of re-injury remain relevant to that issue.

As can be seen dismissing an injured worker can have consequences which include an obligation to reinstate the worker and pay compensation for any lost wages and that compensation is not payable by a workers compensation insurer.

CTP Roundup

Due Search And Inquiry -151Z Recoveries

In New South Wales, if a person is injured in a motor vehicle accident and the motor vehicle cannot be identified, then there is a right to bring a claim against the Nominal Defendant, an entity created by legislation. However, in order to bring a claim against the Nominal Defendant, there are a number of steps that must first be taken. This includes a requirement under Section 34 of the Motor Accidents Compensation Act 1999 that due search and inquiry be undertaken. That Section provides that if due search and inquiry has been undertaken and the vehicle remains unidentified, then proceedings can be commenced against the Nominal Defendant.

But what happens in situations where the claim is not one made by an injured person but by a worker's compensation insurer? Is there still a right to claim against the Nominal Defendant and must the same steps be taken?

In a claim pursuant to Section 151Z of the Workers Compensation Act 1987, a worker's compensation insurer is entitled to recover payments made to, for and on behalf of an injured worker up to a sum equivalent to a notional assessment of damages had the worker commenced proceedings in their own right. In 2004 the NSW Court of Appeal in *Nominal Defendant v Hi-Light Industries Pty Limited* determined that a worker's compensation insurer could bring a recovery action pursuant to Section 151Z of the Workers Compensation Act 1987 against the Nominal Defendant.

What has not been as clear cut since is to what extent is it necessary for a worker's compensation insurer to establish due search and inquiry if a claim for indemnity is made against the Nominal Defendant.

The NSW Court of Appeal has recently considered this issue in the matter of the *Workers Compensation Nominal Insurer v Nominal Defendant.*

Iyad Tallouzih, was injured in a motor vehicle accident on 13 March 2000 when his motor vehicle was struck by another vehicle while he was driving to the bank for his employer. Tallouzih brought a worker's compensation claim as a consequence of the accident. Proceedings were commenced by the Workers Compensation Nominal Insurer (as the employer had gone into liquidation) seeking indemnity from the Nominal Defendant in respect of payments of compensation pursuant to Section 151Z(1)(d) of the Workers Compensation Act 1987.

At the time of the motor vehicle accident, Section 34 of the Motor Accidents Compensation Act 1999 provided:

> *"Claim against Nominal Defendant where vehicle not identified*
>
> *(1) An action for the recovery of damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle on a road in New South Wales may, if the identity of the vehicle cannot after due inquiry and search be established, be brought against the Nominal Defendant.*
>
> *(2) The inquiry or search may be proved orally or by affidavit of the person who made the inquiry or search.*
>
> *(3) In respect of any such action, the Nominal Defendant is liable as if it were the owner or driver of the motor vehicle".*

In 2007, subsequent to this accident, the legislation was amended to include, amongst other provisions, a two month period in which the Nominal Defendant could reject the claim for failure to undertake due inquiry and search. That had not occurred in this case and so the Nominal Insurer sought to argue that the defence of due search and inquiry could not be relied upon. The Trial Judge determined that as the claim pursuant to Section 151Z is a claim for indemnity and not damages then the amending Act did not apply. Therefore, the issue of due inquiry and search was to be determined in accordance with Section 34 of the Motor Accidents Compensation Act 1999 as was in place at the time of the accident, which did not contain the 2 month requirement.

Tallouzih worked for the Oxford Shop at Birkenhead Point between 1994 and 2000 and at the time of the motor vehicle accident was the store manager. His evidence at trial was that on 13 March 2000 at about 10:00am, he was driving his car out of the car park in Birkenhead Point Shopping Centre when his motor vehicle was struck by another vehicle that was reversing out of a car parking space. Tallouzih gave evidence that the driver of the other car approached him and apologised and Tallouzih wrote down the other driver's details.

Tallouzih gave evidence that:

> *"We exchanged details and I wrote his details on a piece of paper and he jumped into his car and just left. there was no need to call the Police, there was nobody injured … he did not hit and run. He did it, just hit. That's it".*

Tallouzih gave evidence that after the accident he returned to the shop and rang George Akkawi, who was the general manager of the Oxford Shop, and told him about the accident. Tallouzih gave evidence that he met Akkawi shortly afterwards and showed him the accident scene. Tallouzih also indicated that he gave Akkawi the piece of paper which contained the other driver's details and Tallouzih told him that the Oxford Shop would "fix it". Akkawi provided the statement in October 2010 according to which he could not recall whether Tallouzih had given him a piece of paper which contained the name of the other driver and if he had, he would have either given it to the secretary of the Oxford Shop or put the piece of paper in his diary. According to Akkawi, his diaries would have been discarded in 2006.

Although initially Tallouzih did not think he had been seriously injured, the morning after the accident he work up in a lot of difficulty and was subsequently certified unfit for work. On 22 March 2000, he submitted a claim for workers compensation. Payments made approximated at $325,000.00. Tallouzih did not return to work and after about two weeks off, his employment was terminated. In 2002 the claimant retained his own solicitors and proceedings were commenced in relation to the motor vehicle accident against the Nominal Defendant but they were subsequently discontinued.

At trial her Honour Judge Olsson examined the due search and inquiry that had been undertaken and determined that the elements required to be proved by the plaintiff claiming against the Nominal Defendant under Section 34 of the Motor Accidents Compensation Act 1999 must also be proved by the Workers Compensation Nominal Insurer claiming indemnity pursuant to Section 151Z of the Workers Compensation Act 1987. The Trial Judge also determined that the provisions of Section 34 did not limit the identity of the person who carried out the inquiry and search and therefore there was no impediment to the insurer carrying it out. Judge Olsson considered the steps taken by Tallouzih and concluded that he had not undertaken due inquiry. Her Honour noted that Tallouzih knew within three or four days after the accident that the piece of paper had been lost but made no further inquiries.

Her Honour then considered whether or not the Workers Compensation Nominal Insurer had undertaken due inquiry and determined that this was not the case.

Accordingly the claim failed as due search and inquiry had not been carried out.

An appeal followed.

The Court of Appeal was called on to consider the Workers Compensation Nominal Insurer was required to undertake due search and inquiry and whether the facts of the case demonstrated the necessary steps were undertaken.
Her Honour Justice McColl found:

> *"Within a day or so of the accident, Mr Tallouzih believed that he had been badly injured. Within a week, on the same assumption the Primary Judge made that he had received the other driver's details, he knew those details were lost. That was at the time that his pain was increasing. By the end of the first week he had consulted the doctor following which he lodged a workers compensation claim. He never returned to work.*
>
> *Even if Mr Tallouzih had not obtained the other driver's details, he knew what he and his vehicle looked like; he was able to give a good description of both at trial more than 11 years after the accident. This was not a case where there was 'no clue of any kind'.*
>
> *In those circumstances, in my view, a reasonable person in Mr Tallouzih's position should have made prompt inquiries (including placing notices seeking information) in and around Birkenhead Point Shopping Centre, including inquiring of others employed in the Centre to see if anyone either was, or knew, a young man of that description, or someone who drove the car which matched the vehicle which struck Mr Tallouzih's vehicle. The Centre was, as Mr Guihot submitted, a relatively confined area and whilst, in my view, one on which there was a 'reasonable prospect of obtaining useful information'."*

Her Honour Justice McColl continued:

> *"As the due inquiry issue had to be determined in the notional trial of Mr Tallouzih's proceedings against the Nominal Defendant … it is arguable that it is irrelevant that the appellant made no inquiries to identify the other vehicle until 2008 by which stage, as the Primary Judge said, the opportunity to make useful inquiries was limited. However, even if inquiries the appellant undertook were relevant, the fact is that in the period when inquiries should have been made, 'before the scent was cold', that is to say, before it might reasonably be expected the passage of time would have dulled people's recollections, it also did nothing to try to identify the other vehicle. It knew about the accident almost as soon as it occurred when the workers compensation claim was submitted, whereupon it started paying Mr Tallouzih compensation".*

In these circumstances, the Workers Compensation Nominal Insurer was unable to establish due inquiry and search and the

claim against the Nominal Defendant was unsuccessful.

As discussed, the provisions of the legislation have changed since this accident. The circumstances of this accident are also somewhat unusual. Nevertheless, it is useful to have some guidance on the issue and if workers compensation payments are made in connection with an accident that involved an unidentified motor vehicle the Workers Compensation Nominal Insurer should commence making inquiries in relation to the vehicle as soon as possible so a claim against the Nominal Defendant is not precluded.

When does the conduct of a party amount to an admission of liability?

In a CTP claim in NSW an insurer is bound by a CARS Assessor's assessment of damages if the insurer admits 'liability' on behalf of its insured.

If an insurer admits 'breach of duty of care', does this mean it also admits 'liability'?

In determining whether an admission of a 'breach of duty of care' amounted to an admission of liability - for the purposes of considering whether an insurer is bound by a CARS assessment of damages - the Supreme Court in *Allianz Australia Insurance Limited V Anderson [2013] NSWSC 1186* looked beyond the words in the insurer's Section 81 Notice and considered the conduct of the parties.

On 20 September 2004 the claimant, Anderson, was involved in a motor vehicle accident. A personal injury claim form was received by the CTP insurer (Allianz). Allianz served a notice under Section 81 of the Motor Accidents Compensation Act 1999 (MACA) admitting a breach of duty of care. Allianz reserved its rights to withdraw the admission if, at a later date, further information caused it to alter its view.

There were significant issues around causation of the injuries alleged. Anderson alleged that she sustained a significant back injury requiring a spinal fusion and consequential psychiatric injury, whereas Allianz claimed that the accident caused soft tissue injuries only.

Anderson lodged a MAS Application for assessment of whole person impairment. Allianz's MAS Reply agreed with Anderson's submission that there was no dispute as to liability and acknowledged that Anderson sustained soft tissue injuries to the cervical and lumbar spine as a result of the accident.

On 20 July 2007, Anderson lodged a CARS Form 2A Application for General Assessment. Allianz confirmed in its CARS Form 2R that there was no dispute as to "liability".

There were a number of preliminary telephone conferences at CARS, the first of which indicated that liability was not in dispute. The second preliminary conference report indicated that there was a causation issue which Allianz would canvass in its submissions. The final preliminary conference report made the same comment in respect of the causation issue.

Those issues as to causation were determined in favour of Anderson at the CARS hearing. Assessor Daley assessed damages totalling $3,441,221, inclusive of a reduction under section 130 of the MACA, plus costs.

Allianz applied to the Supreme Court of New South Wales seeking a declaration that it was not bound by the assessment of the Claims Assessor.

Allianz argued that although its Section 81 Notice admitted 'breach of duty of care' it did not admit 'liability' for the purposes of Section 95 of the Act and so it was entitled to reject the CARS Assessor's determination.

Section 95(2) of the MACA relevantly states:

> *"An assessment under this part of the amount of damages for liability under a claim is binding on the insurer, and the insurer must pay to the claimant the amount of damages specified in the Certificate as to the assessment if:*
>
> *(a) the insurer accepts that liability under the claim, and*
>
> *(b) the claimant accepts that amount of damages in settlement of the claim ..."*

Allianz sought to distinguish between liability, as referred to in Section 95 of the MACA, and a breach of duty of care. It

argued that its Section 81 Notice admitted breach of duty of care in relation to the circumstances of the accident but that liability in respect of whether a particular injury was caused by the motor vehicle accident or the extent and nature of the injuries sustained as a result of the accident were never admitted. According to Section 95 of the MACA, it was submitted, Allianz was not bound by the assessment decision.

Anderson, not surprisingly, submitted that there had been an admission of liability and as the amount of damages was accepted by Anderson, the assessment was binding on Allianz.

Justice Rothman noted that the provisions of Section 81 of the MACA require an insurer to give written notice as to whether it admits or denies liability. Whilst the provisions of Section 81(2) of the Act allow the insurer to admit liability for only part of the claim, Justice Rothman commented that it did not allow Allianz to admit part of the liability for the entire claim.

Allianz submitted that the admission contained in the Section 81 Notice did not admit whether there was injury, loss or damage or their extent. Justice Rothman found difficulties with that submission and noted that, apart from the Section 81 Notice, the insurer's MAS Form 2R accepted that there was no dispute about liability and the insurer's conduct at the preliminary conferences confirmed that liability was not in dispute. His Honour said that this behaviour constituted an admission of liability.

Justice Rothman commented that:

> *"At all times, Allianz has admitted the occasioning of some damage. It has denied that the injury caused damage of the significance claimed by Ms Anderson. In other words, Allianz, at all stages, had conceded that damage had been suffered as a result of the breach of duty, which it had admitted. That which was denied was the quantum of damage".*

Justice Rothman further noted:

> *"The significance of the damage and the amount of the damage or loss are matters for the assessment of damages, not for the assessment of liability".*

Consistent with Justice Rothmans' findings that Allianz admitted liability, the Court determined that Allianz was bound by Assessor Daley's assessment of damages pursuant to Section 95(2)(a), together with the amount specified for costs and for interest.

This case is significant because the Court determined that an insurer's attitude to liability, to which it can be bound, can derive from conduct beyond the mere issuance of a Section 81 Notice.

At common law the question of causation is an element of liability. Arguably, his Honour has concluded that for MACA purposes causation of injuries (medical causation or aetiology) is an element of the assessment of damages.

Allianz has recently lodged an appeal of the decision with the Court of Appeal.

It will be interesting to see if the outcome of the appeal further reflects the reluctance of Courts to intervene and overturn an assessment of claims assessors that take place within the statutory regime.

Pending the outcome of the appeal, the implications for insurers are: where there is dispute concerning causation of injuries, the issue must be raised and specified from the outset. All Section 83 payments should be expressly made on a without prejudice basis. Issues relating to causation of injuries (as distinct from the circumstances of the accident) should be specified clearly in the Section 81 Notice and reiterated in MAS Applications and Replies. Those issues should also be specified in CARS Applications or Replies. The issue should be raised at Preliminary Conferences and if a report arising from a Conference does not reflect the insurer's submissions, the insurer should seek to rectify discrepancies.

'Cross Examination' in CARS Assessments – Achieving Procedural Fairness

A CARS Assessor will from time to time be called on to consider allegations of false and misleading conduct and questions as to credibility during the course of a CARS Assessment conference. A recent decision in *Allianz Australia Insurance Limited v Harrison [2013] NSWSC 1211* provides guidance on the approach that should be adopted by a CARS Assessor who is confronted by these issues.

Ms Harrison ("Harrison") sustained injury when she was a passenger in a motor vehicle on 7 August 2002. CTP insurer Allianz conceded that its insured driver breached his duty of care owed to Harrison.

The claim came before CARS Assessor Cowley on 11 August 2011. Harrison relied upon tax invoices that she said represented payments by her to family members for domestic assistance. Harrison also relied on an employment contract that she and a family member entered into, purportedly providing for work that she would have done if the accident did not supervene.

During the conference before Assessor Cowley Allianz suggested to Harrison that the tax invoices and employment contract were "shams"'. Harrison rejected those submissions.

Assessor Cowley's computation of damages was based on the acceptance of the tax invoices and employment contract. Following the CARS assessment Allianz commenced proceedings in the Supreme Court seeking judicial review of the decision. Those proceedings concluded by consent and the matter was returned to CARS.

A second assessment conference before CARS Assessor Daley ensued on 9 July 2012.

Preceding this second conference, on 2 May 2012, Harrison advised Allianz that she withdrew her claims for past domestic assistance and past economic loss. Harrison advised that she no longer relied upon the tax invoices and employment contract. A new schedule of damages was lodged.

During the course of the ensuing assessment conference Allianz sought leave to 'cross examine' (as that term can apply at CARS) Harrison regarding the withdrawn tax invoices and employment contract.

Assessor Daley would not allow questions concerning those documents. She observed that the claims for past economic loss and past domestic assistance, which had relied upon the withdrawn documents, were abandoned. Assessor Daley's subsequent reasons reported:

> *"(13) The insurer raises the claimant's credibility as an issue and alleges that the claimant is manufacturing evidence. I determined at the assessment conference that the insurer was not entitled to ask individual questions about the abandoned claims of past paid care and past economic loss but may make submissions on the claimant's credibility based on the abandonment of the claim.*
>
> *(14) The claimant is entitled to abandon aspects of her claim. As the alleged past paid care claim and the alleged employment contract are not being pursued by the claimant, there is no need for any further consideration on my part of the abandoned aspects of her claim".*

Allianz was therefore invited to make submissions concerning credibility but was not permitted to question Harrison in relation to the withdrawn documents or the abandoned heads of damages.

Allianz asserted that it was not afforded procedural fairness and sought judicial review of Assessor Daley's decision in the Supreme Court.

The matter was heard by Hoeben CJ on 11 July 2013. His Honour's decision was published on 2 September 2013. His Honour found in favour of Allianz.

His Honour observed that Assessor Daley invited Allianz to make submissions concerning credibility while preventing it from asking appertaining questions. His Honour described that concession to Allianz as "illusory and of no value". His Honour opined that it was not permissible for Allianz to advance submissions in relation to allegations where Harrison had not been afforded an opportunity to respond. The fact that Allianz was prevented from asking questions precluded submissions in relation to the issues that would have been at the heart of those questions. Assessor Daley's course deprived Allianz of procedural fairness.

His Honour acknowledged the latitude given to CARS Assessors when determining the manner in which evidence is to be considered in a General Assessment conference. His Honour observed that the specific circumstances of a matter must be considered when deciding how to conduct a conference. This was significant because the specific circumstances in this matter included apprehensions that the domestic assistance receipts and the employment contract were false and misleading. Those allegations needed to be incorporated into the Assessor's approach to the conduct of the proceedings.

Assessor Daley's certificate was quashed and the matter was returned to CARS.

Perhaps the most salient instructions to be gleaned from this decision concern the way in which Assessors and parties should conduct assessment conferences. Whilst the CARS Guidelines afford Assessors considerable discretion when presiding over an assessment conference, they must be guided by the circumstances of the claim and overriding concepts of procedural fairness. While the laws of evidence do not strictly apply, those laws can be determinative of how procedural fairness is obtained. Specifically, in circumstances where the credibility of a claimant or witnesses is impugned it will be wise for the Assessor to permit questions ventilating the nature of the criticism.

Sharing Disputes between CTP Insurers – Litigation and Sharing Do Not Mix

This case is not typical of the matters that usually find their way into our CTP Roundup. It is not a tort matter and neither party is a claimant; rather the judgment determines a contractual dispute between two CTP insurers. *QBE Insurance (Australia) Limited v Suncorp Metway Insurance Limited [2013] NSW CA290* was decided by the Court of Appeal on 4 September 2013.

The matter involved a dispute between two CTP insurers concerning construction of the Sharing Agreement, which is part of the Industry Deed subscribed to by New South Wales and Queensland licensed CTP insurers.

On 11 February 2001 Mrs Broughton (Broughton) drover her vehicle across the centre line of a highway and collided head on with Mr Veigel's vehicle (Veigel).

Veigel claimed against Broughton, who was indemnified by CTP insurer QBE.

Broughton defended the claim by arguing that she was forced to the wrong side of the road by an unidentified vehicle.

Veigel and Broughton brought proceedings separately against the Nominal Defendant on the basis that the unidentified vehicle was a tortfeasor.

During the course of proceedings evidence concerning the identity of the unidentified vehicle emerged. Evidence suggested that the vehicle was driven by Mr Davis (Davis) and was insured by Suncorp.

Davis subsequently denied that he was at the scene of the accident and denied that he played a role in it. Davis was joined as a defendant and he cross claimed against Broughton.

While maintaining that Davis (its insured) was not at the accident scene and while defending the claim against Davis, Suncorp served a Sharing Application Notice on QBE. Suncorp maintained its argument that Davis was not at the scene, however in the alternative it said that if the court found that Davis caused or contributed to the accident, Suncorp would resort to the Sharing Agreement and seek to share its liability with QBE.

The Court ultimately concluded that Davis caused the accident. It found that he alone was liable to Veigel.

After this verdict was entered, Suncorp again sought to enliven a sharing arrangement with QBE. Suncorp sought QBE's confirmation of 50/50 sharing between the two insurers.

QBE rejected the Sharing Application. It said that Suncorp's decision to litigate liability rather than refer the matter to the Sharing Dispute Panel meant that Suncorp had waived rights that it might have had under the Sharing Agreement. QBE argued that all legal rights, including sharing obligations, were "crystallised" by the court judgment.

At first instance, her Honour Fullerton J found in favour of Suncorp and concluded that the Sharing Agreement applied.

QBE appealed that decision.

QBE contended that, as a matter of contractual construction, the Sharing Agreement is concerned exclusively with claims that have not been overtaken by judicial decisions concerning liability (as between the potential sharing insurers).

Suncorp contended that there is nothing in the Deed that restricts its operation to claims where there has been no judicial

determination of apportionment of liability between multiple insurers.

The Court of Appeal found for QBE. The Court considered the construction of the Sharing Agreement. It concluded that the Sharing Agreement contains an inherent and final mechanism for adjudication of sharing disputes. This mechanism involves a referee and an adjudicating panel maintained by the insurers. A decision to not allow this adjudication method to proceed amounted to a decision to abrogate obligations under the contract. Accordingly, the Sharing Agreement ceased to operate. Suncorp was thus obliged to bear liability for the claim in its entirety. It had no recourse to sharing.

This decision offers guidance to insurers in circumstances where:

- It might be in the insurer's interest to apply to share the costs of a claim with another insurer;
- A factual dispute exists between the insurers as to whether the circumstances of the accident enliven the Sharing Agreement.

The case decides that if the factual dispute between the insurers is litigated the Sharing Agreement will cease to apply and, rather, relative liabilities will be determined solely by the outcome of the litigation.

Therefore, if it is in an insurer's interest to share costs and there is a dispute about the facts that might activate sharing, the insurer that wishes to pursue sharing should ensure that the dispute is handled by the Sharing Panel in accordance with mechanisms in the Deed. The dispute should not be ventilated in court proceedings.

If an insurer elects to argue in Court that its insured did not cause or contribute to an accident (thereby seeking to obviate sharing) and it loses that argument, it cannot then have resort to sharing.

Workers Compensation Roundup

Work Capacity Decisions WIRO In Action

Following the legislative amendments in June 2012, the WorkCover Independent Review Office ("WIRO") was set up to deal with disputes in relation to weekly compensation. Following a work capacity decision by an insurer, a worker can request an internal review with the insurer prior to lodging an appeal with WIRO on the grounds of a procedural error in the review process.

The work capacity decision made by the insurer deals with issues regarding a worker's current work capacity, what constitutes suitable employment for a worker, the amount an injured worker would be able to earn in suitable employment, the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings and decisions about whether a worker, as a result of an injury, is unable without substantial risk of further injury, to engage in employment of a certain kind because of the nature of that employment.

Section 43 of the *Workers Compensation Act 1987 (the "Act")* specifies that any decision affecting a worker's entitlement to weekly payments of compensation is also within the domain of a work capacity decision.

The vast majority of workers that were injured prior to June 2012 and remain in receipt of weekly compensation are currently undergoing a work capacity assessment in order to transition the payments onto the new weekly compensation regime. Due to the large number of work capacity assessments that insurers have undertaken, WIRO have been closely monitoring the wording of the insurer's work capacity decisions and have commenced publication of the merit reviews of those decisions.

One of the primary focuses of the WIRO decisions has been the insurer's requirement to meet Section 54 of the Act. WIRO has concluded that where notification is titled "Notice of Work Capacity Decision" or similar at the top of the letter, the work capacity decision is not valid. This is because the insurer is required to provide notification of any changes to the worker's payments, not to provide notification of the work capacity decisions. WIRO has determined that the heading should refer to a "Notice of Variation of Payments Under Section 54 of the Workers Compensation Act 1987".

An injured worker can seek a review of the insurer's decision within 30 days of the decision being provided. However, it appears that workers are now arguing that time only commences when a valid notice is given and accordingly time does not start to run if a worker received a Notice of Work Capacity Decision.

WIRO has also commented that the timeframe of 30 days for a worker to seek a merit review of the decision only commences from receipt by the worker of the insurer's decision following the internal review which must be contained in a form approved by the WorkCover Authority. To date there has been no such form approved by the WorkCover Authority and WIRO contends that workers are yet to receive proper notice of the decision and therefore time has not commenced for any application for a merit review.

Another issue that has arisen is the question of whether a worker is significantly injured. The term "seriously injured worker" is defined in clear terms in Section 32A of the Act. A seriously injured worker is defined as a worker whose injury has resulted in permanent impairment and the degree of permanent impairment has been assessed, for the purposes of Division 4, to be more than 30%.

WIRO has highlighted that the term "permanent impairment" is used rather than "whole person impairment". Particularly in circumstances where workers were assessed for permanent impairment prior to 2002 (under the Table of Disabilities regime rather than whole person impairment) WIRO concludes in the recent decisions that there is no legislative requirement for a worker to be assessed as having more than 30% whole person impairment. This view may have a significant impact as there are workers who were previously paid permanent impairment lump sums prior to 2002 (and not assessed for whole person impairment) and whole person impairment is not the relevant test.

In relation to a seriously injured worker, WIRO have also concluded that if the aggregate of the Section 66 assessments exceeded 30% for injuries prior to January 2002, then they will be considered to be seriously injured.

The notice provisions have also caught a number of insurers. WIRO has focused on the notice provisions contained within Section 54 of the Act. Section 54 requires that workers should be accorded three months clear notice prior to changes in entitlements. By application of the postal service rule, insurers are required to give workers three months plus four working days for the postal service of a notice.

A failure to abide by the notice provisions within Section 54 attracts a maximum penalty of 50 penalty units ($5,500 fine) In at least one of the recent decisions, WIRO has recommended that the WorkCover Authority investigate a potential breach of Section 54.

The WorkCover Authority has now issued Guidelines including approved forms in relation to internal reviews, merit reviews and Reply to an Application for Merit Review. which deal with some of the issues raised by WIRO.

It is interesting to note that WIRO have been careful not to examine the merit of the decisions they have reviewed. WIRO can only review the procedural aspects of the internal review by the insurer.

It should also be remembered that WIRO's decisions are not binding and are simply recommendations. However, it should be remembered, especially in relation to notice provisions, a breach by an insurer can attract a penalty and WIRO has had no hesitation in recommending to WorkCover Authority that they investigate apparent breaches.

Teething pain must be expected in any new regime and identification of procedural errors by WIRO will no doubt result in fine tuning of the procedures applied by Insurers. The findings of WIRO will result in the adoption of practices by insurers to overcome the perceived procedural errors.

Ultimately it is likely there will be consistency between all insurers with common formats used to give notice of work capacity decisions and the lessons learnt from comments about time frames for notices will ensure that insurers give notice to take into account the additional days envisaged by the postal acceptance rule.

A procedural error at worst invalidates the work capacity decision and the merits of the decision play no role in the invalidity. So do insurers review the claim again and make a further decision or simply reissue the notice based on the original findings about work capacity. The safest course will no doubt be to reconsider the issues and any additional evidence available and make a further work capacity decision following WorkCover Guidelines particularly as circumstances change with time.

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