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.

NSW Government Postpones Introduction of Pre Litigation Procedures

In December last year the NSW Government introduced legislation to regulate the pre litigation stage of civil disputes. The commencement of the legislation was not proclaimed and the legislation is unlikely to commence in the near future following the introduction of a Bill in Parliament on 25 August 2011 which defers the commencement of the provisions until the day that is 18 months after the date the legislation commences or such earlier day as the Governor may appoint by proclamation. The NSW Government's decision follows hot on the heels of the Victorian Government's decision to repeal the Victorian legislation that regulated pre-litigation dispute procedures before that legislation had commenced.

Nevertheless, the Federal Government's legislation dealing with pre-litigation procedures has commenced and it will be necessary to comply with the pre-litigation procedures imposed by that legislation in proceedings in the Federal Magistrate's Court and the Federal Court in all states and Territories including NSW. For NSW the Federal Magistrate's Court and the Federal Court will be the guinea pigs which will allow the NSW Government to evaluate the impact of pre-litigation procedures.

Whilst the commencement of the NSW legislative provisions has been postponed for 18 months the door has been left open for an earlier commencement should the Government decide to proclaim an earlier commencement date. For now those who were planning for the commencement of the pre-litigation dispute provisions must now factor in the deferred commencement of their plans.

Professional Services Exclusion Clauses in Liability Insurance

Broadform liability policies that provide cover for public and products liability often contain exclusion clauses which seek to limit an insurer's liability for claims arising out of the supply of professional services. It is also common to find exclusion clauses which seek to limit liability for claims arising from the supply of professional advice and or errors in design.

When considering the application of an exclusion clause it is necessary to consider the intention of the parties to the insurance contract as an exclusion clause at first blush may appear to exclude liability for claims that will be commonly be made against a business. For example a business which sells products to meet specified requirements may well find that claims are made against it based on contentions that there is a defect in a product, the product's design was defective, the product didn't meet agreed specifications and or that the advice provided about the suitability of a product was inappropriate. The application of exclusion clauses that exclude liability for defective design or claims involving professional advice will then come in to play.

So how do the insurance issues play out? The Victorian Court of Appeal was recently called on to consider the application of these types of clauses to a claim where an insured had supplied hydraulic cylinders for a yacht and the cylinders failed in a Sydney to Hobart race.

Major Engineering Pty Ltd ('Major'), was insured under a broadform liability contract of insurance ('the Policy') with CGU Insurance Ltd ('CGU') in respect of certain risks to which it was exposed in

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the course of its business. That business was described in the Policy as being:

> *"Principally but not limited to Property Owners, occupiers, importers and exporters, design, manufacture, sales service and installation of heat transfer capital equipment, general engineering fabrication, hydraulic pneumatic and lubrication equipment."*

The liability insured was described in the Policy as being either 'Products Liability' or 'Public Liability', which terms were themselves defined. There was also 'Additional Benefits', cover in respect of legal costs incurred by Major. The Legal Costs covered were:

- the legal costs and expenses, incurred with CGU's written agreement, in defending a claim of Public Liability or Products Liability made against Major;
- the legal costs and expenses of any claimant claiming against Major for Public Liability or Products Liability that Major are liable to pay.

This appeal concerned a claim by Major against CGU under the costs extension clause for costs which it incurred in successfully defending a claim brought against it by Timelink Pacific Pty Ltd ('Timelink').

Timelink's claim was for damages arising out of the failure of two hydraulic cylinders that were supplied by Major and fitted to the keel of a racing yacht, 'Skandia' (formerly called 'Wild Thing'). The cylinders failed whilst Skandia was competing in the 2004 Sydney to Hobart yacht race. The failure of those cylinders caused the yacht to capsize, necessitating its abandonment by the crew and resulting in loss and damage suffered by the yacht's owner, Timelink. Major did not 'design' the hydraulic pistons which failed; rather, it selected the size of the cylinders and pistons from a catalogue. They were designed by the Parker Company and were manufactured in Australia to that design.

The litigation between Major and Timelink was hard fought with the matter proceeding to a judgment which was appealed with the appeal being successful and the case being remitted to trial again, then a second judgment and then a second appeal. Although Major was eventually successful in its defence of Timelink's claim, Major incurred significant costs which it did not recover from Timelink.

Major then sued its insurer, CGU, under the costs extension provisions of the Policy. Its claim was for a declaration that CGU was obliged to indemnify it for its costs and it also claimed those costs — $1,026,010.55, being $1,163,510.55 less $137,500 recovered from Timelink.

CGU resisted the claim on the basis of two exclusions in the Policy. The exclusions were in the following terms:

> *"We will not indemnify You against the following:*
>
> *...*
>
> *19 Treatment, design and professional risks*
>
> *Liability caused by or arising out of Your performance or failure to perform the following:*
>
> *(a) the rendering of professional advice or service.*
>
> *…*
>
> *(c) making or formulating a design or specification within the domain of the architectural, engineering, scientific, chemical, actuarial, statistical, economic, financial or medical profession."*

The trial judge concluded Timelink's claim against Major was not a claim of product liability because Timelink never contended that there was any defect in the hydraulic cylinders. They were simply unsuitable for their intended purpose. He also found that even if Timelink's claim against Major had been a claim of product liability, two exclusions in the Policy would have operated to deprive Major of recourse to the costs extension.

An appeal followed.

The Court of Appeal noted to access the costs extension, Major had to prove that Timelink's claim against it, if it had been successful, would have resulted in a liability in respect of which Major would have been entitled to indemnity under the Policy. When considering a claim under a policy neither the actual facts nor the particular formulation of a claim is determinative of its proper characterisation. The true nature of the claim must be considered and the Court must reflect on whether it was the intention of the parties that the insurance contract would cover the particular claim to which the events which occurred gave

rise.

Bongiorno J who delivered the majority judgment noted:

> *"Pleaded claims, even by 'learned and skilled lawyers', are often pitched far more widely in pleadings than they are in a final address to a court adjudicating upon such claims. In this case, despite pleading that Major designed and manufactured the hydraulic cylinders, the case eventually put and adjudicated upon by Byrne J and the Court of Appeal was concerned solely with the supply of hydraulic cylinders which did not meet specifications. It is this claim which falls for consideration in relation to the costs extension."*

After considering the submissions by the parties in the Timelink litigation and the pleadings and the manner the claim was run the Court of Appeal concluded the characterisation of Timelink's claim was a claim for breach of contract to meet a required specification, and had Timelink succeeded, the liability imposed on Major would have been caused by or have arisen out of its failure to supply hydraulic cylinders of the required specification. This liability fell within the insuring provision in the Policy.

With this in mind the Court of Appeal turned to the two exclusion clauses but noted the clauses needed to be read having regard to the intention of the Policy. The Court of Appeal concluded:

> *"The exclusion clauses in this case should be read in the context of a policy designed to cover a specifically defined business known to the insurer for risks arising from the conduct of that business and providing for the payment of costs incurred in successfully defending a claim in respect of which, if it had succeeded, the policyholder would have been indemnified."*

Clause 19(a) excluded indemnity to a policyholder if it acquired a liability which would be otherwise covered by the Policy but which was caused by or arose out of its performance or failure to perform the rendering of professional advice or service. There was no issue between the parties concerning Major's rendering of professional advice. The exclusion invoked by CGU was confined to 'professional service'.

The Court of Appeal noted:

> *"The only service provided by Major to which this issue could possibly refer was the performance of its contract to supply the cylinders which Timelink alleged were defective, a fact admitted by CGU……. It is difficult to see how selling a product, even a bespoke product, could be characterised as providing a professional service so as to take it outside the scope of the Policy. The exclusion is concerned with the provision of a service, not the sale of a product. In ordinary business parlance, there is a recognised difference between 'sales' and 'service'."*

In determining the sale of the cylinders was not a professional service Bongiorno J concluded:

> *"The contract which bound Major was a contract to supply a particular product by reference to its manufacturer's name, the Parker Company. It performed no 'service' other than that of supply. In the circumstances, that supply could not be sensibly characterised as 'professional' or as a service. Any liability which might have attached to Major in respect of the failure of these hydraulic cylinders had Timelink succeeded in its claim was caused by or arose out of Major's failure to comply with a specific term of its contract with Timelink. That is to say, it arose out of its supply of a product which did not meet the contractual specifications. In supplying that product, it was not providing a professional service, much less professional advice. It was operating its business of manufacturing and/or selling hydraulic equipment — the business in respect of which it obtained the Policy. Clause 19(a) must be construed in light of the purpose of that Policy and the specific business that the Policy describes. If clause 19(a) were to operate so as to exclude indemnity in respect of the supply of defective hydraulic cylinders by a business, one of whose specific objects known to the insurer was the supply of such equipment, the purpose of the Policy would be severely compromised. Having regard to the description of Major's business, it would be difficult to imagine many products emanating from that business which would not be similarly excluded."*

Accordingly the professional service exclusion had no application.

The second exclusion raised the issue of whether Major's notional liability to Timelink was 'caused by or arose out of' Major's performance or failure to perform the making or formulating of a design or specification within the domain of the engineering profession.

The Court of Appeal noted the question of design played no part in the way Timelink's claim was litigated and decided. Bongiorno J concluded:

"CGU has not established that any design by Major had anything to do with the notional liability of Major resulting from the failure of the hydraulic cylinders. It could not be sensibly concluded that this liability was caused by or arose out of any performance or failure to perform the making or formulating of a design or specification. "

Accordingly CGU were liable to indemnify Major for its costs incurred in successfully defending the claim and those costs were in the vicinity of $1 million.

When considering whether or not a claim falls within a policy, a Court will look to the risk described in the insuring clause as well as the exclusion clauses and seek to strike a balance when interpreting the exclusion clauses to ensure that the impact of the clauses will be consistent with intent of the policy.

When considering a claim under a policy neither the actual facts nor the particular formulation of a claim are determinative of its proper characterisation and the court will determine the nature of the claim made rather than simply examine the nature of the pleadings in a case.

In this case, CGU were liable to indemnify Major for the costs which it incurred in defending a claim based on a contractual obligation to supply hydraulic pistons which failed to meet agreed specifications. The true nature of the claim was not a claim based on the performance or failure to perform the rendering of professional advice or service or a failure on the part of Major in the design of the hydraulic pistons.

Whenever products are sold by a business it is common to find that advice is provided concerning the suitability of a product but selling the product itself will not usually amount to a professional service and an exclusion clause in a broadform liability policy that excludes claims based on the performance or failure to perform the rendering of professional advice or service may not exclude liability for claims where they are framed on the basis that a product failed to meet agreed specifications.

Indemnity Provisions in Contracts and Personal Injury Claims

Indemnity provisions in a contract are generally designed to reallocate risk. One party to the contract will generally seek to transfer liabilities to the other. Contractual arrangements with indemnity provisions are commonly found in dealings between businesses in the transport and construction industry and in contracts for the sale and/or hire plant and equipment.

When an accident occurs and there are a number of contributing factors to that accident and a number of persons or entities played a role in the accident an injured person will seek to recover damages from all parties who played a role. This will inevitably lead to an examination of the contractual arrangements between the parties that played a role in the accident. Where indemnity provisions are contained in a contract the Court will be called on to determine the effect of the indemnity provision and whether it has transferred any liability and each indemnity clause needs to be carefully examined as generally no two clauses are the same.

The NSW Supreme Court in *Pritchard v Trius Constructions Pty Limited & Ors* was recently called on to consider indemnity provisions in documents which were said to form part of an agreement between parties who had played a role in an accident where Pritchard was injured.

Pritchard was an employee of Trius Constructions. Trius Constructions had been engaged by Oceanic Coal Australia Pty Limited which operated a mine. Trius was engaged to replace a number of steel beams at the mine. Pritchard was injured when he was run over by a forklift driven by an employee of Oceanic. Trius was directing Pritchard in his tasks.

Oceanic settled the claim brought by Pritchard and then sought contribution from Trius. The claim for contribution was based on an assertion that Trius was negligent and further there was an express term in the agreement between Trius and Oceanic relating to the work performed by Trius that provided an indemnity in favour of Oceanic.

There was no dispute that both Trius and Oceanic were negligent and the substantive issue for the Court was whether or not there was a contractual arrangement between Trius and Oceanic and if there was, whether the indemnity provisions found in a document which was said to form part of the contractual arrangements imposed an obligation on Trius to indemnify Oceanic for Pritchard's claim.

The trial judge assessed the culpability and causal contribution on the part of Trius as Pritchard's employer was greater than

Oceanic as the occupier and controller of the forklift and apportioned liability 60% to Trius and 40% to Oceanic. The Court of Appeal did not have a different view on that issue.

It was then necessary to turn to the contract arrangements to see whether or not the risk had been shifted by an indemnity provision. During their trial there was a dispute as to the terms of the agreement between Trius and Oceanic.

Oceanic and Trius had been dealing with each other for almost ten years. Purchase orders were always sent by Oceanic to Trius even when the work referred to in those contracts had been completed before the purchase order was sent. There was a notation on the purchase orders "Terms and Conditions". Oceanic argued that that reference was a reference to "Oceanic General Purchase Order Terms and Conditions" which were provided to the Court. Oceanic sought to incorporate these general terms and conditions into the contract relating to the purchase order for the job Trius was performing when Pritchard was injured. Oceanic argued that the terms could be incorporated into a contract by a course of dealing, that is, that the terms should be incorporated into the terms and conditions for all supplies of goods and services by Trius because of the course of dealings between the parties and Trius had knowledge of the terms.

The Court noted the Oceanic General Purchase Order Terms and Conditions were not at any time sent to Trius and the notation concerning Terms and Conditions under the purchase order appeared to have taken place without prior notification to Trius.

The Court noted:

> *"Where there is no signed contract, terms appearing on documents that are not attached to the contract documents, are only incorporated in the contract if reasonable notice has been given of them."*

The Court also noted there was no evidence from Oceanic that at any time between 2001 and January 2007 in negotiations with Trius in respect of small contracts and procurements, any mention was made by anyone from Oceanic of the terms and conditions that were sought to be relied on by Oceanic in the proceedings.

Ultimately, the Court determined that the General Purchase Order Terms and Conditions did not form part of the contract between Trius and Oceanic. The finding serves as a reminder that it is important for General Terms and Conditions to be provided to another party before goods and services are supplied.

Essentially the Court was not satisfied that reasonable steps were taken by Oceanic to bring the Terms and Conditions which Oceanic said were incorporated in the contract to the attention of Trius and there was no evidence that Oceanic even mentioned to Trius the existence of the terms and conditions.

As the conditions did not apply any indemnity provision in them was irrelevant. However, the Court then went on to consider the indemnity provision to determine whether or not it would have applied if it was part of the contractual arrangements. The indemnity provision was in the following terms:

> *"13.3 You will be liable for and will indemnify us and keep us indemnified from and against any liability and/or any loss or damage of any kind whatsoever, arising directly or indirectly from:*
>
> *(b) The injury of any of your employees arising out of or in connection with this agreement;*
>
> *(c) Any loss or damage arising out of, or in connection with any personal injury to any person caused or contributed to by:*
>
> *(i) The goods and/or services;*
>
> *and/or*
>
> *(ii) The activities undertaken on and in our premises by you and/or your employees;"*

Hoeben J noted that the indemnity provision was cast in very wide terms with the use of the words "arising directly or indirectly from" in the chapeau of the clause. Hoeben J commented that whilst these words were very general words they did not have unlimited application.

It was only necessary for one of the indemnity clauses to be engaged.

Hoeben J noted that for subclause 13.3(b) to apply it was necessary for the injury of Pritchard to be one "arising out of or in connection with this agreement". This provision was seen to be ambiguous and as Oceanic prepared the document the

ambiguity was construed against it. The Court was critical of the clause and concluded that to give the clause its proper meaning words had to be inserted into the clause and because the clause was ambiguous it needed to be construed against Oceanic.

Hoeben J noted:

> *"In order to give the subclause meaning, the words 'the performance of' need to be inserted before 'this agreement'. Even with that addition, however an ambiguity remains. Is this a reference to the performance of the agreement by both parties, by Trius or by Oceanic? On the basis of what the High Court said in Andar I have concluded that subclause 13.3(b) must be read against Oceanic and refers to performance of the agreement by Trius."*

Justice Hoeben noted the indemnity should be read as follows:

> *"You will be liable for and will indemnify us from any liability arising directly from the injury of any of your employees in connection with the performance of this agreement by you."*

Applying that clause to the facts Hoeben J concluded that the indemnity would apply and Trius would be obliged to indemnify Oceanic in respect of Oceanic's liability to Pritchard.

However Hoeben J concluded the second indemnity provision, 13.3(c)(ii), was not effective in requiring Trius to indemnify Oceanic as the reference to "any person" was to be contrasted against the reference to your employees in subclause 13.3(b) and Hoeben J concluded that the reference to any person resulted in an ambiguity which should be construed against Oceanic and the reference to any person did not encompass any employee of Trius. The reference should be seen to have applied only to persons other than an employee of Trius who is carrying out the activity which might cause the injury.

Whilst Hoeben J concluded that the indemnity clause in the contract would be effective in requiring Trius to indemnify Oceanic the claim against Trius failed as Oceanic had not established that the General Conditions formed part of the contractual relationship between Trius and Oceanic.

It is important to note that in the interpretation of indemnity provisions the clause will be construed having regard to the ordinary meaning of the words in the clause. Ambiguities will be construed against the party that has drafted the agreement. However, even where there are ambiguities when properly construed an indemnity provision can still effectively transfer liability for risks and have far reaching consequences. This time the risk was not transferred as the General Conditions were not part of the contractual arrangements however if they were Oceanic would have been entitled to be indemnified for the claim and would not have incurred any cost. A lesson that has been learnt the hard way.

Does The Proportionate Liability Regime Apply In Building Cases in NSW?

The NSW Court of Appeal in *Owners Corporation Strata Plan 46757 v MJA Group Pty Limited* has thrown the cat amongst the pigeons and there is now doubt that the proportionate liability regime found in the Civil Liability Act 2002 applies to claims brought by purchasers of properties against developers for breaches of the statutory warranties imposed on developers of residential properties by the Home Building Act 1989.

The statutory warranties imposed by the *Home Building Act 1989 (NSW)* are warranties that:

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

> the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

These warranties are imposed into the building contract for the residential works and Section 18C of the *Home Building Act 1989* provides that, a person who is the immediate successor in title to a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the developer were required to hold a building licence and had done the work under a contract with that successor in title to do the work.

It has been said Section 18C gives rise to a notional contract between the developer and the successor in title. The notional contract and statutory warranties effectively impose obligations on a developer for the actions of a builder. If the proportionate liability regime applies to a claim a defendant is only liable to the extent that its fault contributed to the loss. So if there was fault on the part of the builder and not the developer does this mean that the developer has no liability?

Whilst the Court of Appeal was called on to determine whether the claim was an apportionable claim within the meaning of Section 34 of the Civil Liability Act 2002 (NSW) and whether the proportionate liability regime in the *Civil Liability Act 2002* applied to the claim, it declined to reach a concluded view on that issue preferring to dispose of the claim on the basis that the claim was statute barred and it was not necessary to determine that issue to dispose of the appeal.

So what was the case about and how does the notional contract work?

MJA Group was the owner of the site at 13-15 Francis Street, Dee Why. It decided to redevelop the building on that site so as to create 12 residential units. In order to do this, it entered into a contract on 6 May 1998 with a company, Build-Care Pty Ltd ("Build-Care").

Build-Care performed work under the contract and the parties to the contract agreed that practical completion had occurred on 5 January 2001.

On 17 January 2001, the local council issued a compliance certificate in relation to the work done at the site. The evidence was that two days' notice had to be given to the council to make the inspection required before issuing such a certificate, so that, as at 15 January, the work under the Build-Care contract would have been finalised.

However, as at 16 January 2001, work included in the council's building approval had not been done with respect to the external finishing of the southern wall of the building. In March 2001, another builder did this work and there has been no complaint about it.

Owners Corporation Strata Plan 46757 filed a claim against MJA Group in the District Court on 16 January 2008. It sued under what was described as the notional contract ie the contract referred to in s 18C of the Home Building Act 1989. Under s 18E of that Act, proceedings on that cause of action had to be commenced within seven years. The question before her Honour was whether the claim was made within the statutory time limit. Her Honour held it was not, and an appeal to the Court of Appeal followed.

In the majority judgment in the Court of Appeal Young JA noted:

> *"It seems to me that the whole structure of the Home Building Act SS18B to 18E is that the developer is in a notional contractual relationship with the Owners Corporation and the contract made by the developer with the builder is what is being looked at as to the content of that notional contract."*

The Court of Appeal confirmed that the successor in title will have the benefit of the statutory warranties in respect of the work done on behalf of the developer, as if the developer had done the work and not the person who did it on behalf of the developer. Effectively the statute vest the developer with that done on its behalf such that the contract reads, as against the developer "as if" the developer "had done the work" and in so doing places the developer in the shoes of the relevant contractor for the purposes of enforcement of the statutory warranties in respect of the work.

In this case as the works had been completed by Build-Care Pty Ltd more than seven years before proceedings were commenced, the claim was statue barred. Accordingly, the claim was dismissed.

However, the Court of Appeal was called on to comment on the argument that the claim was an apportionable claim within the

meaning of Section 34 of the Civil Liability Act 2002 (NSW) and that the proportionate liability regime in the Civil Liability Act 2002 therefore applied. It was submitted by the developer that the only liability which should be placed on the developer's shoulder was that liability for which it was personally liable and not vicarious liability (in the special sense used in the Civil Liability Act 2002) for what the builder did.

The Court of Appeal noted that whilst it is ordinarily the duty of an Appellate Court to deal with all issues that arise on the appeal the proportionate liability point was an extremely significant one and it was not in the public interest that without full argument on it a definitive decision should be given. Clearly the Court of Appeal was concerned that the application of the proportionate liability regime would defeat the intended effect of the Home Building Act which would give successors in title the benefits of statutory warranties against the developer but if the developer was not negligent or at fault it would gain no benefit from statutory warranties.

Where to from here? No doubt the issue will arise again, but in a claim which is not statute barred and on that occasion the Court of Appeal will need to come to a concluded view on the issue. For now the jury is out and there is little doubt that developers will continue to assert the proportionate liability regime applies whilst owners will argue that it does not. So does section 18C of the *Home Building Act 1989* have any benefit for a person who buys a home from a developer?

Use Of Surveillance And The Need To Disclose Surveillance To The Other Side

Surveillance is an effective tool for a defendant where evidence is obtained that demonstrates that the capacity of a claimant shown on video tape evidence is at odds with the allegations of injury and capacity that have been made. That evidence is even more powerful if the claimant denies in their evidence that they can do activities and the video shows that they can. The surveillance will then impact on the credibility of the witness. However that impact is diminished if a defendant has to provide a copy of the video tape to a claimant before the trial commences and the claimant knows exactly what has been observed.

The NSW Uniform Civil Procedure Rules contains provisions that require parties in litigation to serve reports and documents on each other. In addition the Rules specify that a party can apply to the Court to be excused from serving a document. So what happens with surveillance material?

In *Azar v Kathirgamalingan [2011] NSWDC 56*, Truss DCJ determined an Application for the defendant to be excused from compliance with Uniform Civil Procedure Rule 31.10(1) as permitted "… by leave of the court" in Rule 31.10(2) with respect to serving surveillance prior to a hearing.

Rule 31.10 provides:

> *"31.10 Plans, photographs and models*
>
> *At least seven (7) days before the commencement of a hearing, a party who intends to tender any plan, photograph or model at the hearing must give the other parties an opportunity to inspect it and to agree to its admission without proof.*
>
> *A party who fails to comply with sub-rule (1) may not tender the plan, photograph or model in evidence except by leave of the court."*

The genesis of the rule appears fairly plain. Plans, photographs or models may be affected by scale and, in particular, photographs can be affected by perspective.

The object of requiring plans, photographs, and models to be served is to ensure that parties are able to meet issues of scale or perspective. These plans, photographs or models can move parties towards agreement as to certain facts or issues that could be easily assisted by the use of such material.

Surveillance material, on the other hand, is of a totally different nature. It primarily relates to the credit of a party or witness.

On an ordinary interpretation of the meaning of a video and photograph, they are easily distinguished. Any lay person would be able to identify the difference between a photograph and a video.

There has never been any suggestion that a photograph could ever fall within the definition of "video". However, on a technical breakdown of the technological production of surveillance, it is considered to be a sequence of short spaced "photographs". This technical breakdown seems to create an artificial illusion. The number 2 can be broken down mathematically to the

cumulative effect of multiples of the number 1, but it does not make it number 1. It is separate and distinct in isolation.

Judge Truss initially declined the defendant's Application to have the motion heard on an ex parte basis and considered that the plaintiff should be given an opportunity to be heard.

Although seeking leave under Rule 31.10(2), the defendant did not concede that the rule applied to surveillance.

This issue has not been determined in a decision of any superior court in New South Wales.

The nature of the proceedings was that the plaintiff was claiming in excess of $7,000,000, whereas the defendant's case was that she had suffered minor physical injuries which had resolved and that the only ongoing disability related to a pre-existing psychiatric illness.

The defendant submitted that it was entitled to test the plaintiff's evidence by withholding surveillance until cross examination.

The plaintiff relied upon the intent of the Uniform Civil Procedure Rules and the current trend in litigation to avoid "trial by ambush".

Truss J considered that the Uniform Civil Procedure Rules could not detract from the Civil Procedure Act 2005 and, in particular, the provisions of Sections 56 to 58 including the overriding purpose of the provisions and the necessity to follow the "dictates of justice". Her Honour referred to the judgment of Sackville JA (with whom Tobias JA agreed) in Halpin & Ors v Lumley General Insurance Limited [2009] NSWCA 372, particularly at [101]:

> *"… the making of such a direction does not imply that the trial is to be conducted 'by ambush', nor that the party seeking the direction has failed to cooperate in identifying and eliciting the issues in trial. On the contrary, the statutory criteria that must be taken into account for direction to be made should ensure that the issues are clearly defined and that the parties* seeking the directions demonstrates that the 'dictates of justice' will be served by the direction."

Truss J also referred to the separate judgment of Basten JA, particularly at [317]:

> *"The reasonable entitlement of the defendant to preserve pre-trial confidentiality in the results of its investigations, in the face of suspected fraud, remains a legitimate interest."*

Truss J did not consider that there was a necessity for a judge at a pre-trial stage to assume or be satisfied of fraud, untruthfulness or deceit for such an order to be made, but that there is "*some real basis for suspicion so that withholding material is legitimate in all the circumstances*".

The plaintiff had submitted that withholding surveillance would cause unfairness as the plaintiff may not be able to recall the events recorded.

Truss J dealt with this submission as follows:

> *"This is not unusual in personal injury litigation especially where some years have elapsed since the accident and the plaintiff is unwell. Plaintiffs are only required to give their evidence to the best of their recollection, imperfect as that may be. A plaintiff giving truthful evidence generally has nothing to fear from surveillance evidence. On the other hand, the disclosure of such evidence would give the plaintiff, not giving evidence in a truthful manner, the opportunity to tailor his or her evidence to meet the film. Whilst openness and cooperation are not only desirable but are now also required in modern litigation, it is not necessarily appropriate where credit is an issue."*

Truss J therefore granted the defendant's proposed order relieving it from compliance with Rule 31.10 insofar as it may relate to surveillance video.

Truss J declined to make a separate order that the defendants be permitted to withhold supplementary reports from their experts dealing with the surveillance until after the cross examination of the plaintiff. In practical terms, this should have little effect in the event that the surveillance is considered contrary to the histories and complaints detailed by the plaintiff to practitioners, as their opinions would be worthless if the foundations were no longer acceptable.

The decision does not clarify whether a video or film falls within the definition of "photograph", but does provide assistance in a procedure to ensure dispensation of the Rule where it is considered critically important for the purposes of the trial, rather than

to leave it for the determination of the trial judge. This pre-trial order is a reasonable approach until there is a decision by a superior court in NSW as to Rule 31.10.

It appears inevitable that a decision in relation to this Rule will eventually find its way to a superior court in New South Wales. What resonates from the judgment is that it should not matter that surveillance could fall within the description of a photograph in Rule 30.1 as the Court can and will permit the use of the material even where it has not been served on the other side. As Truss J noted:

> *"A plaintiff giving truthful evidence generally has nothing to fear from surveillance evidence."*

Terminating An Injured Worker –Claims For Reinstatement

Whether, and in what circumstances, an employer can end the employment of an injured worker is a perennial issue for employers, insurers and workers.
Various pieces of legislation serve to constrain the rights and obligations of the parties. A recent Court of Appeal decision is a timely reminder that attempting to bring an end to the employment relationship where an injury has occurred needs to be undertaken with particular care.

The decision of *Speirs v Industrial Relations Commission of New South Wales [2011] NSWCA 206* is really a case about jurisdiction as it applies to applications for reinstatement, but it throws up some other important issues.

Legislative Background

In New South Wales, there are complimentary obligations on employees and employers relating to working after injury. Section 48 of the *Workplace Injury Management and Workers Compensation Act 1998* ('the WIM Act') says:

> ***"Injured worker's obligation to return to work***
>
> *An injured worker must make all reasonable efforts to return to work with his or her pre-injury employer (that is, the employer liable to pay compensation to the worker) as soon as possible, having regard to the nature of the injury."*

Likewise, section 49 places an obligation on an employer, in these terms:

> *"**Employer must provide suitable work***
>
> *(1) If a worker who has been totally or partially incapacitated for work as a result of an injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the employer liable to pay compensation to the worker under this Act in respect of the injury must at the request of the worker provide suitable employment for the worker."*

Where a worker is terminated because he or she is not fit for employment as a result of injury, the worker can apply to the Industrial Relations Commission for an order for reinstatement, under section 241 of the *Workers Compensation Act 1987* ('the WC Act').

Facts of the case

This is what Mr Speirs did. He had been injured in previous employment and had brought proceedings in the Compensation Court seeking benefits from a previous employer and the current employer. Those proceedings were settled in 2003, on terms which made no order against the current employer.

Mr Speirs physical condition got worse, and eventually his current employer dismissed him on the basis he was unable to perform the inherent requirements of his position – a longwall production superintendent in a coal mine. It refused to reinstate him because it said that it was not causally responsible for the worsening of his injury. This prompted the reinstatement application.

Jurisdiction question

This is the first important point to emerge from the case.

The IRC refused to hear Mr Speirs application for reinstatement. It said it did not have jurisdiction.

Section 242 of the WC Act defines the "injured worker" who can bring an application for reinstatement under section 241. The definition is:

> *"(2) For the purposes of this Part, an injured worker is a worker who receives an injury for which the worker is entitled to receive compensation under this Act or the Workers' Compensation (Dust Diseases) Act 1942."*

Because Mr Speirs was a coal miner the IRC found that the District Court had exclusive jurisdiction (under s105 of the WIM Act) to determine coal mine matters. It followed, therefore, that the IRC had no jurisdiction.

A similar argument would apply – in a non-coal mine matter – that the Workers Compensation Commission had exclusive jurisdiction, depriving the IRC of the ability to determine an application for reinstatement.

The Court of Appeal said that this reasoning was wrong. Based largely on the legislative scheme, the Court found that the District Court's exclusive jurisdiction (or the Workers Compensation Commission's exclusive jurisdiction) does not include determining entitlements to receive compensation for the purposes of a claim to a reinstatement order under section 241. That is a matter for the IRC.

Meaning of "entitled to receive compensation"

This is the second important point.

Mr Speirs employer argued that, because there was no finding of liability against it in the 2003 proceedings, the worker could not demonstrate that he was entitled to compensation form it within the terms of section 242, so he was not relevantly an injured worker.

The Court of Appeal held this also was wrong.

It is not necessary - for the purposes of a reinstatement application - for a worker to establish by Court determination that his employer is liable to pay compensation. To require this, the Court said, would be contrary to the overall legislative scheme, and would serve to encourage wasteful court proceedings.

The Court said that, in the absence of any previous Court determination, the IRC itself could determine for itself whether the worker was entitled to receive compensation for his injuries.

Conclusion

From the brief discussion above it is easy to see some of the potential problems in this area. For an employer, there is a prospect of reinstatement action over an exacerbation of an injury which might never have been claimed for or even notified. More generally, there is the prospect of the IRC determining entitlements to compensation for itself – and workers may find that more advantageous than the specialist tribunals of the WCC and the District Court.

OH&S Roundup

Ownership Does Not Equate To Control

Section 10 of the *Occupational Health & Safety Act 2000 (NSW)* ("Act") imposes duties on controllers of work premises and places an obligation on a controller to ensure that those premises are safe and without risk to health. The obligation extends to a person who does not have absolute or exclusive control, but merely limited control.

The recent appeal decision of the Industrial Court of NSW *Nicholson v Pymble No 1 Pty Ltd & Molinara (No 4)* examined whether the owner of the premises, Pymble No 1 Pty Ltd ("Pymble"), was the controller rather than the building contractor which it engaged to carry out construction work at the premises. At the original hearing the trial judge determined Pymble was not in control of the premises. An appeal followed.

The prosecutor submitted that the trial Judge erred in finding that Pymble did not have control of the premises because it could not contract out of its ability to control the premises and that the contractual provisions of the agreement between Pymble and

the contractor vested, at the very least, limited control over the premises to Pymble. It was argued that the contractual provisions provided Pymble with the ability to access the premises in order to inspect the building works and that it permitted Pymble to give directions to compel, direct or command actions as to the occupational health and safety of the site to ensure compliance with legislation.

The Full Bench upheld the trial judge's rejection of the submissions made on behalf of the WorkCover Authority which amounted to an assertion that every owner of premises upon which building works are being conducted has the capacity to control everything that occurs on the premises and that this equates to control for the purposes of section 10 of the Act. An extrapolation of such an assertion would render it necessary for either the owner or a representative of the owner to possess the necessary technical skills, expertise and qualifications to be able to assess and comprehend whether anything occurring on the construction site amounted to a risk to the health and safety of persons working on it.

This position is to be contrasted to circumstances where owners of premises on which building work is being conducted have the control over works. This will include a situation where an owner builder which contracts the whole of the building works to a head contractor retains the right to influence the manner in which the building works are being undertaken and establishes a regime to allow the owner to regularly inspect the premises and give directions. Such conduct will amount to control.

In addressing the contractual obligations of Pymble, the Full Bench agreed with the trial judge that Pymble had only a limited contractual capacity to deal with the building works and it could only occur in the event of a breach and after giving requisite notice. Further, it noted that the contract contained no provision to enable Pymble to direct that work cease instantly nor did it obligate Pymble to visit the site or seek access to it.

The absence of any evidence that Pymble or its representatives frequented the site or had any involvement in any safety matters as well as the limited contractual capacity of Pymble to deal with the building works and the fact that it never sought to engage with the site nor have the practical means to do so ensured that the prosecution failed. The Full Bench held that control of the premises resided with the contractor and not Pymble and Pymble did not have an obligation under s 10 of the Act.

The case shows that establishing control pursuant to the Act is a matter of fact and degree. Ownership does not equate to control and the Court will deem the controller to be the person or entity that has the capacity to oversee or effectively manage the building works.

Culpability And Mitigating Factors Of A Defendant

In Inspector Wade v Goldspring's Earthmoving Pty Ltd, the Court provided a helpful outline in determining respective culpabilities of defendants and other entities and in assessing penalties that flow from serious offences and demonstrates where entrepreneurs have two business entities involved in the supply of services there will be substantially penalties for both entities even where there is common ownership and or control of the companies.

Four prosecutions arose from an incident when an employee of John Holland was injured. One corporate defendant, Goldspring's Earthmoving Pty Ltd ("Earthmoving") provided earthmoving and heavy haulage services in the transport industry. Another corporate defendant, Goldspring & Sons Pty Ltd ("Goldspring & Sons"), provided hire of earthmoving plant and equipment. Mr Goldspring the third defendant was a director of both corporate entities and was charged with 2 offences.

Mr Marshall, a machine operator in the employ of Earthmoving was assigned to operate an excavator owned by Goldspring & Sons at a railway site of John Holland Pty Limited ("John Holland"). Mr Goldspring was aware that the excavator had some defects in that its light and reversing alarm required repair. Mr Marshall had not used the particular excavator on any previous occasion.

During works, a ground worker in the employ of John Holland was struck by the excavator operated by Mr Marshall whilst it was reversing. Earthmoving, Mr Goldspring and Goldspring and Sons were prosecuted for breaches of the Occupational Health & Safety Act 2000 and each pleaded guilty.

The charges identified the risk of a worker being hit or struck by the excavator. It was held that the risk was both obvious and well-known within the industry.

In considering objective factors in sentencing, the Court had regard to the need for general deterrence given the need of

employers at such sites to protect workers from hazards present and unsafe work practices and for specific deterrence to Mr Goldspring who continues to operate as a director of the 2 corporations which work in the construction industry. Regard was had to the fact that none of the defendants had prior convictions.

In considering the subjective factors, the Court observed that the defendants entered guilty pleas to the original charges and then to the amended charges (amended by reason of the effect of the judgment in Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW [2010] HCA 1; (2010) 239 CLR 531 which has been the subject of our previous GD News editions) at early stages. As a result of the utilitarian value of the early pleas, the Court was prepared to give the defendants a 25% discount of the penalty it determined that it would ultimately order.

The Court also had regard to affidavit evidence of Mr Goldspring indicating remorse for his role and the role of the corporate defendants in the circumstances of the offences.

Further, the Court found that remorse on the part of the defendants was further demonstrated by reason of their actions following the incident. The defendants addressed safety matters by ensuring the repeated notification and strict enforcement of company policy and safety measures as well as the introduction of a new version of the safety management systems including an OH&S policy specifically designed for Earthmoving.

Section 21A(3) of the Crimes (Sentencing Procedure) Act 1999 which deals with remorse as a mitigating factor to be taken into account in determining an appropriate offence provides that:

> *"The remorse shown by the offender for the office, but only if:*
>
> *(a) The offender has provided evidence that he or she has accepted responsibility for his or her actions, and*
>
> *(b) The offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both)"*

In relation to the respective culpability of the defendants, the evidence revealed that Goldspring & Sons had a more limited role in the circumstances of the offences than Earthmoving as the former corporate defendant was charged for defects to the excavator and the later being charged for offences relating to the excavator usage and failure to ensure administrative controls were implemented at the site. Ultimately, evidence showed that John Holland controlled the construction site and had the attendant responsibilities for the safety of its employees and sub-contractors at the site as well as the operations of those sub-contractors. John Holland was also the employer of the injured ground-worker. It was noted that the culpability of John Holland was greater than that of Goldspring & Sons and Earthmoving.

Having regard to the respective culpability and the mitigating factors, the Court ordered that Goldspring & Sons be fined $84,000 and Earthmoving be fined $105,000. Mr Goldspring was fined a total of $8,750 for the 2 charges of which he was convicted.

The judgment illustrates that a Court does engage in an examination of the culpability of respective defendants and any third parties and will also have regard to the conduct of the defendants after any incident or charge and any other mitigating factors when considering whether the total sentence imposed on an offender is just and appropriate however where entrepreneurs have two business entities involved in the supply of services there will be substantially penalties for both entities even where there is common ownership and or control of the companies.

Seriousness Of Offence And Quantum Of Penalty Considerations

The risks of electrical shock associated with plumbing works due to the proximity of electrical services are well-known. In Inspector Low v Watt t/as Aaron Watt *Plumbing [2011]*, the Court was concerned with a prosecution under the NSW OH&S Act arising from a fatality that that could have been avoided by the exercise of the simple and straightforward step of disconnecting the electrical supply running alongside pipes requiring maintenance works. In this case, the electrocution resulted from a portion of the structural support holding piping in place becoming raised whilst the defendant manipulated the pipe as part of the works and causing that portion to pierce the protective plastic coating of an electrical cable in its proximity. The risk of serious injury and/or death would have been more foreseeable from earlier activities of the defendant as the employees were carrying on work near live wiring and could have been injured if they cut a cable. Although the ultimate risk manifested itself in a manner in which the defendant did not foresee, the risk was still an obvious one.

On the question of the quantum of the fine, the defendant's legal representatives invited the Court to consider the defendant's

severely reduced capacity to pay a substantial fine. Whilst the Court acknowledged that consideration may be given to the burden of a substantial fine on a defendant's strained financial circumstances, it should not necessarily preclude the imposition of a heavy penalty. The Court fined the defendant, an individual $25,000 out of a maximum of $55,000. The penalty would have been quite different if the employer was a company.

Workers Compensation Roundup

Working Director Killed While Cycling – Is Compensation Payable?

The NSW Court of Appeal *in Van Wessem v Entertainment Outlet Pty Ltd* recently examined whether the wife of a sole working director of an "employer" with no office or business premises would be entitled to compensation after her husband was fatally injured whilst riding his bicycle on a Sunday morning.

The deceased worker had an exclusive contract with Aussie Home Loans to provide advice and to act as a mortgage broker for its clients. He had no business premises or formal office where he carried out his work. He worked from home, making contact with clients by using his mobile phone and other electronic communication devices. It was not disputed that the deceased worker was effectively "on call" and was required to be available to attend clients on two hours notice anywhere between 9:00am and 8:00pm on weekdays and 9:00am to 5:00pm on weekends. As the sole working director, he alone determined how and when the contractual obligations with the broking company would be satisfied.

The deceased worker's widow made a claim for death benefits pursuant to Section 25 of the *Workers Compensation Act 1987* ("The Act"). She was ultimately unsuccessful in the claim as although the worker sustained an injury during the course of his employment, employment was not a substantial contributing factor to his fatal injuries. This is the requirement under Section 9A of the Act. President Keating upheld the primary decision of the Arbitrator and the Court of Appeal ultimately dismissed the final appeal by the deceased worker's widow.

Essentially it was noted by the Court of Appeal that the nature of the deceased worker's employment played no role in his accident. Quite simply, as his employment did not require him to undertake cycling, it could not be considered to be a substantial contributing factor to his fatal injuries. Unlike other recent decisions such as *Da Ros* and *Badawi*, this was not a situation where the deceased worker's employment required him to be in any particular place at a particular time when he was working, nor to work in remote locations or otherwise expose the deceased worker to a risk which he would not have otherwise been exposed.

In contrast, in *Da Ros*, the Qantas pilot had been in Los Angeles on "slip time" between flights when he was knocked off his bicycle and suffered injuries. In *Da Ros*, the Court of Appeal found the correct causal connection required by the phrase "a substantial contributing factor" was one of real and substance. As such, the worker's employment with Qantas was found to be a substantial contributing factor to his injuries.

Although the deceased worker had been in the course of his employment within the meaning of Section 4 of the Act, employment was not a factor, let alone a substantial contributing factor to his death. Significantly in this matter, it was noted that the deceased worker had been a keen cyclist and would have undertaken the ride irrespective of his employment. He regularly rode at the same time each week prior to the commencement of his employment as a sole working director and therefore the probability of a similar injury occurring irrespective of his employment was high. The only connection between the employment and the bike ride was that he carried his mobile phone.

The decision effectively reinforces the notion that the course of employment under Section 4 is being extended to cover the increasingly flexible workplace arrangements now enjoyed by workers. Whilst there is significant potential to extend an employers' liability, it should be remembered that the more stringent requirements under Section 9A are still an essential component for a worker to successfully bring a claim for compensation. Whilst a worker may be in the "course of their employment" all of the factors leading to the injury need to carefully examined to ensure employment was "a substantial contributing factor" to that injury. Carrying a mobile phone used for work when an injury occurs does not mean that the injury is suffered in the course of employment or that employment was a substantial contributing factor to the injury.

Industrial Deafness Claims

The Workers Compensation Presidential Members have not had to examine many industrial deafness claims in recent years. Nevertheless, the recent decisions of *Workers Compensation Nominal Insurer v Howard (2011)* and *Qantas Airways Limited v*

Strong (2011) have again focused attention on these classic sources of compensation.

In Howard, Acting President Bill Roche was required to determine a number of issues in relation to a claim for industrial deafness. Mr Howard had brought a claim in relation to industrial deafness due to noisy employment he allegedly suffered in the 1960s. His employer had long been de-registered and Mr Howard had been unable to identify an insurer for the de-registered company. Consequently, he claimed compensation from the Workers Compensation Nominal Insurer. The WorkCover Authority of New South Wales represents the Nominal Insurer and provides for compensation to be paid in situations where the employer did not hold a workers' compensation policy.

WorkCover had argued that the claim had not been duly made as the worker had failed to serve the claim on the de-registered employer and had been unable to establish the correct insurer of that employer. Deputy President Bill Roche examined whether a company was required to be re-registered for the purposes of a claim for industrial deafness and the extent to which "due search or enquiries" are required in order to establish the company was uninsured at the relevant time.

The Deputy President concluded that it was the intention of the legislation that claims by workers of uninsured employers that have ceased to exist should be dealt with on a similar footing as claims by workers of insured and registered employers. Accordingly, there is no requirement for the re-registration of the defunct employer to the company register. Any failure to have an employer restored to a company register created no prejudice to WorkCover in the defence of the claim for industrial deafness.

As part of the process to establish whether the de-registered employer was insured at the deemed date of injury in the 1960s, Mr Howard's solicitors wrote to all of the current Scheme Agents as well as ACE Insurance Limited and Corporate Management Services Australia. These letters incorporated a request that each insurer search its current and archive records for various related companies to the defunct employer. In all, the requests covered over 120 past and current insurers. The worker's solicitors only received responses covering 29 insurers which did not reveal an insurer at the time of the deemed date of injury. WorkCover submitted that a second letter should have been forwarded to all the companies that had not responded. The Deputy President determined that whilst this could have been done, there was no requirement for multiple letters to be sent. The test was whether the worker had established on the balance of probabilities that the employer was uninsured at the relevant time. The enquiries made by his insurers satisfied the Deputy President that on the balance of probabilities that his employer was uninsured and due search and enquiry had been carried out.

The decision of *Qantas Airways Limited v Strong* examined the hearing loss threshold contained within Section 69A of the Workers Compensation Act 1987. Section 69A specifies that the total hearing loss due to "industrial deafness" must be 6% on a binaural basis in order to satisfy the threshold for an industrial deafness claim.

Qantas argued that given a proportion of the work hearing loss was due to severe tinnitus (ringing in the ears); this brought the claim under the 6% binaural hearing threshold and was not entitled to bring a claim for hearing loss.

President Keating of the Workers Compensation Commission determined that Section 69A in its terms created an entitlement to compensation for industrial deafness; subject to the qualification that no compensation is payable unless a worker's total hearing loss is at least 6%. President Keating concluded that the legislation made no attempt to prescribe how the assessment of hearing loss is to be undertaken. The WorkCover Guidelines for the Evaluation of Permanent Impairment were the appropriate mechanism to assess permanent impairment. Any allowance for severe tinnitus may be added to the assessed hearing loss in order to satisfy the threshold contained within Section 69A of the Act. Had the legislature intended that any allowance for severe tinnitus was to be excluded for the purposes of satisfying the threshold in Section 69A, it could easily have made that plain in the subsequent editions of the WorkCover Guidelines to the valuation of permanent impairment. It had not done so and accordingly tinnitus could be aggregated to pure workplace induced deafness assessments to reach the 6% threshold.

These two recent decisions give some clarity to rare but albeit problematical claims that are occasionally made in the Workers Compensation Commission. Practically the requirement not to re-register a de-registered company in order to bring a claim for industrial deafness is a sensible course of action and prevents unnecessary delay and expense in often relatively minor claims for compensation. The decision of Strong also makes it clear that the WorkCover Guidelines for the valuation of permanent impairment (as per American Medical Association 5 Guides) are the appropriate mechanism to assess the level of whole person impairment. Provided those guidelines for assessment continue to contain provisions to allow for the assessment of tinnitus as part of industrial deafness, workers can rely on that component of hearing loss in order to reach the minimum 6% binaural hearing loss threshold.

CTP Roundup

Permissible Use Of Police Diagram And The Advantage of the Trial Judge

Independent witnesses will always be a problem for claimants that allege that they are injured as a consequence of the negligence of the driver of an unidentified vehicle as was seen in the recent Court of Appeal judgement in *Tran v Nominal Defendant.* In that *case* the Court of Appeal principally dealt with a contest as to findings of fact arising from the decision of the trial judge Johnstone DCJ. The plaintiff alleged an unidentified vehicle caused him to swerve and lose control of his motorcycle and he sought damages from the Nominal Insurer for the fault of the driver of the unidentified vehicle.

The trial judge Johnstone DCJ determined that the plaintiff had not discharged the burden of proving it more probable that the accident occurred in the manner that he alleged and found in favour of the defendant. An appeal followed.

Justice McColl noted the High Court has previously commented that:

> *"If the Tribunal of first instance having seen and heard the witnesses comes to a conclusion in favour of the party upon whom the burden of proof does not lie it is almost hopeless to try and induce a Court of Appeal to interfere with that finding unless it was clearly proceeded upon a wrong principle."*

Accordingly, Tran was required to establish that the decision was glaringly improbable or contrary to compelling evidence (as noted by the High Court in *Fox v Percy)*

The essence of the evidence was that the plaintiff alleged an unidentified vehicle caused him to swerve and lose control of his motorcycle, whereas two other independent witnesses did not support the presence, or contribution, of any such vehicle.

The other witnesses' evidence included expressions, such as Mr Swans comment, that he did not "get a great look". Justice McColl considered that such admissions in evidence had to be taken in their context and with an appreciation of the evidence of the witness as a whole.

Johnstone DCJ determined that the independent witnesses' accounts should be preferred over the plaintiff when it came to the question of the absence of any causative unidentified vehicle, and accordingly a verdict was entered in favour of the Nominal Defendant. Justice McColl considered that the findings as to the absence of a vehicle were entitled to be supported by the versions of the independent witnesses and that their testimony was not glaring improbable or contrary to any compelling inferences.

It must be remembered that the plaintiff bears the burden of proving the facts alleged and must demonstrate that their account is more probable.

The other relevant issue that arose in the proceedings was the use of a police diagram.

The plaintiff made some analogies in relation to photographs in that they should not be able to trump testimonial evidence.

It is unclear whether there was any contest over the use of the diagram on the basis that it had not been served in accordance with Uniform Civil Procedure Rule 31.10, as the diagram would have fallen within the definition of a "plan".

In any event, it was considered that the diagram constituted a business record and therefore was an exception to the hearsay rule in accordance with Section 69 of the *Evidence Act*. Therefore, it was admissible to prove the existence of a fact reasonably supposed to be intended to be asserted by the representation, in accordance with the provisions of Section 59 of the *Evidence Act*.

The significance in this case was that the diagram was contemporaneously compiled by Constable Attard following his discussions with the independent witnesses and therefore constituted his early understanding as to the effect of their evidence.

Justice McColl did not consider that the diagram had been improperly used by Johnstone DCJ.

Accordingly, the plaintiff's appeal was dismissed.

The case serves as a reminder that findings of fact made by a Trial Judge will not be easily disturbed on appeal and an appellant needs to do more than complain about the finding and must demonstrate the finding were made without proper foundation.

As a point of note, in the event that a police diagram needs to be relied upon at a hearing to support testimonial and prior representations, it is suggested that it be specifically served prior to the hearing so that there is no argument in relation to Rule 31.10 of the Uniform Civil Procedure Rules 2005.

Sanity Prevails In Relation To MAS Review Decision

In *GIO General Limited v Smith & Ors [2011] NSWSC 802* Hoeben J dealt with an "absurd" determination by a MAS Review Panel that had concluded that when it considered the impairment flowing from two injuries and there was no evidence as to the extent of impairment immediately prior to the second accident, the claimant not having manifested any symptoms at that time, it was not possible to make any deduction from the impairment assessed at the time of examination when determining the impairment flowing from the second injury.

The specific chronology is as follows:

- 12 March 2007 – first motor accident subject of a claim against GIO;
- 26 November 2007 – second motor vehicle accident, the subject of a claim against NRMA;
- 30 April 2009 – NRMA claim referred to MAS for assessment of a permanent impairment dispute;
- 14 May 2009 – GIO claim referred to MAS for assessment of a permanent impairment dispute;
- 5 September 2009 – MAS Assessor Teoh issued a Certificate as to the assessment of permanent impairment and a Statement of Reasons in respect of each accident;
- 16 October 2009 – GIO lodged an Application for Review at MAS;
- 11 November 2009 – NRMA lodged an Application for Review at MAS;
- 4 February 2010 – MAS determined that there was reasonable cause to suspect that the assessment was incorrect in a material respect and referred it to a Review Panel;
- 21 May 2010 – further examination of the claimant was undertaken by two members of the Review Panel, Drs Parsonage and Lewin;
- 23 September 2010 – the Review Panel issued a Certificate and Reasons in relation to both accidents, certifying a 17% assessment of whole person impairment in relation to both claims.

Whilst the claimant appears to have suffered from prior physical symptoms and a psychiatric condition, these were not relevant to the consideration of the matter.

It was also not contested that, as found by the Review Panel, the combination of at least both accidents had resulted in a Major Depressive Disorder and that the relevant assessment of whole person impairment was 17%.

However, it was incumbent upon the Review Panel to make an apportionment between the accidents. The Review Panel referred to a decision of *Ackling v QBE Insurance (Australia) Ltd & Anor [2009] NSWSC 881* as to apportionment. Justice Hoeben found the application of what was said by Johnson J had been wrongly interpreted by the Review Panel.

The Review Panel considered that the Guidelines provided that the effects of each accident could not be deducted from the other as they were not "an unrelated injury". Justice Hoeben, following what was said by Hidden J in Allianz Australian Insurance Limited v MAA of New South Wales & Ors [2011] NSWSC 102, found that the injury was not the defining issue to apply apportionment, but the "event". The two motor vehicle accidents were clearly separate "events" and apportionment was required.

Accordingly, whilst the Review Panel considered that the claimant's whole person impairment in respect of the combined effects of both accidents was 17%, they declined to reduce it by 50% in relation to each accident, or by any other proportion they considered appropriate, and determined that whole person impairment should be assessed in respect of each accident at 17%. Hoeben J concluded that was plainly wrong.

Justice Hoeben, commented:

> *"I agree with the fundamental submission by GIO and NRMA that the issuing of two certificates by the Review Panel, each of which … gave rise to whole person impairment which is greater than 10%, verges on the absurd. … the form of each certificate on its face is inconsistent with the assessment of the total value of whole person impairment contributed to by both motor accidents at 17%."*

Justice Hoeben rejected the submissions of Mr Smith that, in the absence of an assessment prior to the second accident, an apportionment was not possible under the Guidelines. His Honour noted that apportionments are not always required and that Guideline 1.36 only required two calculations to be made, the value of which should have a separate determination of permanent impairment.

As he considered that a value of apportionment was a matter of expert determination by the Review Panel, it was a matter that needed to be undertaken at that level.

Justice Hoeben considered that the Review Panel took into account concepts of "fairness" and "unfairness" and that they were an irrelevant consideration. He considered that the Review Panel's interpretation of the ratio in Ackling was clearly wrong.

His Honour found that the Review Panel's interpretation of Guideline of 1.36 was incorrect.

His Honour therefore determined the decision was without foundation and remitted the matter back to MAS to be considered in conformity with his reasons.

Whilst the Review Panel referred to the possibility of an equal apportionment in their Statement of Reasons, being 8.5% each, thereby resulting in the claimant falling below the Section 131 threshold for both accidents, it may be open for them to revisit the issue.

GIO had submitted that, as no symptoms had manifested themselves at the time of the second accident, whole person impairment, if assessed at that time, would be 0% and that the whole of the currently assessed impairment should be related to the NRMA accident.

However, the Guidelines clearly provide for a determination of apportionment at the time of the assessment, which can take place after intervening events and appears the reasonable construction. There appeared to be no challenge that the first accident, in part, contributed to the Major Depression now suffered by Mr Smith.

The decision of Hoeben J seems clearly correct. Whilst assessments are not always cumulative or additive, the absurdity of each accident being assessed at 17% whole person impairment should have had an ancillary conclusion that his combined whole person impairment was in the order, or in excess, of 30%.

Mr Smith is now in jeopardy of having both determinations certifying an assessment that does not exceed the Section 131 threshold.

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You need the best service and information at your finger tips. We provide the best of both worlds, proven technology delivering internet access to all of your information and a serious focus on communication in plain English. With our personal service, simpler communication and easy access to information you spend more time doing business and less time chasing down problems.

We deliver results

You need practical ideas that deliver real results. Our people and our ideas can make a difference and we thrive on the opportunity to think creatively and deliver innovative solutions. We listen, understand, provide the best information and deliver value for money. We embrace ideas and use creativity to find better ways to do things.

We are Different !

We set ourselves apart from other lawyers by:

- identifying your needs and responding with the most cost effective solution;
- providing practical expert advice;
- meeting deadlines, building relationships and delivering value for money;
- supporting creativity and diversity of thought and bringing excellence to all that we develop, deliver and achieve;
- utilising a team approach that maximises efficiencies and minimises duplication;
- identifying the right legal strategy for the best commercial outcome;

…and having fun whilst doing it.

Contact Us

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtn@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.