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.

Occupier Still Liable Where Architect Is Negligent

Hotel operators continually strive to improve the appearance of licensed premises to attract and retain patrons. Refurbishments are often undertaken under the guidance of interior decorators, designers and architects who recommend novel ideas to improve the aesthetics of the premises. However, sometimes novel ideas when implemented can create a risk of injury to patrons. So what happens when a patron is injured on premises that have been refurbished in a way that renders the premises unsafe? Is the occupier liable for an injury or can they escape liability as they have relied upon professionals who recommended the refurbishment?

The NSW Court of Appeal judgment in *Indigo Mist Pty Limited v Palmer* provides guidance on this interesting issue. Indigo Mist Pty Limited was the licensee and manager of the Oxford Hotel in Darlinghurst. Palmer alleged that she slipped on liquid on the stairs within those premises and suffered injury. Paul Kelly Design ("PKD)"was a firm of architects which designed certain parts of the hotel including the stairs, for a refurbishment which took place in 2006, a little over two years before the incident.

Palmer brought proceedings in negligence against the occupiers, the owner of the hotel and PKD. The claim proceeded to hearing and the owner of the premises escaped liability, however the occupiers and PKD were held to be equally liable.

Palmer fell on stairs which were made of glass blocks sitting on a steel frame, surrounded by cement render. They were lit from below and there was some dim lighting in the ceiling. PKD was the architect in charge of the refurbishment and directly involved in the design of the stairs and made the recommendations that they be constructed of glass blocks. Patrons would carry drinks between the floors. Palmers evidence was that she slipped on liquid on the stairs. The trial judge rejected submissions that Palmer was intoxicated when she fell.

A number of experts gave evidence about the co-efficient of friction of the stairs and the suitability of smooth glass and in particular, wet, smooth glass as a surface for stairs.

Essentially the trial judge concluded that the design of the stairs ought to have taken into account the probable use of the stairs which would have included the fact that patrons were likely to take drinks up and down the stairs and there would be some spillages.

An appeal followed. The occupiers sought to escape any liability and argued that they had delegated responsibility to the architects for the design suitable stairs.

The Court of Appeal found that the risk of drinks being spilt on the stairs given the layout of the hotel was clearly foreseeable. Hoeben JA was of the view that it was not only foreseeable but there was a high likelihood of such an event occurring.

Hoeben JA was of the view that the danger presented by liquid on the stairs was one that should have been obvious to a reasonable occupier of these premises and there was no evidence of any response by the occupiers to this not insignificant risk of harm. It was noted there were no signs, no warnings and no prohibition by staff on the taking of drinks between floors. There was no

We thank our contributors

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

September 2012 Issue

Inside

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

system of regularly inspecting or cleaning the stairs.

The occupiers argued that no response was required by them to the foreseeable risk of harm because their obligations in that regard had been delegated to PKD. PKD was an expert in refurbishment of hotels and they had not given any warnings to the occupiers that there would be a problem with the stairs. It was submitted in those circumstances liability should be found only against PKD.

The occupiers relied on a case of Bevillesta as authority for the proposition that it was appropriate for the occupier to delegate its responsibility. However, in *Bevillesta's* case the Court considered the appropriateness of the delegation by the occupier of cleaning activities to a cleaning contractor and that was a different scenario to this case.

The Court of Appeal noted that whilst PKD had responsibility for the implementation of the refurbishment of the hotel and the design and use of materials in the stairs, it had no responsibility for the day to day management or running of the hotel.

Hoeben JA noted the occupiers had to direct their attention prospectively to what action reasonable care required them to take in order to avoid a foreseeable risk of injury to patrons or other lawful entrants to the hotel. Once the occupiers accepted the design of the stairs, they had to consider for themselves what potential hazards arose therefrom. Hoeben JA noted that given the nature of the premises the occupiers had to determine for themselves whether a foreseeable risk of injury existed in relation to the stairs, and if so, what response they should make to it on a day to day basis. This they failed to do.

Macfarlan JA noted that:

> *"A reasonable occupier would have been entitled to take, and act upon, expert advice as to these matters, thereby effectively delegating performance of its duty to the expert. However, Macfarlan JA determined the delegation had not occurred in this case. The occupiers had simply assumed that PKD, the architectural firm, had satisfied itself of the safety of the stairs, however on the evidence available PKD had not done so and had not been requested to do so by the occupiers."*

The appeal was ultimately dismissed and the occupier and the architects remain equally liable for Palmer's damages. Whilst the occupier relied on an expert to specify the material to be used in the construction of the stairs, that did not mean that the occupier could escape liability for the risks which materialised as a consequence of the use of the stairs.

It is quite simple, an occupier will not escape liability for dangers created as a consequence of refurbishments where inappropriate materials are used in those refurbishments and specified by architects or interior designers. It is incumbent on an occupier to identify all risks that arise from the use of premises and take reasonable precautions to address those risks.

Liability Polices & Exclusion Clauses

The Courts when called on to interpret an insurance policy must always consider an exclusion clause having regard to the commercial purpose of the policy as was recently seen in the Supreme Court decision in *Thompson v NSW Land & Housing Corporation (No. 2).*

Thompson allegedly sustained injury when pest control services were provided by Pestkill Pty Limited at premises which he rented. Pestkill sought indemnity from HDI-Gerling Australia Insurance Company Limited("Gerling") under public liability insurance it had arranged.

The policy covered personal injury suffered or alleged to have been suffered during the policy period in connection with Pestkill's operations and caused by or contributed to by and/or arising out of an occurrence or occurrences.

The policy contained an exclusion in the following terms:

> *"This section shall not apply to liability:*
>
> *(7) For personal injury or illness, or property damage, arising out of discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalines, toxic chemical, liquid or gases, waste materials or other irritants, contaminants, pollutants into or upon land, atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental which takes place at a clearly identifiable point in time during the duration of the policy."*

Gerling accepted that it bore the burden of proof in relation to the application of the exclusion clause and that it must establish that the substance which was discharged or released met the description of either a toxic chemical or irritant and that, applying the contra proferentem rule, the construction least favourable to Gerling should be adopted.

The insuring clause provided that the insurer would pay on behalf of the insured all sums which the insured should become legally obligated to pay for or in respect of personal injury (as defined) suffered or alleged to have been suffered.

Gerling denied liability under the policy on the basis of Exclusion 7.

In the proceedings brought by Thompson, Pestkill succeeded in the defence of the claim. Accordingly, in the cross claim against Gerling, Pestkill sought cover for the value of the costs and disbursements incurred in the defence of the claim plus interest thereon, less any value of any costs order obtained by Pestkill against Thompson.

Five issues were raised in relation to the exclusion and Gerling's denial of liability. The grounds argued and the findings of Hislop J were as follows:

- Gerling argued that Exclusion 7 applied to the claim despite the fact that the clause only referred to personal injury and not personal injury alleged. Hislop J rejected that assertion, noting that the insuring clause made reference to personal injury suffered or alleged and there was no similar reference in the exclusion. Hislop J determined that it was necessary for there to be personal injury suffered for the exclusion to be engaged. Accordingly, Clause 7 did not apply on the facts as found.
- Pestkill argued that for Exclusion 7 to be engaged it was necessary for there to be a discharge, dispersal, release or escape from the land owned by the NSW Land & Housing Corporation where the Termitcide was applied. Hislop J rejected that interpretation, finding that it was sufficient to enliven the clause if there was a discharge, dispersal, release or escape on that land.
- Pestkill also argued that the Termitcide was not a toxic chemical or other irritant. Hislop J noted it was necessary to classify the Termitcide rather than its component parts and whilst parts of the emulsion could be toxic, they did not meet the classification of toxic or very toxic or harmful or irritant or hazardous substance in accordance with approved criteria for classification of hazardous substances. Expert evidence demonstrated that the emulsion as a whole was not toxic or an irritant even though parts of the emulsion were toxic if not diluted. Accordingly, Clause 7 could not apply.
- In addition, Pestkill argued that if it was the individual ingredients which were relevant then the escape of those ingredients was sudden and accidental and the write back in Exclusion 7 would therefore apply.
  Hislop J noted that:

  > *"An accident is something which happens without intention or design. When used with reference to something which causes injury, it means an unexpected and unintended mishap."*

  Hislop J accepted that if there was an escape of ingredients it was both sudden and accidental and the write back clause would preclude the application of Exclusion 7.
- Finally, Hislop J noted that:

  > *"The Court may decline to give effect to the apparent literal meaning of the words used in the contract where to do so would result in an absurd construction which the parties cannot have intended."*

  Hislop J determined that a literal construction of Clause 7 would produce a result which would be contrary to the commercial expectations of the parties, contrary to common sense and would have the effect of virtually depriving the policy of the primary cover for contractors such as Pestkill. Accordingly, Clause 7 should be read down so as not to apply to Pestkill's claim.

In this case Pestkill, when treating termites, used chemicals which contained components which were toxic and Thompson alleged that those chemicals caused him personal injury. Whilst Thompson did not succeed in his claim, Pestkill was put to the expense of defending the claim and Gerling were held liable to indemnify Pestkill in relation to those expenses as the commercial intent of the policy was to provide cover for such circumstances and Exclusion 7 should be read down.

As can be seen, a play on words often occurs when an exclusion clause is considered following a denial of indemnity. Insurers bear the onus of establishing that a claim falls within an exclusion and that onus is not easily discharged. The Courts when examining an exclusion will have regard to the commercial intent of the policy and will not allow the operation of an exclusion to defeat the apparent purpose of a policy. Here a pest controller was sued for injuries sustained as a consequence

of the application of chemicals used by pest companies to control termites. The Court was not prepared to allow the exclusion to permit an insurer to deny that type of claim.

Assessing Non Economic Loss Under the Civil Liability Act in NSW

In New South Wales the *Civil Liability Act 2002* ("Act") sets out the basis for the calculation of an award of damages in personal injury claims. When assessing non economic loss under Section 16 of the Act the trial judge must assess the extent of the person's injuries and disabilities and determine a percentage of a most extreme case and then refer to a table to determine the monetary amount fixed by the Act. That table provides for a deduction for awards where the damages are less than 33%. If the assessment is less than 15% there is no award for non economic loss. Between 15% and 32% the deduction decreases as the percentage increases. The deduction is actually a percentage reduction that the Court applies before calculating the percentage of the maximum sum set under the Act. Where the severity is assessed at 15% the amount payable is 1% of the maximum, for a 25% assessment the amount payable is 6.5% of the maximum and a for a 32% assessment the amount payable is 30% of the maximum.

The current maximum is $520,000 under the Act. A 25% assessment results in an award of $33,800 where an assessment of 33% results in an award of $171,600. Each percentage point between 25% and 33% significantly increases the award for non economic loss. A small change in the assessment can have a large consequence in monetary terms.

However, it is the percentage assessment which a Court must consider rather than the monetary amount when assessing the claim as was highlighted in the recent NSW Court of Appeal decision in *Clifton & Ors v Lewis*.

Lewis was a quarry manager who suffered injuries in an assault. He was also an amateur boxer. He had attended an amateur boxing match at Forbes and after the match had gone to a hotel where others who had attended the match had gathered. He was assaulted in the toilets of the hotel where he was hit and kicked severely by another patron. After the incident he gave up boxing as he could not do the necessary training. The trial judge found that Lewis suffered a serious injury to his right leg consisting of damage to the common peroneal nerve which was exacerbated by chronic pain syndrome. The trial judge assessed non economic loss at 33% of a most extreme case. In addition, the trial judge allowed a buffer for future economic loss of $120,000.

An appeal followed.

The challenges to the damages awarded were based upon claims that the non economic loss assessment was manifestly excessive and there was no evidence to support an award of damages for future economic loss in the sum of $120,000. It was argued that non economic loss should not have been any more than 25% and the appropriate award for future economic loss was $20,000.

In relation to non economic loss, Beazley J noted:

> *"Although the award may be considered generous, in the sense of being at the high end of an appropriate range, it is not outside that range, particularly when the trial judge's assessment took into account the significant impact the injury had on (Lewis') recreational boxing activities."*

Basten JA agreed that the award of non economic loss should not be overturned and commented

> *"First, in relation to non economic loss, there appears to be a tendency to challenge relatively minor variations in the proportion of the most extreme case as assessed for the purposes of S16 of the Civil Liability Act 2002. Thus in the present case, the challenge to the assessment made by the primary judge (33%) sought a reduction to 25%. The assessment involves a matter of "opinion, impression, speculation and estimation". Accepting that the assessment of the trial judge was generous, it would only be necessary to conclude that an appropriate assessment might have been 30% plus or minus 5%, in order to say that both figures were within range and accordingly it would be inappropriate for the Court to interfere."*

Basten JA went on to note that small variations can have significant consequences in monetary terms and commented that:

> *"The fact that a small change in the assessment can have a large consequence in monetary terms does not mean that the nature of assessment changes or can be assumed to be a more precise exercise than it is. The relationship between the assessment and the consequence is fixed by Parliament. To assess the proportion of a most extreme case by reference to the consequence in monetary terms would be to adopt a legally erroneous course."*

The comments of Basten JA reflect the reluctance of the Court of Appeal to become embroiled in appeals that challenge assessments that fall in the range of 25% to 33% of a most extreme case.

Basten JA noted that it was argued that the amount awarded for future economic loss was too high for a true buffer and that it should have been properly calculated by reference to a proportionate diminution in earning capacity subjected to deduction for vicissitudes. Basten JA concluded that the degree of uncertainty in this case rendered artificial a calculation based on current value of future loss. Basten JA noted that:

> *"No doubt there is a point at which the size of the buffer will demonstrate a disproportion of any plausible calculation based on a percentage diminution in earning capacity, current rates of pay, life expectancy and vicissitudes. The figure arrived at in the present case was not so high as to justify such concerns."*

Beazley JA agreed that the buffer was appropriate.

Accordingly, the appeal was dismissed.

The case serves as a reminder that it is difficult to challenge an award of non economic loss for being overly generous and in any event it is the percentage assessment that must be looked at rather than the monetary effect of that assessment. That 25% to 33% range will continue to present problems with the impact in monetary terms that a one or two percent change can have.

The assessment of a person's injuries as a percentage of a most extreme case will always be a difficult task, however, defendants and plaintiff's are likely to find that challenges to those assessments often fail. Further, the case serves as a reminder that substantial buffers are permissible when it comes to assessing economic loss.

Unnecessary Medical Treatment-Exemplary Damages Awarded

Medical practitioners who provide unnecessary medical treatment for commercial benefit can face claims for significant damages including exemplary damages designed to punish a person for a contumelious disregard for another's rights as was seen in the recent NSW Court of Appeal decision in *Dean v Phung* when Dean recovered damages in excess of $1.7million consequent to unnecessary dental treatment provided by Phung.

Dean was injured in the course of his employment when a piece of timber struck him on the chin causing minor injuries to his front teeth. His employer arranged for him to see a dental surgeon. Over a period of approximately 12 months, Phung, a dentist carried out root canal therapy and fitted crowns on all of Dean's teeth. The treatment was undertaken during 53 consultations at a cost of $73,640.

Dean commenced proceedings in the Supreme Court against the dentist claiming damages including exemplary damages for negligence and trespass. Dean alleged that the treatment was unnecessary, ineffective and that the dentist must have known that to be the case. The dentist admitted liability in negligence but, in relation to trespass argued a defence of consent.

Exemplary damages are awarded where there is a "contumelious disregard" of another's rights. The dentist accepted that exemplary damages might be awarded where the conduct in question was "reprehensible, highhanded, outrageous or insulting". Exemplary damages are generally indicated where there is the need for both retribution and general deterrence. However the Civil Liability Act 2002 (NSW) provides that a Court cannot award exemplary damages in personal injury claims.

But there are circumstances where the *Civil Liability Act 2002* does not apply to a claim. Relevantly the Act does not apply to or in respect of civil liability of a person "in respect of an intentional act that is done by the person with intent to cause injury".

The question for the Court was whether the dentist's actions amounted to an intentional act done with intent to cause harm. If the Civil Liability Act applied exemplary damages could not be awarded.

The matter proceeded to Trial and the Trial Judge concluded the Civil Liability Act applied and awarded damages of $1,388,615.20. There was no award of exemplary damages.

Dean appealed.

The Court of Appeal was called on to determine whether:

- Dean's consent to the treatment meant that the dentist had not committed a trespass to person
- whether the dentist's conduct took the claim outside the Civil Liability Act
- whether exemplary damages should be awarded.

Basten JA with whom Beazley JA agreed noted:

> *"A medical procedure will generally be an intentional act: the critical issue is whether, in particular circumstances, it was done "with intent to cause injury". In ordinary language, an injury is a harmful consequence. Something which is done with a therapeutic intent, that is, to prevent, remove or ameliorate a disability or pathological condition, would not ordinarily be so described. Indeed, even non-therapeutic treatment, such as cosmetic surgery, would not generally be so described: … The somewhat controversial distinction between therapeutic and non-therapeutic purposes may be disregarded. The appellant (Dean) sought assistance from the dentist in relation to some minor chipping of his front teeth, together with a level of sensitivity and pain, apparently resulting from injury to the teeth, such symptoms not having preceded the blow to his jaw. There was no suggestion the purpose of the treatment was cosmetic. So far as the operation of s 3B is concerned, it would have been sufficient for the appellant's (Dean's) purposes to establish that the dentist knew at the time of giving the relevant advice that the treatment was not reasonably necessary. "*

Accordingly the Court of Appeal concluded the treatment was an intentional act and the fact the treatment was not required was sufficient to establish that it was done with the intent to cause harm.

Basten JA then turned to consider whether there was a trespass to person and commented:

> *"In the therapeutic context, the defence to the tort of trespass to the person is consent. Where there has been an ostensible consent, which is later challenged, the convenient starting point is to consider the validity of the consent, rather than asking whether it has been obtained by fraud. In principle, consent may be legally ineffective as a result of an innocent mistake or carelessness on the part of the person obtaining it. Further the nature of the consent required is necessary to inform the concept of fraud in this context."*

Basten JA went on to note:

> *"First, consent is validly given in respect of medical treatment in circumstances where the patient has been given basic information as to the nature of the proposed procedure. However, where the nature of the procedure has been misrepresented consent will be vitiated. Thus, if it were demonstrated, objectively, that a procedure of the nature carried out was not capable of addressing the patient's condition, there can have been no valid consent.*
>
> *Secondly, assuming a proposed treatment capable of providing an intended therapeutic effect, for the purposes of determining the effect of a misrepresentation it is necessary to distinguish between core elements, which define the nature of the procedure, and peripheral elements, including risks of adverse outcomes. Absence of advice or wrong advice as to the latter may constitute a breach of the practitioner's duty of care, but will not vitiate the consent.*
>
> *Thirdly, the motive of the practitioner in seeking consent to proposed 'treatment' may establish that what was proposed was not intended to be treatment at all, so that the nature of the act to which consent was ostensibly given was not the act carried out. Thus, although the conduct was objectively capable of constituting therapeutic treatment, if it were in fact undertaken solely for a non-therapeutic purpose not revealed to the patient, there will be no relevant consent.*
>
> *Fourthly, at least where a real issue has been raised as to the existence of a valid consent, the burden of proof will lie on the defendant practitioner to establish that the procedure was undertaken with consent."*

The consent provided by Dean was not informed consent and did not prevent a finding that there was a trespass to person and damages payable. Basten JA noted:

> *"Rather, the issue is whether treatment which was unnecessary (and now conceded to be so) was presented as necessary (again conceded) so that any apparent consent did not satisfy the criteria for consent to treatment, the treatment in question being unnecessary in the sense that it was not capable of constituting a therapeutic response to the patient's condition.*
>
> *It follows from the principles set out above that the concessions made by the dentist are sufficient to demonstrate that the appellant did not consent to the proposed treatment, because it was not in fact treatment necessary for his condition. As a result, the treatment constituted a trespass to the person.*
>
> *If, contrary to the foregoing analysis, some kind of fraud is required on the part of the practitioner, I would draw the necessary inference that the dentist was at least reckless as to whether the treatment proposed was either appropriate or*

necessary for the purpose of addressing the appellant's(Dean's) discomfort, for the reasons given .. in considering the application of s 3B(1)(a)."

MacFarlan JA did not agree and commented:

"I respectfully disagree with his Honour's view that the respondent's (Phung's) concessions that the treatment was unnecessary, yet was presented to the appellant(Dean) as necessary, of themselves indicated that the treatment constituted a trespass to the person.

As indicated by the High Court in the passage in Papadimitropoulos .. for an apparent consent to be a real consent the person on whom the act is performed must be aware of the identity of the actor and of the "nature and character of the act". In that case, the complainant's consent was real because she was aware of the identity of the actor and that the act was one of sexual intercourse. Her mistaken belief that she was married to the actor did not vitiate her consent."

Macfarlan JA went on to conclude:

"I agree with Basten JA's conclusion that in the present case the appellant established that the practitioner acted fraudulently, at least in the sense that he was reckless as to whether the treatment that he administered was either appropriate or necessary ... In other words it was established that the practitioner did not perform the relevant procedures undertaken on the appellant's teeth for therapeutic purposes but for another purpose, presumably to generate income for himself. Contrary to Basten JA's view, however, I consider this finding to be necessary for the conclusion that the appellant (Dean) did not consent to the procedures and they therefore constituted a trespass to his person. On the basis of that finding, the appellant (Dean) was not aware of the nature and character of the dental acts: he believed that they constituted dental treatment that the practitioner regarded as necessary or appropriate. In fact, when the practitioner's state of mind is taken into account, that was not their character. They were acts designed to generate income for the practitioner.

If the practitioner's state of mind is to be ignored, as Basten JA concludes, negligent advice that treatment is required will result in a trespass despite the practitioner's bona fide belief in the necessity for treatment. This would avoid the limitations on recovery of damages imposed by the Civil Liability Act and expose the practitioner to criminal charges for assault"

Whilst there was a difference in opinion in the Court of Appeal as to what was necessary to invalidate the consent the findings of Basten JA with whom Beazley JA agreed are the majority finding of the Court of Appeal on what can vitiate consent there was there was no disagreement that in this case there was a trespass to person, that the act was intentional, and it took the acts of the dentist outside the operation of the *Civil Liability Act 2002*.

The Court of Appeal then turned to consider whether Phung should be punished by an award of exemplary damages. Dean submitted the dentist remained unjustly enriched to the extent of the $73,640 in fees received for a course of conduct which he admitted was not necessary. Dean argued that any amount by way of exemplary damages should include that figure together with interest calculated at 10% in an amount of $61,858, giving a total of $135,500. The Court of Appeal concluded that the calculation of fees and interest should be taken into account, although the ultimate award need not bear any direct arithmetical relationship to them. The Court of Appeal awarded exemplary damages of $150,000.

In addition as the *Civil Liability Act 2002* did not apply to the assessment of damages it was necessary to adjust the award to assess damages at common law. That reassessment increased non-economic loss from $275,500 to $300,000 and other components were increased such as economic loss with the 3% discount rate being applicable rather than the 5% rate specified in the *Civil Liability Act 200.* After the adjustments and the addition of exemplary damages the award was increased to $1,743,000.The dentist is unlikely to have insurance that will cover him for the exemplary damages.

So what is the end result? The key principles are as follows:

- In NSW, the Civil Liability Act 2002 applies to the assessment of damages in personal injury claims except where so called intentional torts are concerned.
- A trespass to person consequent to unnecessary medical treatment is an intentional act done with the intent to cause injury.
- The Civil Liability Act 2002 and its damages regime will not apply to a claim arising out of an intentional which includes trespass to person consequent to unnecessary medical treatment.
- Whilst medical treatment which is unnecessary is often provided with the consent of the patient the provision of the treatment will amount to a trespass to person which is compensable.

- Consent requires more than simply an agreement to have the treatment especially where a patient has not been properly informed or where there is fraud on the part of the medical practitioner. Where there is no valid consent there will be a trespass to person
- Where the Civil Liability Act 2002 does not apply exemplary damages can be awarded.
- It is appropriate to award exemplary damages against a medical practitioner that provides unnecessary medical treatment for commercial gain where that treatment causes harm to a person.

Dark Car Parks Create Liabilities

The NSW Court of Appeal in *Upper Lachlan Shire Council v Rodgers* has sounded a warning for all owners of car parks that there must not be inadequate lighting in a carpark which obscures features in the car park, otherwise the car park owner will be liable for injuries suffered in trips and falls.

Rodgers was 65 years of age when he fell in a darkened car park in Crookwell. Rodgers arrived at the Council car park during the hours of dusk. When he arrived a wooden pole or log lying horizontally in an east west direction some feet from a brick wall was visible. The pole acted as a barrier to further movements of the car in the direction of the wall. The log was about shin height for an average adult.

Adjacent to the car park was a bus shelter. Rodgers parked his car to proceed to a hotel to have dinner with his wife. There were two ways of reaching the footpath. Rodgers could walk between the bus shelter and a pole in a direct line to the footpath or walk a short distance past the bus shelter to the footpath. At the time of his arrival with adequate light at dusk the structures could be seen and either course was perfectly safe.

Rodgers consumed his dinner. He was not affected by alcohol and he returned to his car around 8.00pm. There was no lighting in the car park. The street lights provided illumination along the footpath only. The wall in front of Rodgers' car blocked light from a northerly direction. Rodgers told his wife to wait at the exit of the car park whilst he fetched the car and set off in the direction of the car by the same route as he had left the car walking between the bus shelter and the pole. Unfortunately, he walked into the end of the pole, causing him to fall to the right of the pole, injuring his right knee and right shoulder.

Rodgers commenced proceedings against the Council claiming damages for the injuries he sustained and at trial the Court held that the Council had been negligent and awarded damages of $422,140.00. An appeal followed challenging the finding that there was a breach of duty of care and no contributory negligence.

In an unanimous judgment the Court of Appeal concluded the Council had been negligent. The reasoning for those findings was succinctly expressed by Allsop P in the majority judgment. Allsop P concluded:

> *"The risk of someone tripping or falling over the log in complete darkness was plainly foreseeable. This was a public car park into which people were invited to place their cars. If returning after dark, a person who had parked where Mr Rodgers had would be required to navigate a distance without any light at all in an area where there was a low hazard over which one could easily trip and fall. There was a reasonable probability that harm would occur. The risk was plainly not insignificant. People can be injured badly in falls onto hard surfaces. A reasonable person would have taken precautions either of lighting or blocking access to where the pole would have been in darkness. The burden of taking the precaution of some lighting or a barrier was not great. No case was made that it was. ... The obstruction had been created by the appellant (Council) and allowed to remain in darkness. There was no social utility in leaving a hazard such as the pole in darkness. On the evidence the route taken by Mr Rodgers was one that was plainly available and to a point, more convenient. It was readily foreseeable that people would use that route to get to their cars. Whether there was a better route is very debatable. To begin from the other side of the bus shelter would be to begin from a place of better light but one would still have to walk into the darkened space of the car park."*

Allsop P noted the trial judge held that the obviousness of the risk was irrelevant to the determination of risk and found that conclusion was incorrect. The correct stance, as noted by Allsop P was that the obviousness of a risk is one factor which may affect the response of the reasonable person to the risk and one might ask in a given situation, must I take precautions against a clear and obvious risk which anyone will see and avoid. However, in this case the risk was not obvious in the dark.

In the appeal Counsel argued that there should be a 50% reduction for contributory negligence.

The Council argued that the choice of route to the car was inappropriate and Rodgers should have followed a different route which could have avoided the log. Rodgers was faced with a choice of routes with one being slightly longer. Both routes started in an area of illumination and proceeded into darkness.

The Court of Appeal found that:

> *"(Rodgers) was walking in a cautious manner, keeping such look out as he could, knowing that the log was in the vicinity, but attempting to get to his car. In doing so, in the dark, he hit the log. The assertion as to whether this was a choice reflecting a lack of objective care for his own safety is an evaluative one, dependent in part upon the choices available to him. He could have approached the car from where he asked his wife to stand. Had he done so, he would have had a slightly longer walk over a blue metal surface partly in the pitch dark. He may, in those circumstances have faced the danger of walking too far past the door of his car and tripping over the log. These were not the conscious thought processes of Mr Rodgers but they reflect the objectively equivocal nature of the choice."*

The Court of Appeal was not persuaded that the choice Rodgers made was unreasonable. The Court of Appeal concluded that Rodgers displayed the standard of care of a reasonable person.

At the end of the day the Council was unsuccessful in the appeal.

Owners of car parks need to be aware that where a car park is not properly illuminated and there are trip hazards created as a consequence of barriers which are put in place to stop cars moving beyond certain points, the car park owner will be liable for injuries suffered by those who trip over those barriers in the dark.

Reinstatement Claims Available to Dismissed Injured Workers

In NSW the *Workers Compensation Act* ("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.

However 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 the recent decision of the Full Bench in Bindaree Beef Pty Ltd v The Australasian Meat Industry Employees' Union, Newcastle and Northern Branch on behalf of Riley.

Riley was a slicer employed by Bindaree Beef Pty Ltd. The work of a slicer involved taking cuts of meat boned from beef carcasses by a boner and trimming and slicing the meat according to specifications. The work is reasonably heavy and repetitive.

Riley suffered a repetitive strain injury at work. Riley continued in employment albeit on a lesser paid job, and received make-up pay under the WC Act. Riley subsequently underwent bilateral shoulder surgery and surgery for carpal tunnel syndrome. He subsequently returned to work commencing on restricted duties. After a short period Riley performed his normal pre-injury duties of a slicer for 5 months.

Riley settled a lump sum permanent impairment compensation claim under sections 66 and 67 of the WC Act in respect of a 40 per cent loss of the efficient use of his left and right arms and pain and suffering.

Subsequently Bindaree advised Riley of its concern at the risk of Riley re-injuring himself and the liability Brindaree might incur as a consequence. Later that month Riley's employment was terminated.

The Australasian Meat Industry Employees' Union, Newcastle and Northern Branch, on behalf of Riley, made an application under s 242 of the WC Act for an order reinstating Riley. In a decision of the Industrial Relations Commission, Commissioner Macdonald ordered the Brindaree reinstate Riley in the position of slicer and made orders regarding lost remuneration.

An appeal followed.

The Full Bench of the Industrial Relations Commission noted the jurisdiction of the Commission under the injured worker reinstatement provisions of the WC Act is enlivened if an injured worker is dismissed because he or she is not fit for employment as a result of the injury received.

The Full Bench noted that in reinstatement proceedings:

> *"The presumption in s 244 is that the injured worker was dismissed because he or she was not fit for employment as a result of the injury received. The employer may rebut that presumption if the employer satisfies the Commission that the injury was not a substantial and operative cause of the dismissal of the worker. The test is clearly not whether the worker was dismissed, "in part", due to his or her injury."*

An injured worker is in the poll position. The Full Bench noted:

> *"It seems to us an applicant would need to prove as objective facts, that he or she was an injured worker within the meaning of the WC Act, and that he or she had been dismissed. However, it would be sufficient for the applicant to allege that the dismissal occurred because he or she was not fit for employment as a result of the injury received. The onus would then fall on the respondent employer to rebut that presumption by proving to the Commission's satisfaction that the injury was not a substantial and operative cause of the dismissal of the worker: s 244(2)."*

When a reinstatement claim is brought an employer carries the burden of rebutting the presumption in s 244(1) of the WC Act by having to prove on the balance of probabilities that the injury was not a substantial and operative cause of the dismissal.

When it came to an analysis of the employers case that the dismissal was not because of the injury and was due to concerns about re-injury and OH&S obligations the Full Bench found that the test is an objective one. The Full Bench concluded:

> *"Thus, under s 244(2) in seeking to rebut the presumption in s 244(1), the employer must prove two things: first that the injury was not a substantial cause of dismissing the worker. If there were more than one cause of the employer's decision to dismiss the worker, which included the injury, provided the employer could prove the injury was not a substantial cause it would have satisfied one element of the test. The second element of the test to be satisfied is that the injury was not an operative cause of the dismissal. In satisfying that test the employer's subjective intention is not relevant. The employer must satisfy the Commission, on an objective analysis of all of the circumstances, that the injury was not the operative (or real or effective) cause (or proximate reason) of its decision to dismiss the worker. There must be a substantial causal connection between the injury and the decision to dismiss."*

The Full Bench went on to note:

> *"The onus cast by s 244(2) means that, to succeed, the employer has to establish that it was not actuated by the injury. …., the real reason or reasons for the taking of the adverse action must be shown to be "dissociated from the circumstances" that the aggrieved person has or had the relevant attribute."*

After considering the Commissioner's findings the Full Bench concluded that the decision to reinstate Riley was correct even though the incorrect tests had been applied by the Commissioner. Accordingly the appeal was dismissed.

The Full Court noted:

> *"The idea that the only appropriate response to an injured worker at risk of re-injury is to terminate the worker's employment is at odds with these objects. It is distinctly at odds with the object to promote a safe environment at work that protects employees and others from injury and illness and that is adapted to their physiological and psychological needs. We would think it is also at odds with the objectives of the Workplace Injury Management & Workers Compensation Act 1998, which is to be read and construed with the WC Act. In particular, we note the object to promote the return to work of injured workers as soon as possible and to achieve optimum results in terms of a timely, safe and durable return to work following workplace injuries...*
>
> *If there are genuine concerns on the part of an employer and the concerns are soundly based that an employee is at risk of re-injury and may be a risk to the health and safety of other workers, before making a decision to terminate the employee - a step that in very many cases may have drastic consequences for the individual - it is our opinion there is an obligation on the employer to first examine all of the alternatives including rehabilitation, alternative work and adapting the workplace to the employee's needs. Termination of employment should be the last resort."*

The reinstatement provisions for injured workers in the WC Act impose a significant burden on employers when employees are injured as a dismissal can lead to a reinstatement application and compensation orders and the employer rather than its workers compensation insurer will be liable for the compensation that is payable.

OH&S Roundup

Bankruptcy & OHS Fines

The recent decision in the Industrial Court of NSW in *Inspector Cooper v Cheung* serves as a reminder to directors that a breach of work health and safety legislation work accidents can have enduring consequences for directors.

Cheung was a director of Royal Plastic Pty Limited. He was prosecuted for a breach of Section 8 of the Occupational Health and Safety Act 2000 by virtue of Section 26 of the Act which deems a director to have committed the same offence as a corporation.

A worker employed by Royal Plastic was injured when he was using a knife to attempt to clear a blockage in an unguarded and un-isolated plastic palletising machine. The Court concluded the guarding offence was a serious one. Employees could easily remove the guard and there was no control device in place which automatically cut power off when the guard was removed. The Court noted the risk was not only obvious and reasonably foreseeable, it was foreseen. An Improvement Notice had been issued prior to the accident which had identified the risk. Once the guard was removed it was obvious that any person operating the machine was at serious risk.

The Court noted that Cheung had been prosecuted previously in relation to a failure to ensure safety in not dissimilar circumstances when he was a director of the predecessor corporation to Royal Plastic, which known as Rexma Pty Limited.

The Court determined that in fixing the penalty there should be an element for general deterrence and specific deterrence. The maximum penalty for the offence was $82,500 although there had been an early guilty plea and the court determined the fine should be discounted by 17.5% for that early plea. The Court determined the appropriate level of fine was $50,000 after the discount.

However, Cheung was an undischarged bankrupt and his capacity to pay any fine was an issue.

The Court, in exercising its discretion to fix the amount of any fine is required to consider the means of the accused to pay the

fine when fixing the amount. In this case the Court determined to moderate the amount of the fine to $25,000 and to defer the obligation to pay the fine and any costs payable to WorkCover until July 2014 by which time Cheung will no longer be bankrupt and may be in a better position to pay the fine.

Cheung will not escape payment of the fine because of his bankruptcy and will be faced with an obligation to pay the fine of $25,000 once his bankruptcy ends.

The case serves as a reminder that an individual who becomes a bankrupt does not escape OHS penalties as a consequence of their bankruptcy and fines resulting from OHS breaches are payable despite any bankruptcy. The changes to work health and safety laws that commenced on 1 January 2012 removed the provisions in work health and safety legislation that deemed a director of a corporation to have committed the same offence as the corporation for offences occurring after the changes commenced however directors must exercise due diligence to ensure that a corporation meets its work health and safety obligations otherwise the director will breach the legislation and be liable for prosecution and a fine payable even if the director becomes a bankrupt.

Workers Compensation Roundup

NSW Workers Compensation Scheme Changes Update

In June 2012 the NSW Government introduced changes to the NSW workers compensation scheme which significantly affect the benefits payable to workers.

With the passing of the legislation some of changes commenced with immediate effect and others are to commence upon proclamation. The changes which commenced with immediate effect were the amendments relating to:

- lump sum compensation,
- claims for damages for nervous shock;
- medical and related expenses;
- journey provisions;
- heart attack and stroke claims;
- disease injury claims;
- insurer licensing and transfer of claims;
- the saving and transition provisions.

The most significant change that alters weekly compensation entitlements and the assessment of those entitlements has not commenced. However, the Government has announced that there will be phasing in of the changes for weekly compensation and the dates for the commencement have been finalised.

From 17 September 2012 employees who have greater than 30% whole person impairment will begin receiving weekly benefits under the new regime.

Next workers injured at work on or after 1 October 2012 will receive weekly benefits under the new regime.

Finally from 1 January 2013 all injured workers will be transitioned to weekly benefits under the new regime and the assessment regime introduced by the changes.

The phasing in will result in injured workers who have suffered 30% WPI from injuries before 17 September 2012 moving to weekly payments of compensation of $725.00.

Workers injured before 1 October 2012 will continue to be assessed under the old regime but will be transitioned to the new regime from 1 January 2013. This will mean that those workers will be subject to work capacity assessments and the limited appeals available to challenge work capacity assessments. Once the work capacity assessment is conducted the full impact of the changes will occur three months later as the new weekly benefits system will apply from that time. For those who are less significantly injured (less than 20% WPI) the maximum period for weekly benefits will be a further 260 weeks and only workers who are working 15 hours per week or have no work capacity will receive benefits for more than two years.

Moving forward, from 1 October 2012 and for transitioned claims from 1 January 2013, the landscape for claims for weekly payments of compensation is as follows.

Weekly Payments of Compensation

There will be a change in the way that weekly benefits are calculated and there will be restrictions on the duration of benefits.

The weekly income benefits of award and non-award workers will be determined by reference to the average actual pre-injury earnings of a worker over the previous year or any shorter period of continuous employment however different provisions apply where the worker has been employed for less than 4 weeks. Overtime and shift allowances are included subject to proof that the overtime and shifts would have been worked but for the injury. This will simplify the way in which entitlements are calculated.

Weekly payments of compensation will not continue after the Commonwealth retirement age.

No weekly compensation will be payable to a worker after 5 years (260 weeks) of weekly payments except where the worker has a whole person impairment greater than 20%.

There will be 3 entitlement periods (weeks 1–13, weeks 14–130, and after week 130), with weekly payments after week 130 only available to totally incapacitated workers or partially incapacitated workers who have returned to work for at least 15 hours per week.

For the first 13 weeks of incapacity injured workers will receive 95% of their pre-injury average weekly earnings up to a maximum of $1,838.70 less any current earnings or amounts the worker is able to earn in suitable employment.

In weeks 14-130 totally incapacitated workers will receive 80% of their average weekly earning and partially incapacitated workers will receive 80% of average weekly earnings less an amount that reflects their capacity to earn. However if a partially incapacitated worker has returned to work and is working 15 hours a week or more they will receive 95% of their average weekly earnings less their actual earnings or amounts the worker is able to earn in suitable employment.

After week 130 a worker must be totally incapacitated or partially incapacitated and have returned to work and working more than 15 hours a week earning more than $155 a week to receive weekly compensation and be assessed by the insurer as being, and likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings. The worker will then receive 80% of average weekly earnings less any earnings.

Payment of weekly compensation will be dependent on a work capacity determination made by an insurer and the insurer must conduct work capacity assessments during the life of a claim. The assessments must be conducted in accordance with WorkCover Guidelines.

A new dispute resolution process for disputes about work capacity will feature an internal review by an insurer of its decision on capacity with a merit review by WorkCover and a procedural review by the proposed WorkCover Independent Review Officer.

The following decisions of an insurer will be final and binding on the parties:

- a decision about a worker's current work capacity,
- a decision about what constitutes suitable employment for a worker,
- a decision about the amount an injured worker is able to earn in suitable employment,
- a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,
- a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment;
- any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to above.

A decision to dispute liability for weekly payments of compensation and a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act are not binding.

The Workers Compensation Commission does not have jurisdiction to determine any dispute about a work capacity decision of an insurer and is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer.

The worker can request an insurer to review a work capacity decision, and the insurer must conduct an internal review. If the worker is not satisfied with that decision they can request WorkCover to carry out a merit review of the decision. A worker can also request the WorkCover Independent Review Officer to review the insurer's procedures in making the work capacity decision but not any judgment or discretion exercised by the insurer in making the decision.

Obligation to Provide Suitable Duties

The changes introduced which impact on an employer's obligation to provide suitable duties will also commence from 1 October 2012.

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 in respect of the injury, must at the request of the worker provide suitable employment for the worker. An employer commits an offence with a maximum penalty of $5,500 if they fail to do so.

The employer must provide employment that is both suitable employment and (subject to the qualification) so far as reasonably practicable, the same as, or equivalent to, the employment in which the worker was engaged at the time of the injury.

This obligation does not apply if:

- it is reasonably practicable to provide employment;
- the worker voluntarily left the employment of that employer after the injury happened (whether before or after the commencement of the incapacity for work); or
- the employer terminated the worker's employment after the injury happened other than for the reason that the worker was not fit for employment as a result of the injury.

WorkCover inspectors will be able to issue an Improvement Notice requiring an employer to remedy any contravention of its obligations and may issue an Improvement Notice to prevent a likely contravention from occurring or remedy the things or operations causing the contravention. If an employer fails to comply with an Improvement Notice they commit an offence which attracts a maximum penalty of $11,000.

Conclusion

Whilst the commencement date of the changes has been announced, the Regulations necessary to implement the changes are yet to be proclaimed.

The Government has also established a working party to report on proposed changes to the dispute resolution process. The working party will also consider the proposed no cost regime for disputes which is contained in the amendments to the legislation and provide that each party is responsible to bear its own costs of any dispute. The cost amendment is yet to commence and that may well be changed as a result of recommendations of the working party.

The landscape for workers compensation insurance in New South Wales continues to change.

Operational instructions for scheme agents are under review and it will be some time before we wake up to a brand new day with the full extent of the changes known.

An Employers Is Not Always Liable in Negligence For Work Accidents

Negligence claims brought against employers are difficult to defend and some suggest that because an accident has

happened and an employee is injured, an employer is liable for damages if it can be shown that by some means the accident may have been avoided. However that is not necessarily the case. The Courts have determined that the common law requires an employer to have a safe system of work for his employees and this means that he must take reasonable care for their safety. It does not mean that he must safeguard them completely from all perils.

Factors that are taken into account in determining negligence include whether reasonable care required the elimination of a risk having regard to the consequences of the risk, the probability of its occurrence and the cost, expense and inconvenience of eliminating it.

It has been said that: "a risk was regarded as unreasonable and one to be prevented only if reasonable members of the community would think it sufficiently great to require preventative action".

The High Court in *Bankstown Foundry Pty Limited v Braistiana* concluded that a Court must not approach the issue of negligence on the part of an employer on the basis of some principle that there was a heavy obligation on the part of the employer to protect the worker. What was reasonable was always a question of fact to be judged according to the standards of the time.

The recent decision of the NSW Court of Appeal in *Wilkinson v Perisher Blue Pty Limited* provides guidance on the Courts approach to arguments about accidents that could have been avoided and the reasonable response of an employer to a situation that by necessity places an employee at some risk.

Wilkinson was employed as a mountain awareness officer and in the course of his employment he was injured in a skiing accident when he was struck by a snowboarder. He suffered serious injuries and brought proceedings in negligence against his employer.

Wilkinson was working on a relatively gentle slope on Front Valley at Perisher and he was midway down the Front Valley slope. His duties required him to fence off obstacles, make sure there was signage in place including slow signs and oversee the speed of skiers on the slope. A mountain awareness officer's role included the prevention of high speed experienced skiers becoming mixed with beginners. On Front Valley there were two potential hazards – the speed of fast, experienced skiers combined with the unpredictability of a beginner.

Wilkinson was struck by a snowboarder who was going fast and lost control when he caught an edge and turned a sharp left and headed towards Wilkinson, resulting in a collision. Wilkinson had called out to the snowboarder to slow down before the accident.

Wilkinson failed to convince the trial judge that the employer was negligent and an appeal followed.

Hoeben JA in the majority judgment in the Court of Appeal noted:

> "*in this case the employer had dual obligations. It had an obligation to its employees to exercise reasonable care for their safety. It also had an obligation to the users of the ski fields to exercise reasonable care for their safety. As part of the later obligation, it employed mountain awareness officers, such as the appellant (Wilkinson) to work in a mobile and on occasions, static capacity to reduce the likelihood of collisions. This was done by endeavouring to reduce the speed at which persons descended the slopes and where such persons were recalcitrant or repeat offenders, sanctions were imposed which included removing the right to ski at the resort.*
>
> *The system of work for mountain awareness officers was to employ highly skilled and experienced skiers in the task. Such persons were given a broad discretion as to how and where they were to perform their task. There was a constraint on their initiative in that for an hour or so at the beginning and for approximately the last hour of the day, they were positioned in locations where experienced skiers and beginners, or less experienced skiers, were likely to come together. In the case of the appellant (Wilkinson), the location allocated for him was approximately halfway down Front Valley, near a slow sign. He was not required to be immobile or stationary but had to be within the vicinity of the slow sign. The appellant (Wilkinson) was working with another mountain awareness officer at the bottom of the slope and was equipped with a whistle, radio and a highly visible fluorescent green top. The first question is whether it was reasonably foreseeable that if he were so positioned at Front Valley there may be a collision between him and another user of the slope. The answer is clearly yes."*

Wilkinson had been injured as a consequence of a foreseeable risk of injury. However, that was not the end of the enquiry.

Hoeben JA went on to conclude:

> *"The foreseeable risk of injury to the appellant (Wilkinson) was not greater than that to which any other user of the Front Valley slope for skiing purposes was exposed. The appellant (Wilkinson) however had advantages which a normal skier did not. He was highly visible, he was positioned near a slow sign, he was highly skilled and he was watching for potential sources of danger."*

Hoeben JA noted that:

> *"Given the appellant's (Wilkinson's) experience, the nature of his job, the fact that there had been no previous accidents and his high visibility near a slow sign on a comparatively gentle slope, the degree of probability of a collision was extremely low. The magnitude of the risk, given the nature of the slope was also low."*

The question for the Court of Appeal was what was a reasonable response to the relatively low magnitude of risk. Hoeben JA noted that the issue for determination was:

> *"Approaching the matter prospectively and not in hindsight, what response to that foreseeable risk of injury was required of a reasonable employer?"*

Hoeben JA concluded that no response was required.

The Court of Appeal concluded that by using Wilkinson with his special skills in the way it did, the employer was not unreasonably exposing him to a risk of harm and that a breach of duty of care was not established.

An employer who exposes his employee to a risk of injury is not negligent unless the employee has been unreasonably exposed to the risk of harm.

It is necessary to identify the risk of injury, its probability of occurrence and potential consequences and determine what a reasonable person in the position of the employer would do in response to that risk. If a reasonable person would do nothing in response to that risk, there is no breach of duty of care and an employer will not be negligent.

CTP Roundup

$400,000 Buffer Not Over The Top

The NSW Court of Appeal in *Allianz Australia Insurance Limited v Cervantes*, has recently upheld an award of damages of $400,000 for future economic loss where a CARS assessor determined it was necessary to allow a substantial buffer for a claim for future economic loss rather than embark on an arithmetic calculation of the potential future loss. The Court of Appeal has confirmed that a decision to award damages by way of a lump sum or buffer is essentially an evaluative judgment and the size of the buffer alone will not invalidate the award.

The calculation of damages for future economic loss involves a comparison between the economic benefit to the claimant from exercising earning capacity before injury and the economic benefit from exercising earning capacity after injury.

Calculation of the loss is not always easy and a buffer or cushion award is generally reserved for situations where there is a smallish risk that otherwise secure employment prospects may come to an end in consequence of an injury, at some time distant in the future. However, not all buffers are small and where arithmetic calculation proves difficult some very large buffers have been allowed.

Where earning capacity is difficult to assess, even though no precise evidence of relevant earning rates is tendered, it is open to the Court to abandon an arithmetic calculation and determine an appropriate level of compensation.

In the case of *Allianz Australia Insurance Limited v Cervantes*, the CARS assessor was called on to consider a claim for damages for injuries sustained in a motor accident where Dr Cervantes alleged that she was unable to work the long hours necessary to run a successful private practices as a nephrologist and to maximise her income as a full time hospital specialist.

The claim was pursued under the Motor Accidents Compensation Act and the CARS assessor determined that an appropriate allowance for future economic loss was $400,000. That determination was challenged and a Supreme Court judge concluded

that it is only appropriate in quite extraordinary or peculiar circumstances when reliable information in relation to an injured person's income is unable to be, or is extremely difficult to be obtained, to award a buffer in the vicinity of $400,000. However Rothman J determined that there was no error in awarding that level of buffer.

On appeal the Court of Appeal agreed. Macfarlan JA noted that:

> *"This is a case in which anything approaching precision in calculating future economic loss was difficult, if not impossible. Dr Cervantes' injuries restricted her ability to engage in private and public practice as a nephrologist, an invaluable medical researcher. The income that she would have earned from these activities, if she had been injured, would have varied significantly depending on the mix of activities. Precisely what the mix would have been from time to time could only be a matter of speculation.*
>
> *In my view the extreme difficulty of calculation of future economic loss in this case justified the assessor making an award by way of a buffer."*

Basten JA, in his judgment, also provided guidance on the approach that the Courts will take when considering claims for future economic loss which are difficult to determine. Basten JA noted:

> *"The conventional approach to such an exercise is to assess the earning capacity of the claimant in monetary terms prior to the accident (usually on the basis of nett weekly or annual earnings) and where there is evidence of unemployment or employment at a reduced income thereafter, to assess the quantum of the difference up to the date of the hearing (past economic loss) and to project the calculation into the future (future economic loss). The latter exercise will again conventionally be discounted by 15% on account of vicissitudes.*
>
> *Such calculations produce precise figures, often resulting in awards expressed in dollars and cents. However, such precision is fallacious. Varying degrees of uncertainty will attend the hypothetical aspects of the calculation, rendering any degree of precision misleading.*
>
> *Additionally, with respect to future economic loss, the exercise requires a discounting of the calculation in order to achieve a present monetary value for the assessed loss, which, it is assumed, will accrue steadily over the remaining work life of the claimant.*
>
> *Under the general law it has been long accepted that, at least in some cases, the assessment will involve such a degree of speculation as to render a calculation by the conventional techniques inappropriate. In those cases, a lump sum is awarded by way of "buffer", the Court being satisfied on the balance of the probabilities that a loss will be suffered or, indeed has been suffered.*
>
> *One of the contingencies which may not be readily assessable, thus supporting the lump sum approach, may be the question of vicissitudes. The greater the difficulty in identifying the claimant's most likely circumstances but for the accident, the greater the difficulty in assessing the uncertainty as to whether or not those circumstances would have arisen in any event, and if so when and for how long they must subsist. Awarding a lump sum will usually incorporate the element of vicissitudes into the global assessment."*

Basten JA noted that the argument propounded by the insurer was that a precise calculation was demanded in circumstances where a buffer for future economic loss was as large as $400,000. Basten JA noted that it was not necessary to decide an upper limit which could be placed on an award of an economic loss buffer, however it was clear any large award needed to take into account the cap on damages for economic loss which applied as a result of legislation that governed such an award.

Buffers are permissible when compensating injured claimants for future economic loss under the *Civil Liability Act 2002* and the *Motor Accidents Compensation Act 1999* and even larger buffers will be permissible when the calculation of the loss of earning capacity requires speculation.

Overturning a CARS Assessment

An insurer cannot appeal an award of a CARS assessor made under the Motor Accidents Compensation Act however the award is open to challenge where the assessor commits an error of law. An error of law will permit a Court to set aside the assessor's certificate and remit the matter for reassessment by CARS. In some circumstances the Court will determine that it is appropriate to remit the matter for determination by a different assessor. However, a challenge by an insurer to a CARS assessment is not a merit challenge. Rather, the question is whether or not the assessor committed an error of law. So what amounts to an error of law?

In *CIC Allianz Australia Limited v Daniel Luke McDonald*, the Court was called on to consider an assessment by a CARS

assessor awarding damages of approximately $535,000. Allianz argued that the assessor's reasons disclosed four errors of law, each of them calling for a remedy by way of prerogative relief with the end result that the award should be set aside.

It is settled law that CARS assessments are subject to the supervisory jurisdiction of the Supreme Court and if error is established the assessment can be set aside and the matter remitted to CARS for reassessment.

Under the CARS Scheme a claims assessor must issue a certificate of assessment together with a brief statement setting out the assessor's reasons for the assessment. The Claims Assessment Guidelines issued pursuant to the Act require the assessor to provide a Statement of Reasons as briefly as the circumstances of the assessment permit, and detailing the findings on material questions of fact, the assessor's understanding of the applicable law (if relevant) and the reasoning process that led the assessor to the conclusions made.

Hidden J noted that at the heart of this dispute was the adequacy of the reasons provided. Hidden J, in the matter of Allianz Australia Insurance Limited v Ward had previously concluded:

> "*Clearly an assessor's reasons need not be lengthy or discursive, and should avoid undue formality and technicality. Nevertheless, they must demonstrate that the issues raised by the case had been determined and that any relevant statutory requirements have been considered. Those ends can be achieved in concise reasons.*"

In this case Allianz argued that the reasoning of the assessor did not deal with the expert accounting report of Vincent's relied on by Allianz. The assessor in his reasons had simply noted:

> *"I give the conclusions of Vincent's little weight because the authors of the report have in my view relied too heavily on the claimant's tax returns and business records, have made some erroneous assumptions, have not fully appreciated the fact that the claimant is clearly inconvenienced by his pain and stiffness to the extent that he is working approximately 15 hours less per week than he would have been working had he not been injured."*

Hidden J accepted Alliance's submission that the assessor gave no weight to Vincent's report at all and simply put it aside and he gave no adequate reasons for doing so. Accordingly, the absence of reasons for disregarding Vincent's report were sufficient to set aside the assessment certificate.

Alliance also argued that the assessor did not give adequate reasons for rejecting the evidence of two doctors whilst accepting the evidence of other doctors which were in conflict. Hidden J thought that the reasons were adequate although it was not necessary to express a concluded view of that in light of the error concerning the Vincent's reports. The assessor's findings were in the following terms:

> *"I reject the opinion of Dr Cameron in relation to causation because (it) is contrary to the preponderance of the medical evidence and also the evidence of the claimant and Ms Bolton. There is no evidence that the claimant suffered headaches before the accident and no other plausible explanation for his post accident headaches, other than the injuries he suffered in the accident. I accept the diagnosis of Drs Champion and Patrick. Furthermore I accept their opinions where they are in conflict with the opinions of Drs Cameron and Bornstein."*

Accordingly if reasoning not dissimilar to this is found in the reasons attached to a CARS assessment it will be difficult to challenge the findings as being inadequate.

Alliance also challenged the reasoning in relation to the claim for care on the basis the assessor gave no reason for selecting a figure of one hour per week as that figure had the appearance of being plucked out of the air. Hidden J commented the reasons were barely adequate but again did not express a final view on the adequacy of the reasons which were in essence no more than a statement that:

> *"I accept the claimant's evidence and that of his partner that he is restricted in his ability to carry out some heavier household and outdoor chores and Dr Champion's opinion that the claimant's physical condition worsens with heavy activity, I consider the appropriate allowance be one hour per week."*

At the end of the day it was the assessor's failure to provide adequate reasons for disregarding the accountant's report that resulted in the award being set aside. Hidden J determined that the matter be referred to CARS to be determined by a different assessor.

The case serves as a reminder that assessors are obliged to provide reasons to support their awards however those reasons

do not need to be extensive. However, where there is conflicting evidence there is a need to resolve the conflict and provide reasons that demonstrate the basis for the assessor's conclusions that resolve the issues in the case.

Federal Court Applications To Set Aside Creditors' Statutory Demands

The Federal Court recently handed down a decision which has implications for companies seeking to set aside Creditors' Statutory Demands. In Superior IP International Pty Ltd –v- Ahearn Fox Patent and Trade Mark Attorneys [2012] FCA 282, it was held that the applicant instituting the proceedings before the Federal Court must file a Genuine Steps Statement at the time of filing an application to set aside the demand. The Genuine Steps statement must specify what steps the parties have taken to resolve the issues in dispute before commencing proceedings or to specify the reasons why no such steps have been taken.

This is a new requirement introduced by the recently-commenced Civil Dispute Resolution Act 2011 (Cth) ("the Act") with the objective of ensuring that as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.

The Decision

Justice Reeves of the Federal Court of Australia raised the problems associated with the process of a company applying to set aside a Creditors Statutory Demand and its obligation to file a Genuine Steps Statement at the time of filing the application, including that an applicant faced with a Creditors Statutory Demand has only 21 days from service of the Demand to file the Application.

Applications under Section 459G of the Corporations Act 2001 (Cth) to set aside a Creditor's Statutory Demand are not specifically excluded from the genuine steps requirement in the Act or the Regulations and Justice Reeves held that the obligation to file a Genuine Steps Statement remained.

In addition His Honour held that the failure of either party to file a Genuine Steps Statement should be taken into consideration in determining the costs of the proceedings. The matter was adjourned in relation to costs and Justice Reeves ordered that the parties' lawyers be joined as parties to the proceedings for the purposes of determining costs.

In conclusion, the decision of the Federal Court confirms that applications to set aside a Creditor's Statutory Demand are not excluded from the new legislative requirement to file a Genuine Steps Statement before commencing proceedings in that Court. Accordingly any applicant company seeking to set aside a Creditor's Statutory Demand in the Federal Court must take genuine steps to attempt to resolve the dispute before commencing proceedings. This may make compliance difficult with the 21 day statutory period for commencing the proceedings.

In addition applicant companies should be made aware of the Genuine Steps Statement requirement before the Federal Court as this is a relevant consideration in determining costs. This decision also has implications for legal practitioners who in failing to comply with the obligation to advise and assist their client with filing a Genuine Steps Statement, may be joined as a party to the proceedings for the purposes of determining costs and a possible cost order against the lawyer.

Conclusion

Applications to set aside Creditor's Statutory Demands may be commenced before either the Federal Court or Supreme Court of each State. The requirement to file a Genuine Steps Statement before commencing proceedings currently applies only in the Federal Court as there is no equivalent State legislation in operation.

In light of the decision, companies seeking to set aside a Creditor's Statutory Demand would be better advised to file an Application to set aside the Creditor's Statutory Demand before the relevant State Supreme Court to meet the 21 day period as well as mitigate the risk of severe cost penalties arising from failure to comply with the requirements of the Genuine Steps Statement.

Trustee's Indemnity for Legal Costs

A recent decision of the Full Court of the Federal Court of Australia in *Frost v Bovaird [2012] FC AFC 60* confirms important principles regarding the rights of Trustees claiming legal costs pursuant to their indemnity.

The decision concerned the Estate of the Late Mr Maxwell Alan Frost. Mr Frost was survived by his two children whom he appointed as Executors of deceased estate.

He was also survived by his elder sister, Mrs Bovaird and her son and a dispute emerged between Mr Frost's relatives leading to litigation in two camps, which were his former estranged wife and two children and in the other camp his sister (Mrs Bovaird and her son).

Probate was granted in respect to Mr Frost's Will to the Executors and the whole of his estate amounting to $835,000 was left to a charity. Mrs Bovaird commenced proceedings against the Executors claiming the provision for maintenance pursuant to the Family Provision Act out of the Will. Her son also commenced proceedings claiming damages for breach of an alleged agreement by Mr Frost to lend Mr Bovaird $880,000 unsecured and interest free for a term of 10 years.

Mr Bovaird commenced another set of proceedings in the Supreme Court claiming damages for breach of contract allegedly made in 2001 between her and her brother and a company associated with her brother. All three proceedings were tied together in the New South Wales Court and Brereton J dismissed the proceedings under the Family Provision Act however found that there had been a binding agreement in relation to the loan and awarded damages in favour of Mrs Bovaird, in excess of $1,000,000.

In relation to all proceedings, Brereton J ordered the Executors in their capacity as such to pay Mrs Bovaird's costs. Before making cost orders he considered an argument made by the Bovairds that the Executors should pay the cost of the proceedings personally because they acted unreasonably in defending the litigation and should therefore be denied indemnity both for their costs and for costs payable to the plaintiff.

The argument by the Bovairds was that, the conduct of the defence by the Executors was unreasonable and therefore the costs if paid from the deceased estate would deprive them from the fruits of the litigation and there was no evidence to suggest that an order for costs against the Executors personally could not be met.

Brereton J found, however, that there was no reason to suppose that the defence was in accordance with the wishes of the beneficiary namely the charitable organisation and therefore the Trustees were acting in the interests of the benefit of the estate and not themselves.

Brereton also went to say that had the defendants sought re Beddoe advice from the Court regarding the defence, the Court would have advised that they would have been justified in defending the proceedings.

Consequent upon the judgment of Brereton J an order for the Administration of the Estate in Bankruptcy was made and Stephen Nichols appointed as Trustee in Bankruptcy.

On 19 March 2010 the Executors commenced an Application in the Federal Court against the Trustee in Bankruptcy of the Bankrupt Estate of Mr Frost seeking declarations that the rights of indemnity of the Executor by payment out of the assets of the estate is in priority to the satisfaction of all other creditors and the vesting of property is subject to prior equitable proprietary right of the Executors to be indemnified for future legal costs relating to the proceedings brought against them.

In response the Trustee filed an interim Application for Directions seeking as to whether he would be justified or not justified indemnifying out of the Bankrupt Estate, the legal costs of the Executors.

Leave to appeal was granted to the Bovairds but in relation to Trustee's Application for directions, the Primary Judge declined to make the order and instead on the Trustee in Bankruptcy's Application for Directions, made directions that the Trustee in Bankruptcy would not be justified in paying the legal costs of the Executors as and when they occurred in respect of the Court of Appeal proceedings and the Federal Court proceedings.

In reaching the decision the Primary Judge went onto say:

> *"Although there is an interesting question of priorities between the Executor's right of indemnity and the Trustee's right of indemnity, there are sufficient assets in the Estate at this stage, that that question does not presently – and may never – require resolution."*

The executors appealed against the directions, the first ground of Appeal being that the primary judge had erred in refusing to direct Trustee in Bankruptcy to indemnify the Executors for their costs as and when they were incurred. The second ground, that there were sufficient assets and the third ground, that the primary judge had erred in refusing in make the finding as to whether the right of indemnity out of the Executors for their legal costs in the four proceedings was a right in priority to any right of indemnity of the Trustee in Bankruptcy.

As to the first ground, the Full Federal Court referred to a number of decisions confirming the Trustees have a right of indemnity out of Trust assets and in respect of legal costs which are properly incurred by them as an incident of the administration of their estate.

The right of indemnity applies such that the Trustee is not obliged first to meet a trust liability out of his or own funds and then seek reimbursement on the Trust fund. Rather the Trustee is entitled to have resort to Trust Funds in order to meet the liability in question. Further the Trustee has an equitable lean over the Trust assets to secure the right of indemnity.

The primary issue before the Court was that, whether, pending determination of the Court of Appeal proceedings, the Executors should on an interlocutory basis pursuant to their right of indemnity be so entitled to have legal costs met from the assessed asset of the Estate as and when they were incurred. The Court referred to a decision of Lightman J in *Alsop Wilkinson* which considered that a beneficiaries dispute against a trustee was to be regarded as litigation in which costs followed the event and do not come out of the trust estate. The Court held however that there are exceptions to this general rule and a trustee against whom misconduct is alleged will be entitled to have their costs paid.

The Court referred to the decision of the High Court in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australian and New Zealand [2008] HCA 42* where the High Court recognised that it was open to a trustee faced with an allegation of misconduct by a beneficiary to apply to court for judicial advice and in particular the finding of the High Court that a necessary consequence of s63 of the Trustee Act is that a trustee who is sued should take no step in defence of the suit without first obtaining advice about whether it is proper to defend the proceedings.

In this case there was no evidence that the Executors had sought judicial advice under s63 of the Trustee Act in respect of conducting a defence of the proceedings. There was furthermore no attempt by the executors before the primary judge to address the allegations of misconduct with the object of persuading the primary judge that there was strong prospect of the Bovairds claim being dismissed or otherwise an order being made recognise the executor's entitlement to use trust funds to pay legal costs incurred in defending the claim.

The Court considered these factors did not justify departing from the general position stated by Lightman J and dismissed the executors application that costs to be paid from the estate as and when they were incurred.

The case confirms that:

- A Trustee who has properly incurred costs as an incident of the office is entitled to a full indemnity in respect of those costs. Accordingly, in the ordinary course of events, a Trustee acting properly would be entitled to be fully reimbursed in respect of costs actually incurred by the Trustee.
- However a trustee against whom misconduct is alleged may be able to have resort to its Trust funds pending the determination of their claim in order to pay legal costs in defending the claim without fear of being found liable for breach of trust as a result of doing so.

For over 40 years, Gillis Delaney Lawyers has delivered legal solutions to businesses operating in Australia. We specialise in the provision of legal services in insurance law, workplace relations, employer liability, commercial law, finance, insolvency and construction law. Our clients include Government agencies, public and privately listed companies, insurers and underwriters, insurance broking groups and insurance brokers, underwriting agencies, third party claims administrators, insolvency practitioners and financial institutions. We deliver quality legal services with commercially focused advice. We will make it easier for you to face challenges and ensure you are 'fit for business'.

We listen

We listen to you and understand. We answer your questions and deliver a service that will meet all of your needs. We invest in lasting relationships and take the time to develop closer relationships focused on better legal outcomes through expert advice. Its simple - its about respect and taking the time to understand what you need.

We understand

Good or bad, you need to know where you are before you can determine where you need to be. We tell it like it is. We won't sugar coat the issues. We see the early warning signs and will warn you before it's too late. We will arm you with informed answers to tough questions and keep you on top of the facts that matter.

We are proactive

Prevention is better than a cure. We strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service.

Our service is personal

Our service is personal and 'hands on' and our mix of professionals ensures that you enjoy high level partner contact at all times. Our people are accessible and responsive and provide creative and innovative solutions cost effectively. We have 24/7 accessibility to lawyers.

We communicate effectively

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.