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.

Lifting the Fog in Pure Economic Loss Claims

A company whose managing director flew a helicopter into an overhead power line, after descending the aircraft beneath cloud level into restricted military airspace to avoid early morning fog, has escaped liability for more than $500,000 damage to the aircraft, after the helicopter owner unsuccessfully appealed from a District Court Judgment in which the primary judge found the allegations of negligence and breach of contract were not made out.

In AV8 *Air Charter Pty Limited v Sydney Helicopters Pty Limited* [2014] NSWCA 46, the Court of Appeal of NSW unanimously dismissed the appeal. The Court emphasised that, in determining whether there has been a breach of duty of care in claims for pure economic loss, the principles under Section 5B of the *Civil Liability Act 2002* (NSW) ("CLA") have the same application as personal injury claims. As such, it is important to accurately identify the relevant "risk of harm" since it will usually govern how the other considerations in Section 5B CLA are to be applied.

Pursuant to a bailment contract, Sydney Helicopters Pty Limited ("SHPL") managed and chartered an EC 120B helicopter that was owned by AV8. After conducting pre-flight checks, the managing director of SHPL (a licensed pilot) flew the helicopter with two passengers on board, leaving Scone at 8:00am, bound for Sydney.

Shortly before 8:45am, the weather conditions deteriorated causing the pilot to descend the helicopter below cloud level and into restricted military airspace near Singleton Army Base to avoid an increasing build-up of fog. A few minutes later, the helicopter struck a suspended overhead power line that was not indicated on the visual navigation chart that was available to the pilot within the cockpit.

Licence conditions required the pilot to avoid flying through cloud, to keep sight of the ground every 30 minutes and not fly by instrumentation alone.

The helicopter was forced to land. No serious injury was suffered by either the pilot or passengers. However, the accident caused substantial structural damage to the helicopter which cost $550,000 to repair.

AV8 claimed damages from SHPL in the District Court of NSW in respect of the following economic loss that was allegedly caused by the negligence of the pilot and breaches of contract by SHPL:

- *A diminution in value of the repaired helicopter and*
- *Loss of profits during the period the helicopter could not be used or hired while it was undergoing repairs.*

SHPL denied it was negligent and further denied the alleged breaches of contract. SHPL also raised a proportionate liability defence alleging that Energy Australia, the owner of the power line, was a concurrent wrongdoer whose negligence contributed to the damage. AV8 did not join EA as a defendant.

At first instance, Levy SC DCJ rejected AV8's allegations of negligence and breach of contract. His Honour also found that EA was negligent such that, had EA been sued, it would have been

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found liable for some part of the damage caused to the helicopter.

AV8 appealed, challenging His Honour's findings in respect of negligence and breach of contract. AV8 also sought to argue additional breaches of contract that were not raised at first instance. AV8 argued that negligence was established by reason of the pilot having breached two regulations under the Civil Aviation Regulation ("CAR") namely flying in restricted airspace and flying at an altitude that was too low.

In the leading judgment, Hoeben JA stated:

> *"If one were to be critical of his Honour it would be that he did not in terms define the relevant "risk of harm"… I would have assessed the "risk of harm" as the possibility of the helicopter coming in contact with an unmarked obstruction which was not recorded on any map and which was virtually invisible from the air. The foreseeable risk of that occurring would be low. Such an approach might well have ended the inquiry as to breach at that point… As it was, his Honour, at least implicitly, identified the risk of harm somewhat more widely, i.e. the possibility of the helicopter coming in contact with a structure, without the important qualification that such a structure was virtually invisible from the air. Such an approach was generous to the appellant but even on that basis, his Honour asked and answered the questions posed by s5B adversely to the appellant."*

His Honour highlighted that the CAR regulations were not sources of a duty of care in themselves, rather they were relied upon as particulars of alleged negligence. Further, the regulations had to be read in conjunction with an available defence under Section 30 of the *Civil Aviation Act* if the regulations were breached due to *"extreme weather conditions"* or *"other unavoidable causes"*.

Hoeben JA held that what the helicopter pilot did was the result of an unavoidable cause in order to ensure he flew the aircraft safely and in compliance with his licence conditions. Accordingly, he was not negligent.

His Honour also rejected the breach of contract argument and upheld the primary judge's finding that, had Energy Australia been sued, it would have been found liable for part of the damage. Hoeben JA assessed Energy Australia's liability to be 60% but noted it was an academic assessment in light of the appeal being dismissed. A similar incident had occurred in 1994 resulting in the power line being replaced but Energy Australia had failed to install appropriate marker balls, in breach of Australian Standards, to enhance their appearance.

This case is a timely reminder for insurers assessing pure economic loss or property damage claims caused by the negligence of a third party to accurately identify the risk of harm in order to establish negligence. The Court's decision provides consistency with personal injury claims in the application of the CLA provisions relating to negligence and breach of duty of care.

No Cap On Earnings In Compensation To Relatives Claims

In New South Wales section 12(2) of the *Civil Liability Act 2002* places a cap on economic loss that can be provided to an injured person. The legislation provides that in an award of damages relating to past economic loss due to loss of earnings or the impairment of earning capacity, or future economic loss or for loss of expectation of financial support, the Court is to disregard the amount, if any, by which a claimant's gross weekly earnings would but for the injury or death have exceeded an amount that is three times the average weekly earnings at the date of the award. This means that for high income earners the potential of damages that they can receive if injured in a claim is significantly reduced.

Occasionally the issue of whether this cap applies to other claims, such as loss of servitium claims (a claim by a company for loss of services of an employee) or claims pursuant to the *Compensation to Relatives Act 1897*, will be considered.

The High Court has recently determined this cap does not apply to claims pursuant to the *Compensation to Relatives Act 1897*.

In a claim pursuant to the *Compensation to Relatives Act 1897* dependents are entitled to claim loss of financial dependency, loss of domestic services and funeral expenses.

Craig Taylor was fatally injured when an awning outside a shop collapsed on him. His widow, Susan Taylor, brought a claim in her own capacity and also on behalf of Craig Taylor's dependants pursuant to the *Compensation to Relatives Act 1897*.

Craig Taylor worked as a land surveyor in private practice and it was accepted that if Mr Taylor had survived, his income would have been substantially in excess of three times the amount of average weekly earnings. The defendant argued that the cap should apply to the claim for loss of financial dependency brought by the widow and the dependants.

The question of whether Section 12(2) provided the same limitation on claims pursuant to *Compensation to Relatives Act 1897* as they do to an individual was a separate question to be determined before His Honour Justice Garling in the Supreme Court.

Justice Garling formed the view that the cap did apply and that decision was upheld by the NSW Court of Appeal.

Susan Taylor was granted leave to appeal to the High Court and by majority the High Court determined the cap did not apply when assessing a claim for loss of financial dependency. The High Court determined that on no view the word *"claimant"* as it is used in Section 12(2) of the *Civil Liability Act 2002*, could be read as referring to gross weekly earnings of the deceased. The High Court was of the view that the construction of a section in that way, which was adopted both by Garling J and the majority in the Court of Appeal could not be reconciled with the language of the statute.

The High Court therefore determined that the Court is not required to disregard the amount by which the deceased's gross earnings would exceed three times average weekly earnings.

At this stage the trial in relation to liability and quantum has yet to take place. No doubt it will be an expensive exercise for the defendants in light of the decision of the High Court.

Council Liable for Cycling Injuries

The Courts have often considered cases involving personal responsibility and whether or not an injured person is the cause of their own misfortune. What happens however where an accident involves a child? Would the result of the same facts be different if the same claim was brought by an adult? The answer is probably yes.

The Court of Appeal has recently found Holroyd City Council liable for personal injuries sustained by a child when he rode his bicycle down a grass slope into a concrete drainage channel *(Zaiter v Holroyd City Council).*

Joey Zaiter commenced proceedings by his tutor Michael Zaiter in the District Court at Sydney. The matter was heard in relation to liability only and His Honour Judge Kearns found in favour of Joey Zaiter. His Honour Judge Kearns found that the Council had been negligent as they had not erected a fence along the length of the channel. There was however a deduction for contributory negligence as Joey had not been wearing a helmet when the accident occurred.

At the time of the accident Joey had just turned nine years of age and on his birthday he received a bike and helmet. On the day of the accident Joey, his sister Linda, who was ten years and two months of age, and a friend of unknown age, rode their bikes to the Holroyd Sports Ground. Joey sustained a brain injury as a consequence of the accident and could not recall how the accident occurred.

The evidence before the trial judge was that the sports ground was approximately five hectares and roughly triangular in shape. The ground sloped roughly in a south east direction and sloped down towards a concrete channel. The slope is the steepest at the eastern end of the sports ground. Joey, Linda and their friend Naiden entered the ground on the cycle way. According to Linda, Joey's sister, she did not cycle down the slope as she thought it was dangerous and too steep. However, her brother rode down the slope on Naiden's bike and sustained significant injury when he cycled into the drainage channel.

On 4 October 2007, prior to the accident, the park committee had written a letter to the Council which referred to the fact that the concrete canal was a concern as there was no edge protection on the canal and it was a fall hazard.

No action was taken until 30 May 2008 when Sydney Water was requested to fence the channel. However, Sydney Water contended that they were not responsible for the channel.

The end result was that at the time of the accident there was no fencing in place.

The Court of Appeal stated:

> *"The appellant raised again the proposition that for foreseeability to be established, the respondent needed to show that a*

reasonable Council would have foreseen the actual chain of events commencing at the cycle way and finishing with the fall into the channel.

There are a number of flaws in those submissions. The first and most obvious is that this was not a case where a plaintiff had to identify factors which ought to have made the appellant aware of a risk of injury. The unusual feature in this case is that the appellant was fully aware of the risk of injury. The relevant risk of injury was that a child would fall into an unfenced, two meter deep, concrete channel. This awareness can be seen from the appellant's requirement that AGL construct a fence when channelising the creek, its receipt of a letter from the park committee, the description of the risk in its letter to Sydney Water in May 2008, its own risk assessment which was part of the 2004 management plan and its December 2008 finance and work document. The appellant was clearly aware of the foreseeable risk of injury and was taking steps, albeit somewhat slowly, to do something about it. Nowhere in that material is there an assertion by the appellant as to the unlikelihood of such an accident occurring. On the contrary, the thrust of those documents is an awareness on the part of the appellant of the existence of a real risk of injury to children unless something was done about fencing the channel.

Against that background, the evidence of Mr Kiernan was irrelevant. It mattered not what a reasonable Council might or might not have known. This Council did know of the risk and far from regarding the risk as unlikely to eventuate, it had formed the view that remedial action in the form of a fence should be undertaken."

The Council also sought to invoke the defence found in Section 5L of the Civil Liability Act 2002 which provides that a defendant is not liable for injuries sustained as the consequence of the materialisation of an obvious risk of a dangerous recreational activity. It was argued that riding a bicycle down a grass slope was objectively speaking, a dangerous recreational activity. Hoeben JA concluded that it was not.

Hoeben JA noted that:

"I am not persuaded that riding an unfamiliar bike down a grass slope is properly to be characterised effectively as a dangerous recreational activity. Similarly, as arose in discussion in the course of appeal, riding a bike down a grass slope without wearing a helmet is of itself not a dangerous recreational activity. One can envisage circumstances when riding a bike without wearing a helmet could constitute a dangerous recreational activity, particularly on a busy road or perhaps in a bicycle race. That was not the situation here. "

Hoeben JA also noted that the tender years of the bike rider needed to be taken into account when determining whether or not there was an obvious risk. The presence of the channel which caused the grief was not obvious and would not have been seen by the child until he was at least halfway down the slope and traversing the steep part. The risk which materialised was not a normal incident of the dangerous recreational activity. The risk which eventuated was not of a fall off the bike but falling a distance of two metres into an unfenced concrete channel.
This was not a case where there was a materialisation of an obvious risk of a dangerous recreational activity.

Interestingly the Court of Appeal referred a number of times to the risk of injury to children in particular. It would be interesting to know whether or not the result would have been different had the accident involved an adult. Clearly children do not have the same understanding of dangers as adults do which seems to have influenced the Court's determination. We speculate that if the claim was made by an adult the result would have been very different.

Builder, Manufacturer And Installer All Liable For Unsafe Stairs

The NSW Court of Appeal in *WB Jones Staircase & Handrail Pty Limited v Richardson & Ors*, has confirmed that when a staircase fails in a home built by a project home builder and a person falls injuring themselves consequent to a defect in the staircase, the project home builder, the staircase manufacturer and the staircase installer will all be in the gun in a claim brought by the person injured as a consequence of the defect in the staircase. Not surprisingly where the defect was caused by the acts or omissions of the installer, the installer will bear the lion's share of responsibility. However, the project home builder and the staircase manufacturer will retain an overarching responsibility to inspect the installer's work and cannot simply rely upon the installer to carry out the work appropriately.

In 1999 Mirvac Constructions Pty Limited built a project home for Peter Richardson. Mirvac contracted with a staircase manufacturer, WB Jones Staircase and Handrails Pty Limited ("WBJ") to manufacture and install a staircase including a balustrade on the first floor of the house. WBJ manufactured the balustrade and contracted with JMKG Pty Limited ("JMKG") to install it.

Mirvac designed the staircase and balustrade and WBJ manufactured the component parts of the balustrade.

Mirvac did not know that WBJ had contracted an installer. WBJ had the expertise to install the staircase themselves, however chose to engage JMKG to install the staircase.

Nails used by JMKG to install the balustrade were not of sufficient length or gauge, were installed using a nail gun rather than a hammer contrary to the Australian Standards, and some nails were driven into a gap, resulting in a reduced level of tension.

In 2006 an accident happened when the balustrade gave way and Richardson fell.

There was no defect in any of the component parts of the staircase or balustrade and no criticism of any part of the manufacture of the component parts.

Richardson sued Mirvac, WBJ and JMKG for damages for injuries sustained in the fall and was successful in his claims against each and recovered an award of damages in the sum of $750,000.00, being the jurisdictional limit of the District Court at the time.

The primary judge apportioned liability 40% to the installer and 30% to each of Mirvac and WBJ.

The primary judge noted that both Mirvac and WBJ had used independent contractors to carry out work and found that because Mirvac and WBJ had used independent contractors, each owed a duty to Mr Richardson to retain competent contractors.

The primary judge expressly excluded the proposition that either Mirvac or WBJ were vicariously liable for the negligence of an independent contractor such as JMKG, however the primary judge queried whether or not it was incumbent on Mirvac and WBJ to inspect the work done by JMKG to ensure it was competently executed.

The primary judge accepted that WBJ regarded JMKG as a competent installer and had assumed that Mirvac would do an inspection after the work was completed.

The primary judge noted that Mirvac was onsite practically all the time and ought to have inspected the site.

The primary judge apportioned liability 30% to Mirvac, 30% to WBJ and 40% to JMKG.

An appeal followed.

In the unanimous judgment of the Court of Appeal Hoeben JA confirmed that the installer retained the lion's share of liability and increased their share of liability to 50% and each of Mirvac and WBJ were found to be equally responsible for failing to inspect the work of the installer had and that was the primary reason why they each were liable for 25% of the claim.

In the appeal Mirvac argued that it should not have been required to inspect and check the adequacy of work performed by an experienced contractor such as WBJ. It had engaged a specialist contractor and it did not have specific knowledge concerning the installation of balustrades. It argued that it had an overall responsibility to coordinate the various trades rather than check the adequacy of the work performed by independent contractors.

Hoeben JA concluded that it was reasonable that the contractual obligations of Mirvac to Richardson to construct a house would inform the scope and duty of care.

Hoeben JA noted:

> *"I am satisfied that Mirvac as the builder were the representative onsite most days of the week (although not as it happened, on 24 February 1999) when the staircase was installed). Mirvac was not only coordinating the trades but seeking to ensure that it satisfied its contractual obligations, had as part of its duty of care an obligation to exercise reasonable care in inspecting the work carried out by contractors. This formed part of the content of its overall duty of care."*

Here it was concluded that Mirvac's duty included a duty to take reasonable care to detect and remedy defects. Mirvac was

not required to closely supervise or otherwise control the work of a specialist contractor but its duty encompassed the inspection and detection of defects which were there to be seen by an appropriately qualified builder.

Hoeben JA noted that it would have been obvious on inspection that nails had been inserted by a nail gun rather than by hand and Mirvac ought to have known about the applicable Australian Standard and problems with the staircase could have been simply fixed by hammering in more nails by hand.

Mirvac were liable for failing to inspect the staircase and detect the defects despite the fact that it had engaged an independent contractor to manufacture and install the stairs.

WBJ argued that it was not liable as it had engaged an independent contractor and its duty was limited to the construction of the balustrade, not its installation.

Hoeben JA concluded that the duty of care owed by WBJ could simply be stated as:

> "*To take reasonable care to avoid foreseeable risks of harm arising from the manufacture and installation of the balustrade".*

Hoeben JA noted it was reasonably foreseeable that if the installation of the balustrade was not properly carried out, serious injury could result. The question was therefore whether it was a sufficient discharge of the obligations of the manufacturer to retain another expert installer or whether something in addition was required. In this case Hoeben JA noted that something more was clearly required and that something more was the inspection of the work and this requirement formed part of the content of the duty of care.

Hoeben JA noted that WBJ did not know and ought to have known that it was a dangerous practice to use nail guns when affixing fasteners to structural wooden joints. WBJ could not rely on its own ignorance, as an excuse. WBJ could not delegate its responsibilities to inspect the staircase to Mirvac.

The Court of Appeal determined that the apportionment of the primary judge was not appropriate and adjusted the primary judge's apportionment. It was not correct that the responsibility of the installer was only slightly greater than either Mirvac or WBJ.

Hoeben JA noted:

> "*The causal potency and relative culpability of Mirvac and WBJ was very much the same. Both had a supervisory role in relation to the work carried out by JMKG. They failed in that role. Mirvac's opportunity to intervene was greater than that of WBJ in the sense that it was in control of the whole of the site and had a number of opportunities to intervene.*
>
> *On the other hand, WBJ had particular expertise in the installation of balustrades and was in an ideal position, had it acted appropriately, to intervene on the day that the balustrade was installed. It should also have been aware over a substantial period of time that the use of nail guns by JMKG when installing the balustrades was unsafe."*

The culpability of JMKG and its contribution to the accident was substantially greater than that of the other two. It held itself out as an expert. It installed the balustrade. Not only did it use a nail gun but it allowed nails to be driven into a gap and the nails which it used were not of sufficient strength or sufficient gauge.

The Court of Appeal apportioned liability 50% to JMKG and 25% to each of Mirvac and WBJ.

As can be seen, a builder will not escape liability by simply delegating responsibility for work to independent contractors. Builders need to be aware that they owe an overarching duty to inspect the work of others. The use of an independent specialist contractor by a builder does not remove the builder's responsibility to inspect the works which have been carried out and identify any defects in the work.

Similarly staircase manufacturers need to be mindful of the fact that when they engage independent contractors to install a staircase they will not escape responsibility where they have engaged a contractor to install the new staircase as they will retain an overarching responsibility to inspect the work of their installer.

Employment Roundup

National Survey On Workplace Discrimination During Pregnancy

Workplace laws recognise the importance of individuals working within an environment free from discrimination. As an example, section 351 of the *Fair Work Act 2009* provides that an employer must not take adverse action against a person who is an employee, or prospective employee because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. This section makes reference to the *New South Wales Anti-Discrimination Act 1997* (as well as to the other State and Territory counterparts) which prohibits discrimination or less favourable treatment of persons on grounds including but not limited to sex, pregnancy, marital or domestic status and by reason of a person's responsibilities as a carer.

An adverse action can be taken by an employer in a variety of ways. Section 342 of the *Fair Work Act 2009* provides that adverse action includes instances where the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's detriment or discriminates between the employee and other employees of the employer.

Recently, the Australian Human Rights Commission contracted Roy Morgan Research to conduct a national survey to measure the prevalence of discrimination in the workplace related to pregnancy, parental leave and return to work following parental leave.

The data arises from the survey respondents' perceptions of the ways in which they were treated as a result of their pregnancy, when requesting or taking parental leave or returning to work following a period of parental leave. The respondents included:

- 2,000 mothers;
- 1,000 fathers and partners

It was reported that:

- A quarter (27%) of mothers reported experiencing discrimination in the workplace during pregnancy;
- Almost a third (32%) of mothers reported experiencing discrimination in the workplace when they requested parental leave;
- More than a third (35%) reported experiencing discrimination when returning to work after a period of parental leave (34% related to family responsibilities and 8% related to breast-feeding or expressing milk).

Consequently one in two (49%) of mothers reported experiencing discrimination in the workplace at some point during pregnancy, parental leave or on return to work.

The review found that discrimination takes many different forms. In so far as the types of discrimination that was experienced, startlingly:

- More than a third (37%) reported that they had been threatened with redundancy or dismissal, made redundant, were dismissed or did not have their contract renewed;
- Half (49%) reported discrimination related to pay, conditions and duties (including but not limited to change of hours against their wishes, being made a casual employee, not receiving a pay rise or bonus or being subjected to a permanent change of position)
- 48% reported discrimination related to their health and safety (including being denied breaks, not being provided with a suitable uniform or having their health and safety jeopardised by a failure to accommodate their pregnancy);
- 46% reported discrimination related to their performance assessment or career advancement opportunities; and
- 40% reported negative comments and/or attitudes from their manager/employer or colleagues.

As a result of the discrimination, a significant majority reported a negative impact as a result of the discrimination, primarily to their mental health (72%), financial status (42%), career and job opportunities (41%), family (39%) and physical health (22%).

The review found that nearly a third of women who experienced discrimination looked for another job or resigned. The majority of women who experienced discrimination did not make a formal complaint about it.

In contrast, over a quarter (27%) of the father and partner respondents reported experiencing discrimination during parental

leave or when they returned to work notwithstanding taking very short periods of parental leave. The forms of discrimination largely resembled that experienced by mothers but with different apportionments. The types of discrimination experienced by fathers and partners include as follows:

- Negative attitudes were experienced by 49% of respondents;
- A detrimental effect to pay, conditions and duties were experienced by 46% of respondents;
- 35% of respondents were discriminated against when seeking flexible working arrangements;
- 29% of respondents experienced discrimination in relation to performance assessments and career advancement opportunities
- 29% of respondents experienced discrimination concerning leave; and
- 18% were threatened with redundancy, job loss or dismissal.

The Sex Discrimination Commissioner, Elizabeth Broderick said that *"the major conclusion that we can draw from this data, is that discrimination has a cost – to women, their families, to business and the Australian economy and society as a whole."*

The effects of discrimination do not only affect the aggrieved individual (and potentially their family) but also the business of the employer. It can often lead to decreased employee productivity, disgruntled employees causing friction with management, negative financial consequences for the business by reason of recruiting replacements and associated costs in training and administrative arrangements as well as reputational effects.

To avoid the prospect of facing an anti-discrimination application, general protections claim or similar, employers and employees should familiarise themselves with the legislation, regulations and protocols that ought be observed to avoid any forms of discrimination being exhibited to in the workplace related to pregnancy, parental leave and return to work following parental leave.

Claw-Back Of Unapproved Termination Payments

A former managing director of a large publicly listed company has been required to pay back benefits paid to him on termination of his employment.

Queensland Mining Corporation Limited (QMCL) was originally incorporated as a private company by Mr Howard Victor Renshaw, with the intention of acquiring copper and gold mining leases in Queensland. It subsequently became a listed public company, and is quoted on the Australian Securities Exchange.

Renshaw was managing director of QMCL from 8 July 2004 to 23 October 2012. He was the only executive director of the company over that period. His duties were principally capital raising, company promotion, management of exploration, tenements and mining leases, acquisitions, drilling operations and corporate matters.

In November 2011, Renshaw and QMCL entered into a Services Agreement pursuant to which Renshaw was engaged as Managing Director of QMCL, and a company controlled by Renshaw agreed to provide certain services to QMCL. The Services Agreement was for a term of three years ending on 30 November 2014 and did not contain any provision for its early termination.

Following a significant change in shareholders, Renshaw resigned as Managing Director on 23 October 2012 in accordance with an agreement executed that day by the parties (Settlement Deed).

The Settlement Deed provided for substantial payments (to Renshaw and associated interests) in connection with the termination of Renshaw's employment. These were paid by QMCL by four separate cheques on 23 October 2012. Subsequently, QMCL sought in Federal Court proceedings ([2014] FCA 365) to recover these termination payments on the basis they were made in contravention of s 200B(1) of the *Corporations Act 2001* (Cth) (the Act).

The Act sets up a scheme, in broad terms, which requires all payments or other things given in connection with retirement of senior executives to be subjected to shareholder approval save where the Act or regulations creates an exemption. The seriousness with which the Parliament views such breaches is apparent from the fact that a breach of s 200B(1) constitutes an offence of strict liability: s 200B(1A) of the Act.

Section 200B(1) of the Act provides that:

(1) An entity must not give a person a benefit in connection with a person's (the retiree's) retirement from an office, or position of employment, in a company or a related body corporate if:
(a) the office or position is a managerial or executive office; or
(b) the retiree has, at any time during the last 3 years before his or her retirement, held a managerial or executive office in the company or a related body corporate;
unless there is [shareholder] approval under section 200E for the giving of the benefit.

The term "benefit" and the circumstances in which "a benefit is given in connection with a person's retirement" are broadly defined in the Act. The *Corporations Regulations 2001* (Cth) also specify that certain things are, and are not, benefits pursuant to the Act. Those things which the Corporations Regulations defines as not constituting a benefit include, relevantly:

- a genuine superannuation contribution paid by an employer or employee;
- a payment for leave of absence to which a person is entitled under an industrial instrument;
- a benefit given under an order of a court; or
- a genuine payment by way of damages for breach of contract or for past services where the value of the benefit is less than the person's average annual base salary.

Where a contravention of s 200B(1) occurs, the benefit is held on trust by the recipient (who may not be the retiree) by force of s 200J(1) and must be immediately repaid.

QMCL contended that each of the termination payments were made in contravention of s 200B, being "benefits" for the purpose of that provision, and that they must therefore be repaid to QMCL by the Renshaw parties under s 200J.

The Renshaw parties argued, essentially, that:

(a) none of the amounts paid under the Settlement Deed constituted a "benefit" for the purposes of the Act because they represented the amounts that QMCL was liable to pay under the Services Agreement;
(b) some payments under the Settlement Deed represented payments of withholding tax or GST, and a genuine superannuation contribution excluded from the definition of a *"benefit"* by regulations;
(c) no shareholder approval was required because the amounts paid under the Settlement Deed constituted genuine payments by way of damages for breach of contract and did not exceed the amount worked out under s 200F(4); and
(d) QMCL was prevented from recovering the Termination Payments by reason of its representation in the Settlement Deed that:
(i) it would obtain such approval;
(ii) it released the Renshaw parties from "any and all actions, causes of action, claims and demands".

None of the arguments for the Renshaw parties was successful.

As to ground (a), the Federal Court held that the termination payments were clearly each "a payment" and therefore fall within the definition of a "benefit" in s 200AB(1)(a). That is all that is required by the statutory definition of the term. It was not accurate to say that the payments in fact represented amounts due under pre-existing obligations in the Services Agreement. To the contrary, the termination payments were paid in advance of the time that they would have been paid had the Services Agreement remained on foot for its full term and were paid on different terms and conditions.

As to ground (b), the evidence went no higher than to establish that moneys had been paid which Renshaw intended be paid into his self-managed superannuation fund. In any event, the regulations do not exempt compensation for the loss of future superannuation entitlements. Likewise, no exception is made in the Act or the Regulations for payments which are intended to be applied in the discharge of tax liabilities.

As to ground (c), the Court found that the conduct of QMCL did not reasonably convey a clear intention to repudiate or disavow the Services Agreement. Rather, the conduct of both parties was consistent with them being mutually desirous of reaching agreement for Renshaw to resign as managing director on terms and conditions which would see his entitlements under the Services Agreement fully paid out. It followed that there was no breach of the Services Agreement, and the exemption could not apply.

As to ground (d), it was held that parties cannot avoid the operation of the legislative provisions by agreeing that termination benefits given in contravention of the Act will not be the subject of a claim for their recovery. The Court stressed that ultimately

the purpose of the Act is that excessive benefits should not be given to retiring executives without shareholder approval. If the parties, therefore, could pay the benefits on condition that the giver released the recipient from any claim or demand for them under s 200J, it would mean that unauthorised payments could in fact be made and the prohibition in s 200B circumvented.

The result, unfortunately for Renshaw, is a telling example of the complexities that can arise in termination of employment – even if that comes about by agreement.

Workers Compensation Roundup

Estoppel in Deterioration Claims

The High Court is currently deliberating the appeal in *Adco Constructions v Goudappel*. The appeal was heard on 1 April 2014 and a decision is expected by June 2014. It is widely speculated that the High Court will follow the Court of Appeal's decision in allowing claims for permanent impairment, provided any type of claim for compensation was made before 19 June 2012. If the speculation is correct, we predict there will be a rise in the number of claims lodged seeking additional permanent impairment compensation due to deterioration in the worker's condition.

Despite the likely increase in claims, the recent arbitral decision of *Michael Caulfield v Whelan Kartaway Pty Limited* [2014] NSWWCC 50 ("Caulfield") is a reminder that the onus still rests with the worker to prove that there has in fact been a deterioration that has resulted in additional impairment. Mere medical opinion simply assessing additional impairment will not be sufficient to satisfy the onus of proof on the balance of probabilities.

In the matter of Caulfield, Arbitrator Wynyard was called upon to determine a claimed estoppel by the employer. The employer argued that the claim for additional impairment was based on an assessment of Dr Guirgis which was identical to the assessment of impairment that had been made by another doctor in an earlier report. The earlier report had already been taken into account when the worker had initially been assessed by an Approved Medical Specialist (AMS). The employer asserted that, in those circumstances, there was no deterioration in the condition of the worker's right knee. Furthermore, the employer relied upon the provisions of Section 66(1A) of the Workers Compensation Act 1987 to dispute the worker's entitlement to further lump sum compensation in circumstances where the worker had already been compensated for 8% whole person impairment (WPI) following the earlier assessment of the AMS. In the previous proceedings the worker had relied upon the report of Dr Ghabriel who assessed 15% WPI. In the fresh proceedings before the Commission the worker sought an award of an additional 9% WPI.

The worker underwent further surgery to his right knee and a further report from Dr Guirgis assessing 17% whole person impairment was served with the new claim for additional compensation pursuant to Section 66. The employer asserted that it was necessary for the worker to establish there had been a deterioration in the condition of his right knee before the matter could be referred to an AMS.

The Arbitrator Wynyard commented that whilst Dr Guirgis opined that the injury initiated the onset of post traumatic osteoarthritis and the worker would eventually require a total knee replacement, the doctor did not provide an opinion as to whether there had been deterioration since his earlier examination of the worker.

Referring to the decision of Deputy President Roche in *Abou-Haidar v Consolidated Wire Pty Limited [2010] NSWWCC PD128*, the Arbitrator observed that in deterioration claims if the assessment is the same as in a previous award or order of the Commission, there will be no basis for referral to an AMS. The arbitrator observed that in his most recent report, Dr Guirgis had erroneously assessed a total of 17% WPI whereas the actual total was 15% WPI.

Arbitrator Wynyard noted that no statement had been filed on the worker's behalf. The Arbitrator commented that evidence from the worker himself may well have satisfied the onus of proof in establishing a prima facie case of deterioration.

Arbitrator Wynyard observed that it would be absurd if all that was required to have a worker assessed by an AMS for additional impairment was for the same report of the specialist to be resubmitted. Similarly, as in this particular matter, a further report containing the same opinion would be equally absurd. If this was to be allowed there would be no end to litigation. To refer a further application for WPI without prima facie evidence of an increase in WPI had the potential to cause unnecessary confusion for the AMS to whom the matter would be referred.

The Arbitrator also considered the determination of Acting President Deputy Moore *in E v Sydney South West Area Health*

Service (Concord Hospital) [2009] NSWWCC PD 108, which was concerned with an alleged deterioration of the worker's sexual function as a result of a back injury. In that matter, the Deputy President stated that the onus of establishing whether or not there has been deterioration lay with the worker. If there was plausible evidence of deterioration, the worker is entitled to be assessed by an AMS. As the medico-legal expert had certified an increase from 20% to 40% permanent loss of efficient use of the sexual organs, Acting Deputy President Moore found that the onus had been satisfied.

Arbitrator Wynyard also considered the decision of Deputy President Roche in *Gane v Dubbo City Council* [2007] NSWWCC PD140. In that matter an application for further impairment followed a settlement between the parties by way of a Section 66A agreement. Without expressing a concluded view, Deputy President Roche thought it was arguable an estoppel could arise following the Section 66A agreement. An arbitrator's refusal to refer the matter to an AMS would be in error if the arbitrator firstly did not deal with the estoppel issue.

Overall, Arbitrator Wynyard preferred the view expressed in *E v Sydney South West Area Health Service* that prima facie proof of an actual change in circumstances needed to be proved otherwise the estoppel created by the original award or judgment would apply. If a prima facie case is not made out in the subsequent application then the employer is entitled to rely upon the continuation of the estoppels. Arbitrator Wynyard determined there was no evidence before him that on the balance of probabilities there had been deterioration in the worker's condition. Just because there had been further surgery did not automatically provide evidence of deterioration. Indeed, the purpose of surgery was to improve a worker's condition.

It is also worthwhile mentioning the appeal decision in *Campbelltown Tennis Club Limited v Lee [2013] NSWWCC PD50* ("Lee"). In Lee, President Keating commented that in order for the Commission to award a further lump sum compensation, one of the three circumstances set out in Section 66A (3) must be demonstrated. If a worker entered into a Complying Agreement pursuant to Section 66A, then this was a final and binding agreement as to permanent impairment compensation. Once an agreement had been entered into, a worker must demonstrate an increase in the degree of permanent impairment beyond that agreed previously. If there was no evidence to demonstrate an increase, there can be no referral to an AMS.

Whilst each claim for deterioration leading to additional permanent impairment turns on the individual facts, it would appear that both qualified medical evidence and evidence from the worker evidencing deterioration is required before the claim can proceed to an AMS. The manner of resolution of the initial claim and the evidence supporting the subsequent claim must all be carefully examined to determine whether in fact there is prima facie evidence of deterioration in a worker's condition since an earlier award or agreement was entered into.

The Journey Decisions Continue

In our last issue of GD News we reviewed the decision of *Diwan Singh & Kim Singh t/as Krambach Service Station v Wickenden*. In *Wickenden,* Deputy President Roche determined that compensation was payable under the new journey provisions contained within Section 10(3A) in the *Workers Compensation Act 1987* for a motor cycle accident on the way home from work. The critical factual element in that decision was the requirement by the employer for the worker to stay at work for additional hours, thereby resulting in the journey home being undertaken in the dark which exposed the worker to a danger that contributed to the accident.

Deputy President Roche has now delivered a further decision in *Field v Department of Education and Communities* (2014) NSWWCC PD16. The worker, Denis Field ("Mr Field") had worked for the Department of Education and Communities (the "Employer") as a casual relief/primary school teacher since about 2000. On 23 October 2012 he suffered an injury when he tripped and fell on broken and uneven ground whilst walking hurriedly to the Hampton Park Public School.

Mr Field provided evidence that when he was required to fill a vacancy at a school, his employer, through an agency, would telephone him, usually between 6.30 am and 7.00 am. He would be informed of the name and location of the school where he was needed. On 23 October 2012 the agency telephoned Mr Field at 7.30 am and asked him to attend at the Hampton Park Public School.

Mr Field provided unchallenged evidence that he considered that the school was "strict" and staff were required to be present at the school at 8.30 am in order to be given lessons for the day, shown to the classrooms or given 8.30 am playground duty.

Mr Field hurriedly got ready for work. He was dropped off by bus at around 8.25 am. After alighting from the bus he noted he only had a few minutes to get to the school. He walked in a hurried fashion and tripped on an uneven surface. He fell at a point approximately 100 metres from the school's back entrance. Mr Field claimed that if he had been called between the

usual time of between 6.30 am and 7.00 am he would not have had to rush to arrive at the school by 8.30 am. He claimed the rush to get to school caused his injury.

The arbitrator initially found in favour of the employer on the basis that Mr Field had to prove that his employment *"caused"* the injury. Deputy President Roche commented that whilst Section 10(3A) may, but does not necessarily require a causal connection between the employment and the accident, he accepted Mr Field's submission that the word "*connection"* in Section 10(3A) involved a wider concept in causation.

Deputy President Roche commented that Mr Field's evidence was compelling. He was required to be present at the school at 8.30 am. The only logical conclusion was the requirement for Mr Field to hurry due to the late notice he received from the agency to attend at school on the day of the accident and because he had to be at school by 8.30 am to be given lessons for the day, shown to the classroom or given playground duty. Deputy President Roche accepted the unchallenged evidence that Mr Field tripped and fell because he was hurrying. Mr Field was looking straight ahead and did not notice a crack in the footpath which caused him to trip. This was sufficient to establish a *"real and substantial connection"* between Mr Field's employment and the accident.

This decision represents the second decision in favour of a worker under the new journey provisions. It is clear the Commission is adopting an approach that if a set of circumstances played a role in the accident (albeit not the sole cause of the incident or accident), the connection between employment and the accident will be real and of substance. Employment does not need to be the cause of the accident but there must be a connection between the accident and employment is real and of substance.

CTP Roundup

Look Out! Greater Onus On Drivers Than Pedestrians And Presumptions In Favour Of Injured Parties For Future Care Needs

Regent Street in Chippendale comprises five traffic lanes with no marked safety refuge in the centre. Kim Troung attempted to cross the street without using a pedestrian crossing and sustained injury.

The insured vehicle, driven by Jarryd Gordon, approached Troung as he attempted to cross. On seeing Gordon's vehicle, Troung moved forward and then back and as he did this he was struck by Mr Gordon's vehicle.

Mr Gordon conceded liability for the accident. The significant issues in dispute were contributory negligence and the claim for commercial assistance.

Phegan ADCJ found that there was no contributory negligence.

Additionally, his Honour declined to award any amount for future domestic assistance.

Court of Appeal

Gordon appealed the finding of no contributory negligence and Troung cross-appealed in respect of the finding of no damages for future commercial assistance. The decision was published in *Gordon v Truong; Truong v Gordon [2014] NSWCA 97 on 4 April 2014*.

The Court of Appeal referred to Section 138 of the Motor Accidents Compensation Act 1999 and Section 5R of the Civil Liability Act 2002 when formulating the correct process for assessment of contributory negligence. The Court observed that a defence of contributory negligence requires apportionment of liability based upon the relative responsibility of each party involved in the accident.

The Court of Appeal held that both Troung and Gordon ought to have seen each other in ample time to take evasive action and there was contributory negligence on the part of Troung.

It was argued that the negligence of Troung was greater because it was easier for him to see a large van approaching than for the driver of the van to see a pedestrian against the background of parked cars, however ultimately the Court of Appeal did not accept this proposition.

The process of apportioning liability looked to the possible responses available to each of the parties. The Court of Appeal concluded that the culpability of the driver was greater because if he had seen the pedestrian in a reasonable time, he could have either slowed down or changed lanes so as to leave ample room to avoid the pedestrian. The option open to a pedestrian are more limited in these circumstances.

Balancing all of these factors, the majority of the Court of Appeal assessed contributory negligence of Troung at 35%.

Future Domestic Assistance

The Court of Appeal laid out the relevant formula, in which an award of future commercial assistance requires the plaintiff to establish that the accident created a need due to a disability caused by injuries sustained in the accident. The onus was on the plaintiff to establish that he would require the assistance alleged and the requirement was accident related.

The future possibility involves a finding in accordance with the principle in *Mallick v J C Hutton Pty Ltd [1990] HCA20* which held "the court assesses the degree of probability that an event … might occur, and adjust its award of damages to reflect the degree of probability".

Where domestic assistance was provided gratuitously and there is an absence of evidence the gratuitous assistance would cease either immediately or sometime in the future, it would be inconsistent with *Miller v Galderisi [2009] NSW CA 353* to make an award for commercial domestic assistance.

The Court in Miller held that there were four relevant variables:

- the condition of the respondent as of the date of the trial;
- whether any proportion of his disabilities resulted from a pre-existing condition unrelated to the accident;
- the age of the injured party and whether there was likely degeneration would create a similar need for domestic assistance in any event; and
- the ability and willingness of family members to provide assistance.

The Court of Appeal in Miller held that it was not appropriate to simply pluck a figure out of the air because there was a remote, although not entirely fanciful chance, of the need for commercial domestic assistance in the future.

In respect of the Cross Appeal in the present case, Troung was successful in convincing two of the Court Of Appeal judges that inferences should have been drawn that his children would cease provision of gratuitous services and Troung's wife would return to work and similarly cease gratuitous services.

The Court of Appeal found that Troung would most likely need commercial domestic assistance in the future. It was held that the domestic assistance would be 3 hours per week for the next 30 years at $35 per hour which equated to a sum of $86,310. This was on the basis that the primary judge estimated that the plaintiff required domestic assistance between two to four hours per week.

Ramifications

This case revisits well known principles and does not involve new or novel approaches to regularly encountered issues.

It highlights the positive duty on a pedestrian to minimise or eliminate the risk of harm they will always face. It reiterates the role of the Court to consider contributory negligence via the balance of the relative culpability of each party.

On the issue of future commercial assistance, this case reiterates the need for a plaintiff to demonstrate that gratuitous assistance will cease before an award for commercial assistance will follow.

CARS Strikes Back – The Return Of The Jurisdiction: Amendments To Cars Claims Assessment Guidelines And Claims Handling Guidelines

Recent judgments (discussed in previous GD Newsletters) resulted in constriction of the CARS jurisdiction. The *Smalley, Anderson* and *Harrison* matters cumulatively resulted in circumstances where more claims can be exempt from CARS, insurers were permitted to reject CARS decisions more frequently, and the opportunities for insurers to contest liability via

procedural defects were increased in scope.

Smalley concluded that the Claims Handling Guidelines, in place since October 2008, are ultra vires to the extent that they stipulate that a breach of duty of care constitutes an admission of liability and binds the insurer to procedural steps as a consequence.

The interpretation of Section 95 of the *Motor Accidents Compensation Act 1999* by *Lee v Yang* permits insurers to reject a CARS Assessor's assessment of damages if liability is in issue and Smalley expanded circumstances where liability is contested.

The March 2014 CARS Bulletin stipulated that changes to the Claims Handling Guidelines and Claims Assessment Guidelines are intended to address these issues and to *"provide greater certainty for insurers as to when to admit or deny liability for a claim"* and *"reduce the potential increase in the number of claims automatically exempted from CARS assessment."*

The amendments take effect from 1 May 2014.

We look firstly to the amendments to the Claims Assessment Guidelines.

A significant change concerns circumstances generating mandatory exemption from CARS.

Clause 8.11.1 previously required exemption where *"fault"* was denied in a Section 81 Notice. Amendments to that clause permit exemption where *"liability is expressly denied … but only in circumstances where liability is denied because the fault of the owner or driver … is denied".* A notation to this paragraph indicates that denial of liability in circumstances where fault is admitted will not satisfy this exemption requirement. This amendment addresses circumstances where denial on the basis of procedural defects, as opposed to denial of fault in the use or operation of a vehicle, permitted exemption.

Clause 8.11.2 is removed from the amended Guidelines. This clause required exemption when there was an allegation of greater than 25% contributory negligence. The new guidelines no longer permit exemption on contributory negligence grounds.

Clause 14.6.7 previously stated that a consideration relevant to a discretionary exemption included whether a claim involves *"complex issues of causation"* and instanced scenarios such as sequential accidents, pre existing conditions and complicated medical presentations. The amended clause simply refers to a consideration of whether a claim involves *"issues of liability including issues of contributory negligence, fault and/or causation".* Contributory negligence of higher percentages therefore moves from mandatory to discretionary exemption criteria.

Clause 14.6.8 previously permitted a discretionary exemption to consider whether an insurer was deemed to have denied liability via Section 81(3). That clause is now omitted. A deemed denial is no longer a consideration towards discretionary exemption.

We turn to the Claims Handling Guidelines.

Amendments will oblige an insurer, in circumstances where liability is not wholly admitted, to issue a Section 81 Notice that permits the claimant to understand the insurer's reasons for its denial or contributory negligence allegation. A contributory negligence allegation must be quantified. The Section 81 Notice must cite reasons for the denial or contributory negligence allegation. The Notice must identify the evidence that supports those reasons.

An insurer that fails to issue a Section 81 Notice within three months must inform a claimant whether it denies or admits liability within seven days of identifying its failure to issue the Notice.

There is no guidance concerning the detail required in an insurer's reasons and description of evidence. In our view, these obligations ought to extend no further than those applying to Court pleadings – allowing the claimant to know precisely the case that he / she must prove and the evidence that he / she must refute.

We now explore considerations concerning the likely efficacy of the amendments in achieving their stated goals and their broader ramifications for insurers and claimants.

The new Section 81 Notice requirements onerously demand compliance within three months of receipt of the claim. An insurer is expected to particularise its reasons and identify the evidence that it will rely upon by that time to support its decision to deny liability or allege contributory negligence. Investigations, witness enquiries and expert opinions may not be at hand within that timeframe. Interested parties have offered submissions concerning deferrals of Section 81 requirements however the Authority's response to those suggestions is not clear.

The changes to Section 81 Notices enliven concerns regarding privilege. Where insurers are continuing to prepare a case and possess evidence that is not ready for disclosure, they should endeavour to rely initially on publically accessible material. The Guidelines do not preclude introduction of further material subsequently obtained after the issue of a Section 81 Notice. If an insurer is compelled to disclose material that might otherwise attract privilege, its Notice should advise that that the disclosure follows compulsion and does not signify waiver of privilege.

Self-evidently, the more information a party possesses, the better it can prepare. We foresee circumstances where claimant's representatives will seek further particulars concerning the content of a Section 81 Notice and those requests are likely, on occasion, to adopt the demeanour of interrogatories. There will be vigorous debate concerning the details that the new guidelines require.

The concept of *"fault*" is at the centre of the new mandatory exemption criteria. A mandatory exemption follows where liability is denied because fault is denied. Fault is not defined in the Guidelines. The MAC Act defines fault as *"negligence or any other tort"*. However CARS has previously concluded that fault, as applied in the Guidelines, does not incorporate all elements of negligence. We query whether CARS' approach is sustainable. A circular argument appears to arise. CARS suggests that admission of breach of duty of care is sufficient to admit fault and therefore liability. However this is not consistent with the definition of fault in the Act. It remains the case that denial of causation of all injuries claimed is the same as a denial of *"negligence or any other tort"* and therefore denial of liability. Circumstances can therefore continue where an insurer can admit breach of duty of care and deny causation, and therefore liability and seek an exemption.

The retention of contributory negligence allegations within the CARS jurisdiction will create challenges that must be addressed by parties and Assessors. Issues that will confront CARS assessment processes attempting to resolve liability arguments will include:

- the absence of a transcript;
- the absence of Notices to Admit mechanisms;
- inability to compel witnesses to provide evidence;
- the fact that evidence that is obtained from witnesses is not provided under oath;
- expert reports can be served while the experts might not give oral evidence and be cross examined;
- the quicker and informal CARS processes might not be amenable to addressing complex issues raised by competing experts and witness accounts;
- CARS has no power to award costs against claimants and so liability arguments will be not foreshortened by the prospect of adverse costs awards.

In circumstances where a party exercises its right not to accept a CARS liability decision and the matter proceeds to litigation, Section 111 will require the matter to be remitted to CARS if new evidence emerges during the litigation. The differences in procedures and a decision maker's powers at Court versus at CARS must create apprehensions that additional evidence will emerge at Court and so multiple CARS proceedings are likely in vigorously contested liability circumstances.

There are of course potential positives. The cost regulations at CARS might operate as a brake that curtails debate and facilitates earlier resolution. The CARS process will be quicker than litigation. An insurer can bring liability issues to a head if it wishes because, unlike a Statement of Claim, an insurer can file a CARS Application for assessment.

A key objective of the changes is to ensure that where liability is denied by an insurer because of procedural defects, the claim will not receive a mandatory exemption. However, it remains the case that Section 95 will permit an insurer who denies liability to reject the outcome of a CARS Assessment and subsequently require the claim to be litigated.

It should be noted that where matters proceed to Court after CARS, the UCPR Offers of Compromise regime will not apply but, rather, cost provisions will continue in accordance with the Motor Accident Regulations (*San v Rumble No 2*). If a CARS liability finding is rejected pursuant to Section 95, the matter will proceed to Court. However the claimant's costs will remain bound by the Regulations, which are more onerous than the costs expectations that usually apply in a litigated scenario. The

fact that Section 95 does not differentiate between liability and breach of duty of care will mean that costs strictures could affect claimants when the denial of liability arises from causation or procedural factors.

As a consequence of these changes there will be fewer exemptions and more matters will be heard at CARS. However, as a corollary, there will be an increase in the number of CARS decisions that are not binding on parties who use their rights to refuse to accept a liability finding. It is likely that court proceedings dealing with significant contributory negligence issues will frequently identity evidence requiring remission to CARS. We will see more multi-CARS assessments as a result.

We suspect the amendments presume that the imposition of a quicker and less formal procedure will activate the parties' pragmatism more readily, resulting in earlier settlements so the challenges described above are rarely visited and are ultimately worthwhile. No doubt this approach emerged from the recent MAA review that identified high informal settlement rates. Only time will tell whether these goals will be achieved.

Cow Caught In the Headlights – No Late Blameless Accident Amendment Allowed

The Court of Appeal in the matter of *Mamo v Surace [2014] NSWCA 58* has highlighted the need for plaintiff lawyers to consider including in their initial pleadings a allegation the accident was a blameless accident as late amendments after the trial or on appeal will not ordinarily be allowed.

On the evening of 30 March 2008 the defendant was driving with the plaintiff as passenger when a cow suddenly ran into the vehicle's path causing a collision.

Just prior to the collision the defendant had momentarily looked at the CD player. However, he alleges that he re-directed his attention to the road when the cow suddenly ran into the vehicle's path leaving him no time to take evasive action.

The plaintiff had his head bent down lighting a cigarette when the collision occurred. The plaintiff alleged that the collision occurred as a result of the defendant failing to use the high beam lights in circumstances where the risk of striking something on the road was foreseeable and the fact that the defendant was looking at the CD player instead of watching the road.

The plaintiff did not plead that the accident was a blameless motor accident.

The respondent denied liability and pleaded contributory negligence.

The primary judge dissected the defendant's duty to take reasonable care in the context of the defendant driving in a semi-rural area close to the plaintiff's home. His Honour noted that there was no evidence the defendant knew or ought to have known that animals were likely to stray onto the road. His Honour further noted that as there was no indication of any danger on the roadway the defendant did not fail to keep a proper lookout by looking at the CD player.

In response to the plaintiff's evidence that the defendant ought to have used his high beam headlights His Honour concluded that the surrounding circumstances did not require the use of high beam headlights. Essentially, the cow appeared unexpectedly leaving the defendant no time to avoid the collision. The trial judge determined the plaintiff had failed to establish the defendant breached his duty of care within the meaning of Sections 5B and 5C of the Civil Liability Act 2002.

On appeal the plaintiff sought leave to argue that if the defendant did not breach his duty of care, the claim fell within the blameless accident provisions of the Motor Accidents Compensation Act 1999 ('MACA') *Axiak v Ingram [2012] NSWCA 311; (2012) 82 NSWLR 36*. It was the plaintiff's submission that the defendant would not be prejudiced if leave to amend the pleadings to raise the blameless accident argument was allowed.

The plaintiff relied on the Second Reading Speech for the Motor Accidents Compensation Amendment Bill 2006 and Section 7G in support for the proposition that a motor accident could be "blameless" and simultaneously caused by someone's fault.

In considering liability Justice McColl examined the trial judge's determination of the defendant's duty of care. Essentially, her Honour determined that the trial judge did not err in finding that the defendant did not breach his duty of care by momentarily taking his eyes off the road to look at the CD player. The circumstances of the accident were such that the collision was unavoidable. The act of the defendant taking his eyes off the road momentarily was an act which any reasonable driver would do in the course of driving.

In addressing the Axiak amendment Her Honour emphasised the underlying legal principle that a party is bound by the conduct of his or her case, except in exceptional circumstances.

Her Honour ultimately determined that the plaintiff had not established the exceptional circumstances necessary to permit a party to raise a new point on appeal.

Her Honour noted that the plaintiff had more than adequate time at trial to plead the blameless accident provisions. The plaintiff argued that the fact Axiak v Ingram was not raised with the trial judge reflected the time of the trial being contemporaneous with the decision of the Court of Appeal. Justice McColl noted that whilst the plaintiff placed an emphasis on the decision in Axiak v Ingram, the blameless accident provisions were inserted into the MACA by the *Motor Accidents Compensation Amendment Act* in 2006.

The case is important in that plaintiff's solicitors will now be alert to the need to plead the blameless accident provisions at an early stage. Plaintiffs will ordinarily not be permitted to amend their pleadings or raise a new point on appeal where they fail to establish negligence during a trial. We suspect a trend towards more timely amendments of this nature in the future.

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