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.

Contractor Liable for Injury to Subcontractor Employee

The NSW Court of Appeal has recently upheld the findings of Justice McCallum in the Supreme Court of NSW who determined that a contractor cannot escape liability where they have taken over control of another subcontractor and their employees and one of those employees is injured.

Michael Perigo was employed by Bradley Tracey Scaffolding Services Pty Limited ("Bradley Tracey Scaffolding") as a scaffolder. Perigo sustained serious injuries when he fell 8 metres onto a concrete concourse while dismantling scaffold at the Wentworth Park Stadium in Glebe.

Perigo initially commenced proceedings in the Supreme Court against the Workers Compensation Nominal Insurer (as Bradley Tracey Scaffolding was deregistered) and Waco Kwikform. Bradley Tracey Scaffolding was a subcontractor to Waco Kwikform, who was engaged by the principal contractor, Axis Constructions Pty Limited to supply, construct and dismantle the scaffolding. Waco Kwikform had engaged Bradley Tracey Scaffolding to provide scaffold labour services. Perigo contended that Waco Kwikform was responsible for the system of construction of the scaffolding and supervision of its dismantling.

Prior to the incident involving Perigo there had unfortunately been two serious accidents on Bradley Tracey Scaffolding sites, one resulting in a fatality. On both sites Bradley Tracey Scaffolding had entered into contracts with Waco Kwikform. On 3 January 2006 Paul Hughes sustained fatal injuries when he fell 8 stories. On 5 May 2006, another employee, Roy Salisbury, fell from a roof at a building site at Bondi and also sustained significant injuries. Michael Perigo was a witness to that incident.

As a consequence of the incident involving Salisbury, WorkCover stopped work at the Wentworth Park site. In addition, Waco Kwikform decided not to give any future work to Bradley Tracey Scaffolding. Rodney Mill, the then executive general manager of Waco Kwikform, also formed the view that Waco Kwikform should terminate the involvement of Bradley Tracey Scaffolding on existing projects. However, as a consequence of intervention from the CFMEU, Mill allowed nine remaining scaffolders employed by Bradley Tracey Scaffolding to finish the job at Wentworth Park. The only remaining task at that point was to dismantle and remove the second bird cage, a task that Mill thought would take three to five days.

In addition, following the Salisbury incident and the stop work subsequently imposed by WorkCover, Waco Kwikform also determined it was necessary to develop a Revised Safe Work Method Statement for the dismantling process. It was also determined that for the remainder of the Wentworth Park site, a Waco Kwikform employee would be onsite at all time to oversee dismantling of the scaffold.

In the construction of the scaffold there had been a shortage of transforms and in some instances, ledgers had been used in place of transoms in the construction of the second bird cage. The Revised Safe Work Method Statement gave different instructions for dismantling the structure according to whether or not a deck was being moved down onto a bay with transoms or ledgers. One of the safety measures introduced by the Revised Safe Work Method Statement was a requirement that the scaffolders wear a safety harness.

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At the time of this incident it was not commonplace in the scaffolding industry to require scaffolders to wear harnesses and following the introduction of the Revised Safe Work Method Statement, Tracey had to obtain harnesses for use by his employees. There was an issue as to whether or not the harnesses obtained by Tracey had one or two lanyards. It was accepted that Perigo was wearing a harness with only one lanyard at the time of his fall.

The trial judge ultimately found in favour of Perigo against both defendants, with a 25% liability attaching to the employer and 75% to Waco Kwikform. The trial judge was also of the view that there was no contributory negligence on the part of Perigo.

Waco Kwikform appealed however failed in its challenge of the judgement.

The Court of Appeal upheld the decision of the trial judge and determined that the duty of care owed by Waco Kwikform to Perigo extended to a duty to take reasonable care to ensure that the work methods employed by Bradley Tracey Scaffolding were safe. Justice Meagher, who delivered the leading judgment, stated:

> *"Contrary to the submissions made by Waco, that case respects the distinction that the common law draws between the duty a principal owes to its own employees and the duty it owes to its independent contractors and their employees. As the analysis above shows, Mr Perigo does not contend for a more extensive obligation in the circumstances of this case than that recognised in Stevens v Brodribb. Here the primary responsibility for the adopting and following of a safe system of work with respect to the task of dismantling the scaffold was assumed by Waco. From that point in time it had taken primary responsibility for adopting such a system out of the "contractor's hands": see Stevens v Brodribb; Leighton Contractors"*

In this case the subcontractor was not competent and Waco Kwikform had assumed primary responsibility for devising a safe work method and that duty extended to ensuring the system of work adopted by Bradley Tracey Scaffolding for dismantling the scaffold was safe.

The Court of Appeal also upheld the apportionment found by the trial judge of 25% liability for the employer and 75% to Waco Kwikform.

That left the issue of contributory negligence. The trial judge had found that the work that Perigo was performing was monotonous and in those circumstances Perigo was not contributorily negligent. The Court of Appeal disagreed in this regard. The Court of Appeal found that Perigo's conduct was not merely due to inadvertence or carelessness his actions had contributed to the accident and deducted 20% for contributory negligence. This was not because of the failure to hook up the harness but was because of the fact that Perigo did not check the components which had been used in the bay before he lifted the planks down to it.

The Court of Appeal however noted that:

> *"That omission was explained partly by the repetitive nature of the task he was undertaking, partly by the fact that before the day in question he had not come across any ledgers used as transoms and partly because of the use of the transom on his right and ledger on his left. It involved, however, precisely the kind of carelessness or inadvertence that the system of work that Waco and BTSS had a duty to devise and should have taken into account. Had they done so the accident and Mr Perigo's injuries would not have occurred."*

Following on from the decision of *WB Jones Staircase & Handrail Pty Limited v Richardson & Ors*, that we discussed in our previous issue of GD News, the Court of Appeal has again reminded us that contractors on building sites have an obligation to look after more than their own employees, particularly in this situation where they have assumed responsibility for the supervision of work undertaken by sub contractors.

No Duty of Care Owed by Principal Contractor to Independent Contractor

The Supreme Court of NSW has recently considered the issue of whether a principal contractor owed a duty of care to an independent contractor who was injured on a worksite when he fell from a roof (*McGlashan v QBE Insurance (Australia) Ltd (No 2)* [2014] NSWSC 486).In this case the Court concluded that there was no duty owed by a principal to a specialist contractor.

Barry McGlashan worked as a roofer in partnership with his son, Jason. The partnership was formed in 1998 after Jason qualified as a carpenter. Although McGlashan did not have trade qualifications, he had significant industry experience working

as a roofer. The partnership was successful until a downturn in the business in 2006 forced the partnership to look for other work.

The partnership supplied its labour to Lidoran Roofing Pty Limited ("Lidoran") as required between 1 May 2006 and early September 2006. On 7 September 2006, McGlashan received a telephone call from Lidoran's production manager calling off work for the day due to rain. However, McGlashan received a call from the same manager about one hour later requesting if he could work that day fixing roof leaks.

McGlashan accepted the work which he did alone. It was in dispute that McGlashan allegedly did this on the promise by the Lidoran's manager that others would also be there to help him the work.

On the third job that day, McGlashan was injured when he fell from a height of three or four metres. McGlashan alleged that the ladder he was descending blew over in the wind and he was forced to jump off. The Lidoran manager alleged that the ladder blew down in the wind and McGlashan climbed down from the roof to a light fitting, and then jumped to the ground, without seeking assistance. This allegation was said to be based on admissions made by McGlashan to the Lidoran manager after the incident.

McGlashan sustained serious injury to his heels rendering him permanently unfit for work as a roofer and he brought a claim against Lidoran in the Supreme Court.

The trial before Campbell J proceeded by way of separate questions concerning liability and damages. A further issue in dispute which was not decided was whether McGlashan was entitled to succeed directly against QBE, the insurer of Lidoran, which had been deregistered.

There were factual disputes as the evidence of McGlashan differed from the evidence of the Lidoran manager. In relation to the circumstances of the accident, the trial judge accepted McGlashan's account that the ladder blew over while he was on it, causing him to fall to the ground. The trial judge considered the account given by the Lidoran manager would have required a feat of considerable acrobatic ability.

However, on the question of whether Lidoran owed McGlashan a duty of care, the trial judge found that no duty of care arose in the circumstances and accordingly, McGlashan failed in the claim.

After reviewing the established legal authorities including *Leighton Contractors Pty Ltd v Fox, Stevens v Brodribb Saw Milling Co Pty Ltd*, and *Pacific Steel Constructions Pty Ltd v Barahona* and others, Campbell J considered that the ultimate issue for determination was whether or not the Lidoran manager assumed responsibility, knowing McGlashan relied upon him, to provide a second man to assist in the performance of the leak-repair work. This was hotly contested on the evidence.

McGlashan contended that he needed assistance because it was a two man job and that the Lidoran manager had assured McGlashan he would have help. The Lidoran manager did not, however, turn up to any of the three jobs that day.

When McGlashan arrived at the third job, he alleged that he had difficulty making himself understood by the Asian workforce that was present. He conceded, however, in cross examination that he was a very experienced roofer and did not need to be told how to do the job.

The Lidoran manager denied he offered to assist and stated that he left it to McGlashan to determine if he could fix the leaks, and if he considered it was safe to do so.

Some of the contentions from both witnesses were accepted and also rejected. His Honour decided the matter based on whether McGlashan was competent to control his own system of work without supervision given that it was known that he performed the work alone, contrary to common industry practice.

His Honour considered the issue of liability was evenly balanced but came down in favour of Lidoran on the basis it was entitled to leave the leak-repair work to the judgement of an experienced tradesman, like McGlashan who could determine whether a particular job could be undertaken safely by him. McGlashan was entitled to decide not to perform the job if it required a second man.

In light the above, Campbell J held that Lidoran did not owe McGlashan a duty of care and accordingly his claim failed.

On the separate questions, his Honour found that, had a duty of care been established, Lidoran had breached the duty by failing to take the precaution of providing adequate means of securing the ladder, even to the extent of providing a second tradesman to foot it, if required. His Honour was also satisfied that the breach caused the injury. Damages were assessed at $645,693.00.

This case highlights that the Courts will attribute personal responsibility to experienced independent contractors if they decide to carry out works with actual knowledge of a not insignificant risk of injury, as opposed to refusing to carry out the works. An experienced independent contractor who refuses to carry out the works or to postpone them until assistance is provided, will generally be precluded from claiming damages based on an alleged reliance on the principal contractor to ensure there were enough workers to do the work. This was a case where the contractor had engaged a specialist roofing contractor to do work and had played no role in supervising the activities of the specialist contractor and it was appropriate to leave it to the specialist to carry out the work.

The independence exercised by McGlashan was his personal decision to carry out the roof-leak works knowing they involved a significant risk of physical injury because it was recognised as proper industry practice for the works to be performed as a two-man job. He knew the absence of a second worker increased the possibility that the ladder would not be safely secured but he continued to perform the works in any event.

Contractors who engage specialist contractors to carry out work do not necessarily owe a duty of care to those contractors however the situation will change when the contractor takes on a role in supervising the contractor as we saw in our review of the judgement in Perigo in the preceding article.

Recovery Of Money Paid Under A Mistake Of Fact

Recovery of money paid under a mistake of fact has been a recognised common law action for over 300 years. Lord Mansfield's decision in 1760 provided some relief for the recipient of a payment made under a mistake of fact where they could prove they had changed their position and it would be detrimental to the recipient to have to refund the payment. We now have a 2014 judgement of the High Court in *Australian Financial Services & Leasing Pty Limited v Hills Industries Limited [2014] HCA14,* which has confirmed the principles behind recovery claims where payments have been made under a mistake of fact.

The ability to recover money paid under a mistake of fact is part of a broader unifying legal concept of unjust enrichment where it is considered unjust for a party to be enriched due to a payment which they would normally not have received, or a benefit they would normally have had to pay for, but for some technicality or mistake.

This overriding principal has been seen to apply for instance in building cases where work has been undertaken by a tradesperson and the recipient of the work has argued that the tradesperson is not entitled to payment due to circumstances such as the lack of a contract or the lack of a document specifically requesting the work. If the tradesperson can show on the balance of probabilities that the work was requested by the recipient then the Courts will on the basis of "quantum meruit" order the recipient to pay a reasonable price for the work.

The mistake of fact in the *Hills Industries* case was made by a finance company, however claims for mistake of fact have been made in other circumstances such as when payments have been made by insurance companies based on documentation which has been incorrect or fraudulent, where a payment has been made but a promise has not eventuated, payments by banks to the wrong person and for payment of debt that was not actually found to be owed. In fact, in 1760 the Court noted that the remedy was available in any case in which money has been paid in circumstances where it was unjust for the defendant to retain it. The grounds on which the recipient might contend the retention of benefit would not be unjust were also left open.

In this case a company identified as TCP was in debt to Hills and Bosch for monies not paid for invoices rendered to TCP. Hills and Bosch were suppliers of equipment to TCP. Bosch had undertaken to pursue the claim in Court and had obtained default judgments and supporting Garnishee Orders against TCP and its directors.

The directors of TCP fraudulently issued invoices from Hills and Bosch for equipment supposedly being purchased from Bosch and Hills and approached AFSL, a finance company, to purchase the equipment for TCP's use on a lease back arrangement with AFSL. AFSL subsequently paid monies electronically to Hills and Bosch mistakenly thinking that the money was being

paid to purchase the equipment.

There was nothing on the payment documents that showed the money was to be used for purchase of equipment. Hills and Bosch assumed the payment was to satisfy the debt owed by TCP to both Hills and Bosch. Hills and Bosch applied the money to the debt.

The fraud went unnoticed for six months before AFSL discovered its mistake. At that time TCP had entered into liquidation. At trial in the first instance it was found that the monies had in fact been paid by mistake of fact on the basis of fraudulent invoices and prima facie Bosch and Hills were obliged to repay the money. The primary judge rejected Hill's defence of change of position given that TCP was in a financially precarious situation and it was likely that Hills would have been unable to recover significant sums from TCP anyway.

On the other hand the primary judge held that Bosch made out its changed position defence because it was able to establish real detriment by way of actual extinguishment of the legal claim to TCP's property. Bosch had obtained a number of default judgments against TCP and its directors and had placed Garnishee Orders with the banks of TCP. Due to the payment made by AFSL Bosch filed Consent Orders with the Court to discontinue the default judgments and Garnishee Orders. As the default judgments had been discontinued then Bosch was now unable to take any further action to recover the debts.

An appeal followed however the Court of Appeal dismissed AFSL's appeal to have the decision in favour of Bosch overturned and also allowed Hills' appeal seeking to overturn the primary judge's decision that Hills were obliged to repay the money.

The matter then continued it journey with an appeal to the High Court which confirmed that AFSL was not entitled to recover its payments.

The High Court noted that where the recipient of a payment shows there would be an "irreversible detriment" if the money was required to be repaid an order to repay the money should not be made. However irreversible detriment is not a narrow or technical concept and is not is not satisfied by identifying the quantum of a loss in financial terms but must be supported by evidence that actions taken will prevent recovery of that loss in the future.

The High Court found that at the time AFSL demanded repayment the respondents had suffered economic detriment of the kind that falls well within the class of detriment relevant to the change of position defence. Whatever prospect had existed for Hills and Bosch to recover all or part of the monies owed to them by TCP before AFSL provided payments in August and September 2009 no longer existed. Existence of detriment did not depend on whether the debts owed to Hills and Bosch by TCP could be said to have been discharged or released. The detriment was attributable in part to the passage of time from when the payments were made to the date of demand. The injustice which precluded refund of the payments lied in the disadvantage which would result to the recipient if the payer were to be permitted to recover payments mistakenly made where they have been applied by the recipient.

The High Court found that as between each of Hills and Bosch on the one hand and TCP on the other payments were made and applied to discharge TCP's indebtedness to Hills and Bosch. In a practical sense, the receipts had consequences for Hills and Bosch beyond the simple fact of the receipt and these consequences were irreversible as a practical matter of business. Moreover neither Hills nor Bosch was able to reverse the consequence of its decision to continue trading with TCP and the commercial risks that decision entailed. In the circumstances of this case the High Court found that if Hills and Bosch were required to repay the monies received from AFSL, the disadvantages showed that it would inequitable to require them to do so.

The decision demonstrates the difficulties that confront a party who seeks to recover a payment made under a mistake of fact. Here a fraud was committed by a person and other parties had benefited from a payment by the victim of the fraud however if those other parties were required to pay the money it was simply unfair as they had lost rights to pursue the perpetrator of the fraud for normal business debts unrelated to any fraud. It was not appropriate to shift the consequence of the fraudulent activity.

The change of position defence to claims for recovery of money paid under a mistake of fact is alive and well in Australia.

Roads Authority & Road Contractors-Liability For Motor Accidents

The NSW Supreme Court has ruled in favour of a plaintiff who came off his motorcycle on a stretch on recently laid road at

Nimbin, New South Wales in its decision in *Pillinger v Lismore City Council & Anor*.

On 22 January 2006 David Pillinger was seriously injured when he lost control of his motorcycle as he was travelling uphill on Blue Knob Road. Pillinger was travelling with a group of approximately 20 fellow motorcycling enthusiasts who were on a trip from Queensland to New South Wales.

Pillinger commenced proceedings against the Council and Boral Limited who had tendered to undertake the works. The works had recently been completed by both the Council and Boral. The Council removed the pre-existing road surface and laid a new road base of crushed basalt and other rocks. Boral then used a rotary broom to sweep the road surface to remove loose material and applied a new bitumen surface. Aggregate was then laid and compacted and excess aggregate was swept from the road surface. Both the Council and Boral left windrows, a row of excess amounts of road base and aggregate on each the side of the road. The road did not have a kerb.

Following several days of heavy rain the excess road base and aggregate washed across the road leaving a swathe of material across the road. A nearby drain had overflowed allowing rainwater to collect the road base and aggregate. This was also mixed with vegetation caught in the drain. Pillinger became dislodged from his motorcycle when it lost traction as he drove over the swathe.

His Honour Justice Button found that both the Council and Boral were negligent in allowing the excess road base and aggregate to remain on both sides of the road. His Honour found that there ought to have been a windrow to the west of the road so that the rainwater would not wash the swathe across the road surface.

The Council sought to rely upon section 45 of the *Civil Liability Act 2002*. Section 45 provides a defence to road authorities for a failure to carry out road works. His Honour rejected this argument on the basis that this was a case of misfeasance rather than non-feasance. Here the Council had not failed to carry out road works but rather, his Honour found the works had been negligently performed.

Pillinger also argued that Council ought to have erected a warning sign. His Honour was not satisfied that Council's failure to erect signage amounted to an act of negligence. His Honour agreed with the submission made by the Council that section 43A protects the Council from any liability arising from the absence of road signs. Section 43A provides that the failure of exercising a statutory power, in this case erecting signage, does not gives rise to a civil liability unless the act or omission was so unreasonable that no other authority in the same position would consider the act or omission reasonable.

As we know every case turns on its own facts and in this case the roadworks had been completed approximately five weeks prior to Pillinger's accident. The Court was not satisfied that it was unreasonable for the Council to not to have a sign or signs in place on the day of the accident, five weeks after the road works came to an end. In this regard Pillinger had failed to adduce evidence as to what a reasonable Council would have done.

The Council also argued that the accident involved an obvious risk and there was no duty of care to warn of an obvious risk. It was submitted that as Pillinger had travelled over the same stretch of road earlier in the day the risk was obvious to him. His Honour did not have to consider this argument having already found that section 43A applied.

However, Button J considered that Pillinger's earlier traverse over the hazard was sufficient to put him on notice of the existence of the swathe. Button J found Pillinger's contributory negligence was 10%.

In determining apportionment between the two defendant's Button J considered that while the Council had left roadbase, Boral had left road base and aggregate. In addition, it was noted that a company engaged in the specialised business of sealing roads has more experience than a local council which is commonly engaged in a multitude of other tasks. The Council was found 40% liable and Boral 60%.

The Council was successful in its cross-claim against Boral for breach of contract. Boral had failed to effect public liability insurance that covered the Council's liabilities to Pillinger. As a result, his Honour found that the Council was entitled to an indemnity from Boral for the whole of its liability to the plaintiff. Boral's cross-claim against Council for negligence in allowing the drain to overflow was dismissed having been effectively abandoned by Boral. The evidence was that the swathe was a result of the presence of the windrow rather than the overflowing drain.

In this case the Civil Liability Act operated to protect the Council for its failure to have signage at the scene of the road works but not more than that as in this case it was found that a reasonable person in the position of the Council would have taken

steps to ensure that a windrow of roadbase was not left to the high side of the road.. The Council was liable as was its road contractor.

No Appeal Without Appeal Grounds

The NSW Court of Appeal recently dismissed an application for an extension of time to appeal by a self-represented litigant who challenged an order of Robison DCJ in the District Court dismissing his claim for damages based on assault.

In *Valder v Fabrizi* [2014] NSWCA 152 the Court of Appeal unanimously held that the appeal did not enjoy reasonable prospects of success not only because it lacked merit but because the applicant had only filed an application for extension of time (noting the purported appeal was filed out of time) without filing a draft Notice of Appeal containing the relevant appeal grounds.

The claim arose from a family fracas that occurred when Mr Valder and Mr Fabrizi attended a family gathering at the home of Mr Fabrizi's father. The purpose of the gathering was to provide support to Mr Fabrizi senior following the death of his wife just three weeks earlier. Mr Fabrizi senior was also the father of Mr Valder's partner.

During an argument that ensued on the outside patio between Mr Valder and Mr Fabrizi junior, Mr Valder alleged that a punch was thrown, knocking him to the ground. Mr Valder landed on his back. Whilst on the ground, Mr Valder grabbed a chair and pointed the legs at Mr Fabrizi who then removed the chair from him and manoeuvred it so that it was pointing towards Mr Valder who then alleged the chair made contact with his body when it was pushed by Mr Fabrizi into his legs.

Robison DCJ held that that Mr Valder had failed to establish that, on the balance of probabilities, he had been assaulted by Mr Fabrizi. He dismissed Mr Valder's claim for damages and ordered him to pay Mr Fabrizi's costs. However, his Honour assessed damages at $80,000 that he would have awarded had Mr Valder's claim been successful.

The judgment was delivered on 4 December 2012 and the orders were entered on the same day. Mr Valder did not file a Notice of Appeal, Application for Leave to Appeal or a Notice of Intention to Appeal within 28 days after 4 December 2012, as required by the UCPR. Instead, some 79 days later on 21 February 2013 he filed a Notice of Motion seeking an extension of time to appeal. At no time in the appeal proceedings did he file a proposed Notice of Appeal containing the proposed appeal grounds. He was self-represented at the hearing of the Motion for an extension of time.

Basten JA, with whom Mcfarlan & Emmett JJA agreed, observed:

> *"The fact that no notice or draft notice with grounds has ever been supplied militates heavily against the grant of … leave."*

The Court of Appeal found that as the matter in issue involved less than $100,000 leave to appeal was required in any event.

The submissions upon which Mr Valder relied were found to be, in places, "… not merely illogical but incoherent" regarding the alleged doctoring of the transcript of the District Court trial. Mr Valder also relied upon alleged inconsistencies in the evidence that the trial judge had failed to take into account but the Court of Appeal held that there were no such inconsistencies.

Accordingly, the Court found that it was not possible to conclude that any appeal would have reasonable prospects of success. The application for an extension of time to appeal was therefore dismissed.

While the case presented its own peculiar circumstances involving an unrepresented litigant, the Court of Appeal reminds us that an appeal cannot proceed without proper appeal grounds being filed and, if the appeal involves less than $100,000, there must be sufficient prospects of success for a grant of leave to appeal.

Pregnancy And Constructive Dismissal Not a 'Good Look'

The Federal Circuit Court of Australia in *Sagona v R & C Piccoli Investments Pty Ltd & Ors [2014] FCCA 87* has awarded a former employee in excess of $174,000 in damages for discrimination on the grounds of pregnancy and demands to work unreasonable hours. In addition, the Court imposed penalties totalling $61,000 under the Fair Work Act 2009 against the former employer and its directors (the "respondents").

Sagona worked in a small portrait photography business. She, and the son of the shareholders of the employer, were the key photographers working in the business. Sagona had been employed for in excess of 12 years.

Her announcement that she was pregnant came as a shock to the business owners, producing some remarkable conduct.

The Court found that:

- Sagona was told that she could not return to photographic work after the summer break;
- Sagona was also told that part-time work was not an option after she returned from maternity leave; and
- There was some discussion about Sagona undertaking alternative duties and the fact that other people, who were paid less, were already employed to perform those roles.

One director was found to have said that having Sagona out in the field doing shoots was not a 'professional look'. He later stated that he did not think that it was right for a lady, heavily pregnant, to be out in the field and that he did not think it was a good look.

The Court also found that, following her announcement, that:

- The respondents demanded that Sagona work additional hours;
- The respondents refused to allow Sagona to work in her usual occupation, or in alternative duties, after the Christmas break;
- The respondents refused to consider a return to work on a part-time basis; and
- The respondents subjected Sagona to abusive conduct which was directly related to her refusal to work additional hours and her letter complaining of discrimination.

Perhaps the most interesting part of the case concerns the compensation awarded to Sagona. The Court was satisfied that, but for the breaches of the Fair Work Act, Sagona would have continued to work for the respondent until she elected to terminate the contract. In the circumstances, this had to be reconciled with the uncontested evidence that the owners wished to shortly "withdraw" from the business, handing on beneficial ownership to their son and Sagona.

Doing the best it could on the available evidence the Court assessed an amount for future loss of $136,000 (the equivalent of more than 12 month's salary) and deducted the "usual amount" of 15% - apparently for vicissitudes. Agreed medical expenses and a $10,000 award for hurt and distress made up the balance of the award.

An expensive exercise for the employer – and possibly a foretaste of the growing significance of economic loss claims in the *Fair Work Act* jurisdiction.

Workers Compensation Roundup

High Court Clarifies Lump Sum Compensation Entitlements – Or Does It?

The matter of *Adco Constructions Pty Limited v Goudappel & An*or needs little introduction and on 16 May 2014 the High Court of Australia delivered the eagerly anticipated judgment. It was not good news for workers.

On 17 April 2010 Mr Goudappel, an employee of Adco Constructions Pty Limited ("Adco") was injured at work and was entitled to receive compensation from Adco under the *Workers Compensation Act 1987* (the "Act"). He initially made a claim for compensation on 19 April 2010 but did not make a specific claim for permanent impairment compensation until 20 June 2012. This was one day after the significant amendments to the NSW workers compensation regime purportedly took effect.

Adco disputed Mr Goudappel's claim as his claim for whole person impairment was not greater than 10% as required by the amended Section 66(1) of the Act. Initially the dispute was upheld by the President of the Workers Compensation Commission on the basis that the claim for impairment compensation was made after 19 June 2012 and Mr Goudappel did not reach the 11% WPI threshold. That decision was overturned by the Court of Appeal, who in its unanimous decision determined the 2012 amendments to lump sum compensation did not apply to claims for compensation (any claim) which were made before 19 June 2012 even if the specific lump sum claim was made on or after that date.

Adco then appealed the decision to the High Court. The High Court focused on the correct approach as to the construction and provisions in the Act. In particular the making of regulations which had a transitional operation.

The High Court found Clause 5(4) of Part 19H of Schedule 6 of the Act enabled the making of Clause 11 of Schedule 8 of the Regulations. This resulted in claims for lump sum compensation that had not been specifically made prior to 19 June 2012 as being invalid. In other words, if a worker was not assessed at over 10% WPI and had not specifically made a claim before 19 June 2012, the claim was subject to the 10% threshold. Accordingly, Mr Goudappel's entitlement to impairment compensation was extinguished as he had made his one claim.

Effectively, the High Court decision means that the 11% WPI threshold affects any impairment claim made on or after 19 June 2012. In addition, claims for Section 67 compensation (pain and suffering) that had not been specifically made prior to 19 June 2012 were also invalid.

Despite the decision of the High Court there are still some potentially unresolved issues including whether the 2012 amendments apply to claims under the Table of Disabilities (that is for injuries prior to 1 January 2002) and whether further "top up" claims or "deterioration" claims are prevented by Section 66(1A).

The WorkCover Independent Review Office has issued guidance notes on 20 May and 27 May 2014 expressing the view that a claim made before 19 June 2012 does not count as the "one claim" as provided by Section 66(1A) of the Act. The WorkCover Independent Review Office are prepared to fund injured workers who wish to make a claim after 19 June 2012 for Section 66 compensation for permanent impairment, irrespective of how many claims were made for the same injury prior to 19 June 2012. They however cautioned that "lawyers should be exceptionally careful to ensure that the injured worker fully understands that there is now only one claim for lump sum compensation for permanent impairment and that the worker may be better advised to wait if there is any prospect of further deterioration.""

We expect WorkCover will now issue a number of directives or operational instructions to cover the outstanding issues such as top up claims and claims under the Table of Disabilities. Subject to further clarification by WorkCover or further judicial interpretation, it is now simply a wait and see approach for those types of claims. One thing for sure is that the High Court decision has finally brought clarity to Section 66 claims of less than 11% and claims for pain and suffering that were not made prior to 19 June 2012. Workers who received compensation whilst the Court of Appeal judgment was good law must be breathing a sigh of relief.

Employer's Knowledge is Not Enough to Satisfy the Injury Notification Requirements

You may recall from our recent newsletters there have been a number of determinations in the Workers Compensation Commission with regards to the six month time limit for a worker to make a claim for workers compensation in NSW.

Section 261 of the *Workplace Injury Management and Workers Compensation Act 1998* ("WIM Act") provides that compensation cannot be recovered unless a claim for compensation has been made within six months after the injury. Of course, there are a number of qualifications to that time limit contained within Section 261 however the time limitation cannot be ignored by a worker as was seen in a recent decision of the NSW Workers Compensation Commission in *Puffett v Leighton Contractors Pty Limited* [2014] NSWWCC PD24.

Mr Puffett was employed by Leighton between September 2003 and August 2007 but ceased work on 14 August 2007 due to ongoing pain and disability in both knee joints. From the evidence presented to the Commission it was apparent that Mr Puffett had for a number of years prior to ceasing work suffered from the condition of osteoarthritis in both knees. Mr Puffett received a left total knee replacement in August 2009 and a right total knee replacement in November 2010.

On 19 December 2012 Mr Puffett's solicitors forwarded a Notice of Claim to Leighton seeking payment of lump sum compensation pursuant to Section 66 and 67 of the *Workers Compensation Act 1987* as well as treatment expenses pursuant to Section 60. The claim was disputed for various reasons including the fact that the claim had not been made within time as required by Sections 260 and 261 of the WM Act.

The arbitrator issued a Statement of Reasons on 28 January 2014 accepting that Mr Puffett sustained an injury to his knees during the course of his employment from 1 September 2003 to 14 August 2007 and that his employment was a substantial contributing factor to the knee injuries. Despite this finding, the arbitrator also determined a Notice of Claim had not been duly made in accordance with Section 261(1) of the 1998 Act and that Mr Puffett had not discharged his onus on the balance of probabilities to allow him to rely on Section 261(4)(b). This section allows for a claim to be made late if there is serious and permanent disablement. An award in favour Leighton was entered by the arbitrator.

An appeal followed. On appeal Deputy President O'Grady referred to the specific requirements of Section 261(4). This section requires that a claim be made within six months after the date of injury or in special circumstances within three years. The special circumstances include a scenario where:

- the failure to make the claim was occasioned by ignorance, mistake, absence from the State or other reasonable cause; or
- the injury resulted in death or serious and permanent disablement of the worker.

Reference was also made to section 261(6) which deals with the worker's knowledge of an injury deeming the injury to have been received when the worker becomes aware of the injury.

Deputy President O'Grady referred to what he termed "circumstantial evidence" concerning the Mr Puffett's knowledge of injury and the failure to establish that Mr Puffett was unaware of any injury until some later date which would bring him within the timeframes provided for in Section 261. A submission that Leighton would have "known of the injury" at the time of the cessation of his duties with them was insufficient with regards to notice.

Deputy President O'Grady considered the arbitrator did not err when he determined that Mr Puffett had not discharged his onus of showing that his failure to bring a claim out of time should be excused by reason of ignorance, mistake, absence from the State or other reasonable cause pursuant to Section 261(4)(b).

The decision of the Commission in this matter is a timely reminder that it is insufficient for the worker to rely upon an employer's purported knowledge of an injury and that the Notice of Claim requirements stipulated in the WIM Act do have teeth.

CTP Roundup

Anticipating Irrational Behaviour Of Pedestrians

Personal responsibility is alive and well in NSW with the decision of Court of Appeal in *Johnston v Stock* confirming that the driver of a vehicle does not need to anticipate every action of a pedestrian as they approach a pedestrian standing on the edge of a roadway. A reasonable response to the risk of injuring a pedestrian may be continuing to drive at a reduced speed and keeping a vigilant lookout.

Stock was injured in the early hours of the morning when she collided with Johnston's motor vehicle after walking onto the road into Johnston's vehicle. Johnston had seen Stock coming down a footway leading to a kerbside ramp providing access to the roadway. When Johnston first saw Stock she was stumbling a little bit but walking quite fast down the footway. Johnston slowed the speed of her vehicle to 40 kph and observed Stock stop at the ramp and look in the direction of the vehicle which was approaching.

The Court heard evidence that between the kerb and the traffic lane there was a 2.2 metre wide auxiliary lane. This meant that if Johnston kept her vehicle within the traffic lane, Stock had to step off the kerb and walk a distance of 2.2 metres before colliding with any vehicle in the traffic lane.

The primary judge found that Johnston was negligent in failing to take further precautionary steps such as flashing her lights, sounding her horn, slowing down further and particularly in failing to keep to the right hand side of the lane to give Stock as wide a berth as possible.

An appeal followed and the Court of Appeal found the primary judgement could not stand.

Meagher JA found that the evidence did not provide any basis for a conclusion that, had Johnston flashed her lights or sounded her horn that would have made any difference whatsoever to what Stock did so as to justify a conclusion as to factual causation under Section 5D of the *Civil Liability Act 2002* (NSW).

Meagher JA also found that the primary judge's conclusion that the accident would have been avoided had Johnston kept to the right hand side of the traffic lane could not be justified on the evidence.
To support that conclusion one would have to assume that Johnston continued to travel at 40 kph after she saw Stock step from the kerb which would ignore the fact that Johnston, acting reasonably, could have applied her brakes. The experts at the trial opined that this was the response which a reasonable driver would have made.

Meagher JA concluded that when travelling at 40 kph Johnston could have stopped had Stock continued onto the roadway but as Stock did not continue onto the roadway and instead stopped at the kerb and looked towards Johnston's vehicle there was then no reason for Johnston to further reduce her speed.

On the issue of the standard of care the primary judge referred to *Manley v Alexander* in finding that a driver is required to give reasonable attention to what is happening not only on the roadway but near the roadway where there is a potential source of danger. Johnston argued that this formulation was too wide and too onerous. She argued that the reasonable care exercised by a driver requires that the driver control the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events. Johnston argued that the version offered by the primary judge supposes that drivers must also drive on the assumption that persons on the side of the road will, for no apparent reason, enter onto the roadway in front of the vehicle.

Barrett JA noted that in light of Section 5B of *the Civil Liability Act 2002* (NSW) due discharge of the duty of care owed by a motorist to persons on or near a roadway on which he or she is driving, requires the exercise of reasonable care and the adoption of reasonable precautions to avoid the risk of harm. This involves a degree of anticipation including whether persons may act carelessly. The required standard is influenced by reference to the precise circumstances. He went on to refer to *Marien v Gardener*; *Marien v HJ Heinz Company Australia Limited* which found that the question as to whether there had been a breach of the duty to take reasonable care is to be addressed prospectively and by reference to what a reasonable driver in the circumstances would have done, if anything, by way of response to any foreseeable risk of injury or source of danger.

Meagher JA noted a driver must pay reasonable attention to all that is happening on or near the roadway that may present a source of danger.

Barrett JA also referred to the observations of Kirby P in *Stewart v Carnell* which concluded that negligence must imply a want of care to prevent foreseeable injury and that there are limits to which the irrational behaviour of pedestrians, in apparent disregard of their own safety, should reasonably be anticipated by a reasonably careful motorist.

In the present case Johnston emphasised that having slowed to 40 kph she saw Stock looking in the direction of her car. Barrett JA therefore concluded that she was entitled to believe Stock had seen her car and would act accordingly. There was therefore no need to flash the lights or sound the horn as these things are done to attract the attention of someone whose attention needs to be attracted. A person whose gaze is apparently on the approaching vehicle is not someone whose attention needs to be attracted.

Barrett JA concluded that the precautions referred to by the primary judge were not called for in the interests of due care towards the pedestrian standing on the kerb apparently watching the approaching vehicle and waiting for it to pass. The primary judge's finding that additional precautions could have avoided the risk of harm did not of itself warrant any conclusion that Johnston should have taken the additional precautions in accordance with Section 5C of the *Civil Liability Act 2002*.

The Court of Appeal unanimously found that the primary judge's conclusion that there was afbreach of duty on the part of Johnston was erroneous. There was no failure to exercise reasonable care. Johnston acted reasonable. The actions of Stock caused her injuries.

So there we have it. A pedestrian cannot always blame a driver when they are involved in a motor vehicle accident.

Personal Responsibility And Contributory Negligence

When a pedestrian's actions play a role in a motor vehicle accident it is commonly argued that the negligence of the driver should be assessed differently to that of the pedestrian when determining the relative culpabilities of the driver and the pedestrian. However the NSW Court of Appeal has confirmed that is not the case in the recent decision in Cosmidis v Boral Bricks Pty Limited.

Orestis Cosmidis worked as a tanker driver. He delivered loads of fuel. Boral Bricks Pty Ltd ("Boral") was one of Mr Cosmidis' customers.

On 18 April 2008 Cosmidis finished his delivery, completed paperwork in a Boral office and then left that office to walk across a work zone to his truck. While he was walking he was hit from behind by a forklift. He suffered major injuries.

Cosmidis brought proceedings against Boral. Boral had a duty of care to Cosmidis by virtue of its occupation of the site and operation of the business site, and, via its vicarious responsibility for the conduct of the driver of the forklift.

The matter came before Levy DCJ in the District Court. His Honour found Boral was negligent but there was no contributory negligence.

Boral appealed.

On 18 December 2013 the Court of Appeal set aside the finding that there was no contributory negligence. Their Honours McColl, Basten and Emmett directed the parties to provide submissions on quantification of contributory negligence. This issue was considered on the papers and gave rise to a decision dated 7 May 2014.

The Court of Appeal identified several factual indicia that spoke to the contributory negligence. Cosmidis had attended the site on a monthly basis for two years; he knew that forklifts operated in the area; he had seen forklifts driving through the area earlier that day; he was familiar with a warning sign concerning presence of forklifts; he was familiar with a visitors' pass stating that forklifts had right of way.

When the matter was first considered by the Court of Appeal it rejected several factual findings made by Levy DCJ, describing them as "implausible". The Court of Appeal concluded, contrary to Levy DCJ, that the forklift was in Cosmidis' visual field as he emerged from the office and began to walk. A corollary of this finding was a conclusion that Cosmidis did not check the roadway before walking on it, despite his evidence concerning attempts to check in all directions. The Court of Appeal also rejected Levy DCJ's findings concerning the location of the impact and concluded that Cosmidis had walked further into the path of the forklift than he admitted. Additionally the Court of Appeal considered an expert report prepared on behalf of Boral, the tender of which was rejected by Levy DCJ in a ruling which the Court of Appeal found to be erroneous. This expert report also concluded that Cosmidis did not check the roadway before stepping upon it.

Cosmidis submitted that Boral's negligence as occupier and business operator ought to be characterised as a "major systemic" failure, aggregating to the forklift driver's failure to keep adequate attention, so that Boral's negligence significantly outweighed Cosmidis' momentary or casual failure to pay adequate attention. Cosmidis submitted that contributory negligence should fall in a range of 5% to 10%.

The Court of Appeal committed considerable attention to the interplay between Section 138 of the *Motor Accidents Compensation Act 1999*, Section 5R of the *Civil Liability Act 2002* and the common law. The Court of Appeal concluded that Levy DCJ wrongly found that the *Civil Liability Act 2002* does not apply to motor vehicle accidents (that is, to circumstances enlivening the *Motor Accidents Compensation Act 1999*). The relevant sections of Section 138 MACA observe that contributory negligence is to be assessed according to common law and enacted law and, further, that it ought to give rise to a reduction in damages that is "just and equitable in the circumstances of the case".

Section 5R of the Civil Liability Act observes that the principles that apply to determination of negligence also apply to ascertainment of contributory negligence and to that end the standard of care considered in a contributory negligence assessment is that of a reasonable person in the position of the injured person; the assessment is to be done on the basis of what the injured person knew or should have known. The Court of Appeal recognised that Section 5R "reflects a plaintiff's duty to take care for his or her own safety rather than a duty to anyone else".

Basten JA observed [81] a statement by the High Court in *Podrebersek v Australian Iron and Steel* [1985] HCA 34:

> *"The making of an apportionment ... involves a comparison both of culpability, ie. of the degree of departure from the standard of care of the reasonable man and of the relative importance of the acts of the parties in causing the damage."*

Cosmidis argued that contributory negligence apportionment ought to reflect the fact that the driver of a vehicle can cause more damage than a pedestrian and so contributory negligence apportioned to the driver should be amplified during the apportionment process. In this endeavour, Cosmidis relied on argument emerging from *Talbot–Butt v Holloway* (1990) 12MVR70:

> *"the evaluation and assessment of the culpability of the plaintiff and the defendant must take proper account of the fact that ... the plaintiff's conduct posed no danger to anyone but herself, while the defendant who was driving ... was in charge of a machine that was capable of doing great damage to any human being ...".*

Basten JA considered application of Section 5R and observed:

> *"assuming that the requirement that people should take responsibility for their own lives and safety is now reflected in Section 5R, and was intended to override the approach of Murphy J in "Watt", there is a question as to whether the statements in "Talbot–Butt" still reflects the law in this State. The potential dangerousness of heavy machinery and fast vehicles can no doubt be applied universally ... on the other hand applying the general principles in Section 5B(2) one could approach the matter differently ... no distinction is made between the fact that from one perspective the driver is in control of a vehicle that could cause serious harm to a pedestrian, whilst from the perspective of the pedestrian, it was the likelihood of serious harm which was to be considered. If the plaintiff were aware, or ought to have been aware, of the presence of a large forklift operating in the area and if the forklift driver were aware, or should have been aware, of the likely presence of pedestrians, and if each were equally careless, liability should be shared equally.*
>
> *A purposive approach to the operation of Section 5R (and Section 5B) requires that this approach be adopted."*

Basten JA adopted conclusions that he considered consistent with the IPP report on the Civil Liability reform noting:

> *"leading textbook writers have asserted that in practice the standard of care applied to contributory negligence is lower than that applied to negligence despite the fact that, in theory, the standard should be the same ... this may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel's view, this approach should not be supported".*

Basten JA and Emmett JA found in favour of 30% contributory negligence; this was the finding of the majority of the Court of Appeal. McColl JA assessed contributory negligence at 10%.

This judgment is a useful reminder of the approach the Court adopts in the application of statutory provisions and the common law when determining contributory negligence.

The Court of Appeal confirmed that the standard of care to be presumed when considering negligence and contributory negligence is the same. The standard of care attaching to a pedestrian is no less than the standard of care attaching to a driver simply because the pedestrian is at greater risk of significant harm.

The Court of Appeal found that Section 5R of the *Civil Liability Act* ensures that the standard of care applied to plaintiffs when assessing contributory negligence is no less than the standard of care applied to defendants, irrespective of the extent of harm that either party risks as a consequence of the incident.

The severity of harm that can be caused by a driver's conduct will generally be greater than the harm that can arise from a pedestrian's conduct however this does not diminish the responsibility of either party for the accident. If each party is equally careless liability should be shared equally. The earlier approach that the culpability of a person controlling a dangerous vehicle is necessarily greater by virtue of the risks that the vehicle poses – as opposed to respective responsibility for the incident – no longer applies.

Head-On Collisions on Unmarked Roads

Personal injury claims arising from head on collisions are often hotly contested with the drivers of both vehicles commonly blaming each other for the accident. The recent decision in *Aitkenhead v Kaufline* highlights some of the difficulties that confront the Court when determining responsibility for a head on collision.

Aitkenhead and Kaufline were involved in a head-on motor vehicle accident on Woods Lane, a graded dirt road in the Australian Capital Territory. The point of impact occurred at the crest of a hill.

The gradient on either side of the crest was approximately 8% although approaching from the south of the crest the gradient increased more rapidly compared to the gradient on the northern approach. The road surface was not considered dangerous.

Aitkenhead was travelling south along the road and he estimated that he was travelling 50-60 kilometres per hour as he approached the crest and that he was close to the left hand edge of the roadway and to the left of the notional centre line of the roadway.

Kaufline was driving his father's Ford Falcon one tonner north on the same road.

As Aitkenhead came over the crest he saw something coming towards him on his side of the road fully in his lane. Aitkenhead tried to swerve right to go around it, but the vehicles collided.

Kaufline was travelling at an estimated speed of 45 kilometres per hour. The first time he saw Aitkenhead's vehicle was approximately 10 metres from the point of impact. Kaufline stated that he was on his side of the road at about two and a half tyre widths from the edge of the road. When he first saw Aitkenhead's vehicle it was about halfway across the notional centre line.

Photographs were taken at the accident scene which showed extensive damage to the front of both vehicles.

The issue of contention was which direction were the respective drivers turning their vehicles when they first noticed the other vehicle approaching.

Aitkenhead engaged Mr Colin Wingrove, transport engineer, to prepare an expert report.

The Court accepted Mr Wingrove's evidence that the vehicles were travelling in a straight line at the point of impact and there was no lateral movement in the 1.5 seconds prior to impact.

It was accepted that the point of impact, Kaufline's vehicle was positioned on the right hand side of the road and the Aitkenhead's vehicle was positioned in the middle of the road.

The difference in rotation of the vehicles upon impact was due to the difference in rigidity of the two vehicles. The apparent turning of the wheels of Aitkenhead's vehicle was caused by displacement of the axle during the crash and not by the turning of the steering wheel prior to the collision.

These conclusions were inconsistent with Kaufline's evidence insofar as he said that he was on the left hand side of the road at the point of impact and was in the process of turning to the right immediately prior to impact and the assertion that Aitkenhead was also attempting to turn right prior to the point of impact.

Therefore, it was held that it was more likely that at the point when Aitkenhead first saw Kaufline's vehicle, Aitkenhead's vehicle was travelling down the middle of the road.

The Court held that Kaufline's vehicle was driving over the crest on the wrong side of the road when it struck Aitkenhead's vehicle and therefore, breach of duty of care was established.

On the issue of contributory negligence the Court took into account the total environment surrounding the point of impact and the relative culpability of each party.

The only assertion of contributory negligence that was pursued by Kaufline was that Aitkenhead failed to keep his vehicle wholly or substantially on the left hand side of the roadway as he approached the crest.

The Court was satisfied that Aitkenhead failed to take reasonable care when approaching the crest by driving in the centre of the road. This was on the basis that a reasonable driver approaching a crest should ensure that his vehicle is positioned to the left hand side of the notional centre line and as close as reasonably possible to the left hand edge of the roadway.

However, the second limb of the test of contributory negligence was for Kaufline's to establish that Aitkenhead suffered damage partly because of Aitkenhead's failure to take reasonable care. Therefore, it was necessary to show a causal connection between Aitkenhead's conduct and the injuries sustained.

The negligence of Aitkenhead meant that the collision between the two vehicles was an offset head-on collision in which only part of the front of each vehicle struck each other. Had Aitkenhead been travelling as far as possible on the left hand side of the road, the collision would have been a full head-on collision in which a greater proportion of the front of each vehicle would have made contact.

Interestingly there was no expert liability evidence relied upon by Kaufline in this case.

There was no evidence led by Kaufline of the fact that the collision was an offset head-on collision that increased the damage to Aitkenhead when compared to a complete head-on collision. The Court relied on the case of *Hoare v Rudd* (1989 9MVR 229 at 2.34 per Meagher, JA) where it was held that it is incumbent on the defendant to lead precise evidence as to how contributory negligence would have made a difference to the injuries.

The Court was not satisfied that Kaufline evidence proved that Aitkenhead's negligence in approaching the crest in the middle of the road increased the likelihood of the accident or increased the severity of the consequences of the accident. Therefore, there was a finding there could be no deduction for contributory negligence. Kaufline had not satisfied the two limbs required for a finding of contributory negligence.

Head on collisions often give rise to conflicting versions of the events and expert evidence is often the key to resolving conflicts in evidence. This case highlights the need for expert evidence to address the circumstances of the accident, whether there was a failure to take reasonable care by any driver and whether any failure caused or contributed to the injuries sustained.

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