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When does a dangerous recreational activity begin?

In New South Wales in personal injury claims there are various defences to a claim which are set out in the Civil Liability Act 2002 *("Act").*

For example, where the risk of harm which materialised was an obvious risk within the meaning of Section 5F of the *Act* by reason of Section 5H of the Act, a person does not owe a duty of care to warn of that risk.

In addition when a person is involved in a recreational activity and they suffer injury it is common to see two additional defences relied on. Those defences are that:

- A person does not owe a duty of care in respect of a risk of a recreational activity where that risk has been the subject of a risk warning within Section 5M of the Act;
- Where a person is engaged in a dangerous recreational activity within the meaning of Section 5K of the Act there is no liability where the injury is suffered as a result of the materialisation of an obvious risk of that activity.

Often an issue arises as to what makes a recreational activity a dangerous recreational activity.

The terms "recreational activity" and "dangerous recreational activity" are defined in the *Civil Liability Act 2002*.

A recreational activity is defined to include any pursuit or activity engaged in for enjoyment, relaxation or leisure.

A dangerous recreational activity is defined as a recreational activity that involves a significant risk of physical harm.

However tasks preparatory to undertaking a dangerous recreational activity are not in themselves a dangerous recreational activity as was seen in the recent decision of the NSW Court of Appeal in *Liverpool Catholic Club Limited v Moor.*

The Liverpool Catholic Club was the occupier of a sporting complex which included an ice rink open to members of the public. Moor slipped and fell backwards when descending a flight of stairs which provided access to the ice rink. At the time he was wearing skating boots which he had hired from the Club.

He brought proceedings against the Club alleging it breached its duty of care as an occupier. The claim was defended on the basis that the Club did not owe a duty to warn of an obvious risk, that Moor was engaged in a dangerous recreational activity and the injuries resulted from the materialisation of an obvious risk of that activity and that Moor had been provided with a risk warning.

The matter proceeded to trial and the primary judge accepted that the Club was negligent and awarded damages of $148,443.

In doing so the primary judge noted that the activity of descending the stairs was merely preparatory to engaging in the recreational activity of ice skating and that preparatory activity was not in itself a dangerous recreational activity.

The Club subsequently appealed to the Court of Appeal and Moor found no joy with the appeal.

Meagher JA with whom Emmett JA and Tobias AJA agreed, confirmed that tasks preparatory to engaging in a recreational activity are not in themselves a dangerous recreational activity.

Meagher JA noted:

> *"The definition of recreational activity focuses upon the pursuit of all activity engaged in at a place, as distinct from any particular characteristics of that place which may differ from those in other places at which the same activity is undertaken. The activity of walking in skating boots down the stairs at the appellant's sporting complex was not ice skating. Nor was it a necessary incident of ice skating either at those premises or more generally. At the appellant's premises, the skates could have been put on after descending the stairs."*

As the preparatory tasks were not a dangerous recreational activity the defences based on a risk warning and materialisation of an obvious risk of the recreational activity fell away.

That left the defence of obvious risk. The Court noted:

> *"Section 5F(1) defines an obvious risk to a person who suffers harm is a risk that in the circumstances would have been obvious to a reasonable person in the position of that person….It has been described as one which is clearly apparent or easily recognised or understood… It may include a risk that has a low probability of occurring and one which is not prominent, conspicuous or physically observable."*

The Court confirmed that the risk which is the subject of the enquiry called for by the legislation is that which is the subject of the claim for damages.

A forward looking enquiry is required to determine whether that risk of harm would have been obvious in the relevant sense of the hypothetical reasonable person in the circumstances of the plaintiff.

In this case Moor was 18 years of age. He was not familiar with the ice rink. He was a relatively inexperienced skater. He was wearing a size 13 skate boot, the blade of which was significantly longer than the tread of any of the stairs.

The Court of Appeal noted that the fact that there were balancing and other difficulties in descending the stairs in boots was easily observed from the actions of the patrons who descended whilst Moor was standing at the top of the stairs.

However Meagher JA when he considered whether the risk was obvious noted:

> *"It would have been apparent to a person in his position that the risk of falling when walking down the stairs was significantly heightened by the fact that he was wearing skating boots."*

In those circumstances the Court of Appeal determined that the primary judge had erred in finding that the risk of harm was not an obvious risk.

In this case the risk was obvious. There was no duty to warn of the risk of injury from descending the stairs.

However, that was not the end of the matter. It is not that there was no duty of care in respect of an obvious risk, there was simply no duty to warn of an obvious risk.

The Court of Appeal confirmed that the Club owed a duty to take reasonable care to provide a safe means of access to the ice rink. However, it was not Moor's case that the only means of access to the ice rink required the use of the stairs wearing skating boots or that the Club was negligent in not providing some other means of access. Moor accepted that the ice rink could be accessed by walking down the stairs in

ordinary footwear and putting skating boots on in areas at the bottom of the stairs where chairs were located.

The Court of Appeal noted Moor's case was not that there should have been signage which indicated the existence of that alternative means of access.

The Court of Appeal observed that a duty to warn is distinct from a duty to provide information but this was not a case where Moor argued that there had been a failure in the duty to provide information about the chairs at the bottom of the stairs.

Meagher JA confirmed a warning about a risk of harm may be given by describing the risk in general terms and describing the circumstances that give rise to it and in doing so, perhaps by identifying what might be done to avoid or minimise the risk. It may also be given by prohibiting the conduct which gives rise to or involves the risk.

For example, the risk of injury from diving into water which is or could be too shallow may be the subject of a warning which in words or diagrammatically conveyed that the water is or may be shallow. Alternatively, the warning may instruct what should be done to avoid that risk by discouraging or, as a more emphatic form of warning, prohibiting or purporting to prohibit that activity.

The primary judge had found that there were warnings which the Club ought to have given however the Court of Appeal concluded those warning were warnings of the risk of injury in descending the stairs with skate boots on and there was no duty to provide such warnings.

At the end of the day Moor failed in his claim against the Club. Even though descending the stairs was not a dangerous recreational activity, Moor's injuries arose from an obvious risk and there was no duty to warn of that obvious risk and as that was the only negligence alleged, Moor not succeed. The trial judge also found that the risk was not an obvious risk.

The defence based on the provision of a risk warning could have no relevance as there was no dangerous recreational activity.

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When is a work accident a motor accident?

The NSW Court of Appeal in *Eptec Pty Limited v Alaee* was recently called on to consider circumstances where it was alleged that a work accident gave rise to a claim for damages under the *Motor Accidents Compensation Act 1999("MAC Act")* rather than the Workers Compensation Act 1987 when a worker was injured whilst carrying out activities in an elevated work platform.

The contention that the accident was a motor accident was a significant issue for Alaee as he had been assessed as having a permanent impairment of less than 15% which precluded him from obtaining common law damages against his employer unless he could show that he was entitled to damages in accordance with the *MAC Act*.

Alaee was injured whilst working as a painter at the Thales Garden Island Dock. He was painting the Spirit of Tasmania whilst standing in a bucket in an elevated work platform("EWP"). He was working with a colleague who was operating the controls of the EWP. The co-worker was responsible for operating the controls which were located in the bucket.

By manipulating levers and buttons on the console an operator could drive the EWP backwards or forwards on its wheels and could move the bucket up and down. The controls also had a red button which was known as a "deadman's button" which if pressed could stop the operation of the machine.

Alaee could only succeed if he established his injuries were within Section 3A(1) of the *MAC Act*.

That section applies only in respect of the death of or injury to a person that is caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle and only if the death or injury is a result and is caused (whether or not as a result of a defect in the vehicle) during:

- the driving of the vehicle; or
- a collision, or action taken to avoid a collision, with the vehicle; or
- the vehicle running out of control.

Section 3 of the MAC Act defines fault to mean negligence or any other tort.

The MAC Act does not contain any definition of the term "driving".

There was no dispute that the vehicle was a vehicle for the purposes of the MAC Act. Vehicles such as elevated work platforms, cranes and forklifts fall within the definition of vehicle for the purposes of the MAC Act.

What was in issue was:

- whether or not the injury was caused by the fault of the co-worker;

- was the fault in the use or operation of the EWP; and
- were the injuries the result of and caused during the driving of the EWP.

The trial judge found that Alaee had satisfied all these three requirements and awarded damages in excess of $650,000. Eptec appealed.

In an unanimous judgment of the Court of Appeal, Sackville AJA concluded that it could not be determined whether Alaee's claim occurred during the driving of the EWP or operating the EWP to raise or lower the bucket and therefore there was insufficient evidence to determine whether the accident occurred during driving the EWP and fell for cover under the MAC Act. In those circumstances the claim failed.

The first question considered by the Court of Appeal was whether or not the injuries were caused by the negligence of the co-worker. The primary judge had found that the co-worker's negligence consisted of his failure to take appropriate action when the EWP began to rock violently after the instruments had been engaged to move the vehicle forward. The primary judge found that the co-worker had apparently panicked and failed to press the red stop button which presumably would have stopped the engine and terminated the violent rocking. The Court of Appeal accepted that it was open to the primary judge to find there had been negligence and accordingly, the injuries of Alaee were caused by the fault of the driver of the EWP but there was more to the case.

It was necessary to determine whether or not the fault of the driver was in the use or operation of the vehicle. This required a characterisation of the act of negligence.

The Court of Appeal noted that in *Whitehead v Lowe* the Court held, with some hesitation, that negligence by the operator for a stationary front end loader was in the use or operation of the loader. The loader was an articulated vehicle which had movable tines or forks attached to a hydraulic arm. The negligence consisted of operating and manipulating the tines so as to separate a 500kg chute from a sleeve to which it had been partially connected. This allowed the chute to swing free on a chain and strike the plaintiff who was standing nearby. The Court accepted that *Whitehead v Lowe* supported a finding in this case that the fault of the EWP operator was in the use or operation of the vehicle.

The Court of Appeal also noted that even if the co-worker had merely engaged the controls to raise or lower the bucket and not drive the vehicle forward, the injuries could probably be characterised as having been a consequence of or by reason of the use of the EWP.

However, the Court of Appeal noted it was not necessary to decide that point conclusively as the injury was not caused in the driving of the vehicle.

In *Whitehead v Lowe* it was held that the manipulation of the tines of the loader in order to move the chute into position while the loader itself was stationary, did not involve the driving of the loader.

In this case, the Court of Appeal noted that the critical finding of the primary judge was that the shaking of the bucket occurred as the worker engaged the instruments on the console in order to move the stationary EWP forward. This reflected an intention to drive the EWP to a new area and that the bucket began to shake when he attempted to drive the vehicle to that new area.

The Court of Appeal did not accept those findings were available on the evidence. Alaee's injuries may well have been the result of and caused by the driving of the vehicle even though the EWP had not actually commenced to move forward, however the problem for Alaee was that neither of these two critical findings of fact of the Primary Judge were supported by the evidence. The Court of Appeal concluded that the evidence fell short of establishing that the accident occurred while the driver of the EWP was attempting to move the EWP forward or had begun to do so.

The Court of Appeal noted the evidence did not address whether the operator of the EWP intended to or had begun to move forward, as distinct from commencing to raise or lower the bucket while the EWP remained stationary. The evidence was therefore not capable of establishing that the operator was attempting to engage the locomotive functions of the EWP rather than raising or lowering the bucket.

The Court confirmed that it was held in *Whitehead v Lowe*, if the operator of a dual function vehicle such as a loader or forklift, uses the controls to change the position of an attachment to the vehicle while the vehicle itself remains stationary, any injury occurring during this process is not a result of or caused during the driving of the vehicle.

As the evidence did not allow the Court of Appeal to determine the operator's intentions at the time, the Court of Appeal could not determine whether or not the injuries could have been sustained in the driving of the vehicle.

The appeal was ultimately successful, and Alaee's claim failed.

The case serves as a reminder that:

- a claimant bears the onus of establishing the facts necessary to prove a claim;
- the actual activity at the time of the accident must be determined to categorise the acts of negligence;
- if the operator of a dual function vehicle such as a loader or forklift, uses the controls to change the position of an attachment to the vehicle while the vehicle itself remains stationary, any injury occurring during this process is not a result of or caused during the driving of the vehicle and therefore is not governed by the MAC Act.

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When is a verdict for the defendant in the interests of an injured person?

When an injured person is legally incapacitated any settlement of proceedings for damages for personal injuries must be approved by the Court.

When determining whether or not a settlement should be approved the Court must weigh up whether or not the settlement is in the best interests of the incapacitated person. So, is a settlement on the basis of a loss ever in the best interests of a plaintiff? The simple answer is that it is, sometimes.

In *Nikolopoulos v Gajlay ANI Nominees Pty Limited*, Campbell J in the Supreme Court was called on to approve a settlement proposed for Nikolopoulos who was very seriously injured in the course of his employment as an apprentice electrician.

Nikolopoulos had suffered a severe electrical shock when he came into contact with an energised copper pipe located in the sub-floor space of a house whilst working for his employer. Nikolopoulos was left with a very substantial brain injury and had a 65% whole person impairment. He claimed workers compensation benefits. He also commenced proceedings against the owners of the property and a plumber claiming damages for injuries he sustained.

Nikolopoulos did not sue his employer.

The Court was called on to approve a settlement on the basis that there would be judgments in favour of each of the defendants which would bring the proceedings to an end. There was to be no order as to costs. No doubt there was some offer to pay the plaintiff's costs, however the terms of that offer were not reflected in the settlement to be approved by the Court as there would be no formal cost order.

Nikolopoulos had received workers compensation payments in excess of $1.2 million.

Nikolopoulos was represented by very experienced Senior Counsel and Junior Counsel who recommended the settlement and had advised Nikolopoulos' mother and tutor that Nikolopoulos was better off continuing on his workers compensation benefits which were likely to continue for the rest of his life.

The accident occurred at residential premises under renovation. Nikolopoulos' employer was a qualified and licensed electrician. The Court noted that as a qualified electrician, primary responsibility for the failure to disconnect the electrical supply before the commencement of work was one that would fall at the feet of the employer.

The Court noted that Nikolopoulos' common law rights against his employer were extremely truncated by the limitations in the *Workers Compensation Act 1987*.

It was also noted the case against the occupiers was likely to be weak even if evidence was garnered that the party responsible for energising the copper pipe was the plumber.

The Court noted that even if Nikolopoulos won his common law case against the plumber and others, his damages would be very substantially reduced by the operation of the apportionment provisions in the *Workers Compensation Act 1987* which adjusts damages where the employer and a third party have both been negligent.

The Court noted the parties were desirous of settling the common law proceedings by entering a judgment for each defendant with no order as to costs. The Court accepted that was in the interests of Nikolopoulos.

The agreement that there be no order as to costs does not prevent a side agreement that an amount for costs be paid to the plaintiff.

The Court confirmed that except with the approval of the Court there cannot be any compromise or settlement of any proceedings brought by a person under a legal incapacity.

The Court concluded that the decision made by the tutor to resolve the claim on the basis of a judgment for the defendant was in the best interests of Nikolopoulos who could remain on workers compensation benefits. Nikolopoulos is not affected by the 2012 amendments which restrict ongoing entitlements to weekly compensation as he was severely injured.

As can be seen, settlement on the basis of a judgement for the defendant can be in the interests of an injured person particularly where their workers compensation benefits paid and payable in the future will be more beneficial than any damages award.

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All accidents are not caused by negligence

The NSW Court of Appeal in *Coote v S&P Jackson Pty Limited* has provided a timely reminder to those injured in accidents that they must establish negligence has caused an accident in order to recover damages for the injuries sustained. It is not enough if the evidence gives rise to conflicting inferences of equal degree and probability so that the choice between them is a mere matter of conjecture.

Coote was employed by Boral Construction Materials Group Limited as a plant operator at an asphalt batching plant at Coffs Harbour.

Boral had contracted with North Coast Cranes to supply a 15 tonne Tadano crane to facilitate the clearing of a blocked dust extraction unit 15 metres above the ground.

The crane lifted a work box containing Coote and Brendan Curry to the height of the dust extraction unit. French, another employee, was operating the crane.

After the box had been suspended for between 30 and 45 minutes Coote requested Curry to ask French to lower the box one or two metres.

After being raised slightly to enable the lowering to occur, the work box suddenly fell to the ground whilst still attached to the crane's fly jib.

Coote and Curry suffered serious injuries.

The crane was 24 years old and it had not reached the time for its 25 year service.

The crane required a service at 10 years however no record was found which showed that the crane had undergone a 10 year service.

Two experts gave evidence. One expert's theory was that the occurrence was a rare, unforeseeable event and both experts agreed that no reasonable steps could have been taken to avoid the accident occurring if that was the case.

The other expert concluded the accident occurred due to wear which was foreseeable. However the evidence did not establish that any steps a reasonable person would have taken would have detected the wear prior to the accident as the wear would only have been detected at the 10 or 25 year services which were major services or if a problem with the operation of the clutch led to a need to inspect the clutch. Ordinary maintenance services other than the 10 year and 25 year major services would not have identified the wear referred to by the expert. The wear would only have been detected if the clutch valve was removed and checked.

At the original trial the primary judge accepted the evidence of the expert that concluded that the occurrence was a rare unforeseeable event.

Coote had also argued that the accident was a motor accident governed by the *Motor Accidents Compensation Act 1999* however the primary judge concluded the accident was not a motor accident. The injuries were not caused by the driving of the vehicle.

Coote was dissatisfied with the rejection of his claim and an appeal followed however Coote found no joy in the appeal.

The Court of Appeal dismissed the appeal concluding that the primary judge's preference for the theory of one expert was well founded but even if that were not the case, a Court is required to reach a definite conclusion affirmatively drawn that the other expert had correctly identified the cause of the accident if the other expert was to be preferred and the evidence did not permit that finding.

Macfarlan JA noted that:

> *"In examining an issue which provides a foundation for a finding of negligence, it is necessary for the Court to reach a definite conclusion affirmatively drawn. It is not enough if the evidence gives rise only to conflicting inferences of equal degree of probabilities so that the choice between them is a mere matter of conjecture."*

The experts provided opinions based upon theoretical possibilities.

Testing of the crane after the incident showed that the clutch selector valve lost pressure over time, however cranes that hold a load static for a period of time do lose hydraulic pressure, with the rate of loss depending on the age of the crane and the older the crane, the greater the loss. However, that leakage was quite normal.

A sudden failure caused the action because there had been sufficient pressure for the crane to raise the work

box. A momentary failure of the valve could not be replicated on testing.

There was a possibility there was a contaminant in the hydraulic fluid. It was also possible the contaminant may have been a part of a filter that had broken off. However, no contaminant was found on inspection subsequent to the accident.

As any wear could only have been detected during the 10 or 25 year service and only the 10 year service could have occurred, Coote focused on the absence of a document substantiating that the 10 year service took place as establishing that there had been no service.

However the Court of appeal concluded the absence of a record of the service was not a sufficient basis for inferring that it had not been done, particularly as there had been a change in ownership of the crane. No compelling inference that the 10 year service had not occurred could be drawn.

In this case the evidence did not establish that there were any steps that a reasonable person would have taken that would have avoided the accident. As a result, neither expert's theory on the cause of the accident supported a finding of causative negligence.

In a damages claim based in negligence it must be proved that a reasonable person in the position of a defendant would have taken steps to prevent the risk of harm.

Here, there were no reasonable steps that would have been taken that could have prevented the accident and there was no one to blame for an accident that was not foreseeable.

Here there was a horrific accident at work and the injured employees could not establish negligence.

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Offers of compromise - The Court provides further guidance

In the last couple of years there has been ongoing debate in the Courts in relation to the appropriate form of an Offer of Compromise. That debate has resulted in amendments to the Uniform Civil Procedure Rules 2005 which govern Court proceedings.

The NSW Court of Appeal has again considered the format and effect of an Offer of Compromise in the recent decision of *Leach v The Nominal Defendant*.

We have previously discussed the outcome of the case in a recent edition of GD News. On 28 November 2008 at about 9.50 pm, Steven Leach was a passenger in a Mitsubishi Magna and an unidentified white Holden Commodore struck the Mitsubishi in its rear, causing it to move slightly to the left. Gunshots were fired from the Holden into the Mitsubishi and Leach was shot, as a consequence of which he sustained injury. The Commodore from which the shots had initiated was stolen and uninsured. Leach subsequently brought proceedings in the District Court against the Nominal Defendant and was unsuccessful in his claim. Leach appealed and the appeal was also unsuccessful.

Prior to the Court of Appeal hearing the Nominal Defendant had served an Offer of Compromise on the basis of a verdict for the respondent with each party to pay their own costs in respect to proceedings in the District Court and the Court of Appeal proceedings. After the unsuccessful appeal, an application was made by the Nominal Defendant for indemnity costs, relying on the Offer of Compromise served. That application was opposed by Leach. A similar offer had been served in the District Court proceedings and the trial judge, Judge Kearns declined to make an order for indemnity costs on the basis that the case "was not a straightforward one, even with all the facts determined in favour of the plaintiff".

In relation to the costs application in the Court of Appeal Leach did not dispute the fact that judgment on appeal was more favourable to Leach than the terms of the offer. As the appeal was dismissed with costs, the Nominal Defendant retained the costs order in its favour at trial as well as the Court of Appeal costs.

Leach made submissions in relation to the manner in which the offer was framed but these were rejected by the Court of Appeal. The Court of Appeal noted that the current Uniform Civil Procedure Rule 20.26 refers to the wording of "verdict" as opposed to "judgment" and now proposes "No order as to costs" whereas the offer contained the words "Each party ... pay their own costs." The Court of Appeal in that regard noted that the effect of a "No order as to costs" order is that each party must pay their own costs and therefore the effect of the wording was the same.

The Court of Appeal then went on to consider whether or not the offer was a "genuine Offer of Compromise". In this regard the Court of Appeal noted that whether or not an offer has a real element of compromise must be determined effectively according to the circumstances of the particular case in which the offer was made.

The Court of Appeal noted that previous consideration has been given to offers made on the basis of judgments for defendants with each party to bear their

own costs. Justice McColl who delivered the leading judgment, stated:

"In my view in the circumstances of this case, the offer did constitute a genuine Offer of Compromise. The opportunity to offer any compromise for the respondent was limited. The substantive issue on appeal was an all or nothing determination on the liability issue. There was no range of verdicts as in the case of a challenge to an award of damages or to an assessment of contributory negligence or contribution between tortfeasors (see Leichhardt Municipal v Green) ... thus the only room for compromise was in relation to costs, in which respect the respondent was prepared to forego the costs order it had been awarded by the primary judge and any costs order it may ordinarily obtain in this Court ... that constituted a "real concession"."

However, the Court of Appeal was not persuaded to vary the costs order. Justice McColl formed the view it was not unreasonable for Leach not to accept the Offer of Compromise. Justice McColl noted:

"In my view, the liability case cannot be said to have been frivolous or vexatious so as to trigger the indemnity costs mechanisms. It was difficult and, to a certain extent, novel, as is apparent from the discussion in Leach (No.1) and the different outcome in Nominal Defendant v Hawkins upon which the appellant relied heavily. Thus, at the time the offer was made, notwithstanding the primary judge's conclusion (and as His Honour recognised in his costs judgment) the outcome on liability was "far from a foregone conclusion"."

So, what is the latest guidance from the Court of Appeal? Although it was not an issue in this case, care must be taken when framing Offers of Compromise to ensure that they comply with the correct form. If the offer constitutes a walk away offer then the Court will look at all of the circumstances of the case and consider whether or not a failure to accept the offer was unreasonable.

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EMPLOYMENT ROUNDUP

Accruing annual leave whilst receiving workers compensation payments

Since the introduction of the *Fair Work Act 2009* Section 130(1) has operated so that injured employees in receipt of workers compensation payments are prevented from accruing or taking any leave entitlements whilst in receipt of workers compensation payments.

Section 130(1) provides:

"*An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a compensation period) when the employee is absent from work because of a personal illness, a personal injury, for which the employee is receiving compensation payable under a law (a compensation law) of the Commonwealth, a State or a Territory that is about worker's compensation*"

However, Section 130(2) of the Fair Work Act, 2009 provides:

"*Subsection (1) does not prevent an employee from taking or accruing leave during a period of compensation if the taking or accruing of the leave is permitted by a compensation law."*

In the Explanatory Memorandum to the Fair Work Act, 2009 the effect of Clause 130 is to "switch off" the leave accrual and taking rights for the period of the employee's absence from work in receipt of worker's compensation.

There has been much debate about whether Section 49 of the *Workers Compensation Act 1987* (NSW) is a state law which authorises the taking or accruing of annual leave whilst an injured employee is in receipt of payments of worker's compensation.

Section 49 provides that workers compensation is payable to a worker in respect of any period of incapacity even though the worker has or is entitled to receive in respect of the period of payment an allowance or benefit for holidays, annual holidays or long service leave.

There have been many views expressed as to whether Section 49 of the *Workers Compensation Act 1987* permits an employee to take or accrue leave during a compensation period.

Some employers have interpreted Section 49 of the *Workers Compensation Act 1987* ("WC Act") as not creating an entitlement to take or accrue annual leave. Simply, it requires a Scheme Agent to continue to make payments of weekly compensation during a period of incapacity notwithstanding an employee has received or is entitled to receive a payment for annual leave. Any payment for annual leave would be in addition to an employee's entitlement to receive workers compensation.

Section 49 of the WC Act does not, by its express words, prevent or authorise an employee from taking

or accruing annual leave. It simply provides an obligation on a Scheme Agent to make payments during a period of compensation notwithstanding an employee is also receiving annual leave payments. On one view, annual holidays are an entitlement that has been accrued to an employee so that an employee is entitled to receive a payment for when he or she is absent from work. Any payment made to an employee who is in receipt of workers compensation would, in effect, be a cashing out of that employee's entitlement to annual leave.

However there has been a recent decision in the Federal Circuit Court in *NSW Nurses and Midwives Association v Anglican Care* [2014] FCCA 2580. Her Honour Judge Emmett has determined that a liberal approach to statutory interpretation is appropriate when dealing with legislation aimed at protecting the safety of workers and providing for compensation to injured workers. Her Honour considered it was well established that beneficial and remedial legislation should be given a "liberal construction (see *IW v The City of Perth* [1997] HCA 30]).

Her Honour considered Section 49 of the WC Act expressly provides for the opportunity for an employee to receive workers compensation and accrue annual leave at the same time. Her Honour was satisfied Section 49 of the *WC Act* does not prevent a worker from receiving both compensation and accruing annual leave and on that basis (on a beneficial construction) permits the receipt of those payments because it does not expressly prevent a worker from accruing annual leave.

Consequently, Her Honour concluded that as Section 49 of the *WC Act* does not prevent an employee from receiving both annual leave and worker's compensation payments (and indeed expressly provides that an employee can receive both workers compensation and accrued leave) and a beneficial construction of Section 130(2) of the *Fair Work Act, 2009* would allow for it to be enlivened as Section 49 does not prevent the accrual of annual leave. In that sense, Her Honour says Section 49 of the WC Act "allows" or "permits" the receipt of both.

The Court determined that Anglican Care was required to pay Ms Copas an amount that reflected the accrual of annual leave owed to her under the Fair Work Act during the period from 1 January 2010 to 23 May 2013 whilst she was on workers compensation benefits.

This is the first judicial decision on the interpretation of the effect of Section 130 of the *Fair Work Act 2009*. Employees should be aware this decision of the Federal Circuit Court means New South Wales employers should accrue annual leave for their injured workers who are not at work when in receipt of workers compensation payments.

We expect the decision will go on appeal having regard to the significant ramifications for employers in New South Wales who are not accruing annual leave for employees off work on compensation because of the perceived application of Section 130(1) of the *Fair Work Act 2009.* No doubt some employers are now facing significant contingent liabilities.

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Reinstatement as a remedy for unfair dismissal – when is it appropriate?

In *Thing Nguyen & Thanh Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, the Full Bench of the Fair Work Commission (FWC) provided a helpful analysis of the appropriateness of the remedy of reinstatement following the termination of employees. The case was an appeal from the decision below in which the Commissioner concluded that reinstatement was inappropriate and made an order for compensation. In doing so, FWC took into account the existence of ongoing litigation between the parties involving the underpayment of wages.

Nguyen and Le had been employed as teachers at the Vietnamese Community Ethnic School (the School) for many years prior to being dismissed from their respective employment. They commenced proceedings seeking orders for reinstatement and the payment of lost remuneration. The School opposed the reinstatement submitting that it was neither practical nor appropriate on the basis that, among other things, the relationship between the parties had been so damaged that it could not be restored, and changing teachers part way through the school year would be detrimental to the students.

Section 390 of the *Fair Work Act 2009* (the Act) deals with remedies for unfair dismissals. Relevantly, it provides as follows:

> *390 When the FWC may order remedy for unfair dismissal*
>
> *(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:*
> *(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and*

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Nguyen's and Le's submissions in the appeal were that reinstatement automatically follows from a finding of unfair dismissal. The Full Bench held that this was not correct and that there is no automatic right to reinstatement consequent upon a finding that an applicant has been unfairly dismissed. Reinstatement will only be ordered if the FWC is satisfied that it is *appropriate* to do so.

The Full Bench found that subsection 390(3) underscores the primacy of reinstatement as a remedy for an unfair dismissal and noted that the discretion to order a remedy of compensation may only be exercised if the FWC is satisfied that reinstatement is "*inappropriate"*.

The Full Bench recognised that the most common argument advanced in support of the proposition that reinstatement is inappropriate, that "*there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship*." "Trust and confidence" in this context is not to be confused with the implied term in a contract of employment of mutual trust and confidence, the existence of which was recently rejected by the High Court in *Commonwealth Bank of Australia v Barker* (see GD News for November for further detail). The context with which the FWC was concerned was that which is essential to make an employment relationship workable.

Dealing with various authorities concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate, the Full Bench found:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but whilst important, it is not the sole criterion or even a necessary one;
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship is capable of withstanding some friction and doubts;
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based. The onus of establishing a loss of trust and confidence rests on the party making the assertion;
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the dismissed employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship is irreparably damage or destroyed;
- The fact that it may be difficult or embarrassing for an employer to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct is not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate;
- The ultimate question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In assessing this, the FWC will consider the rationality of any attitude taken by a party.

In considering the decision under appeal, the Full Bench noted that the Commissioner at first instance had regard to the following:

- Ongoing litigation relating to Nguyen's and Le's underpayment claims;
- The manner of communication between the parties during the course of earlier conferences;
- The fact that reinstatement could disrupt the operations of the School and the delivery of classes to students, particularly mid-way through the school year; and
- A declaration signed by other School teachers which appeared to identify the potential for disruption and conflict between Nguyen and Le with other teachers.

The matters raised by Nguyen and Le did not persuade the Full Bench that the Commissioner erred in his consideration of whether to grant the remedy of reinstatement. It did however recognise that in pursuing their underpayment claims, Nguyen and Le were exercising a workplace right within the meaning of section 341(1)(b) of the Act. Part 3-1 of the Act prohibits an employer from taking adverse action against an employee where he or she is exercising such a right. The Full Bench found that it would be incongruous if the exercise of a workplace right operated as a barrier to reinstatement in an unfair dismissal proceeding in circumstances where Part 3-1 of the Act prohibits an employer from terminating the employment of an employee who exercises a workplace right.

The acrimony between the parties arising from Nguyen's and Le's underpayment claims was found not to be a matter which the Commissioner ought have taken into account in determining whether reinstatement is appropriate. However, that error did not alter the fact that there was a sound and rational basis for the Commissioner's finding that it was inappropriate to restore the employment relationship. Ultimately, the limited error in the decision below was insufficient to enliven the public interest requirement necessary for leave to appeal to be given and the appeal was dismissed.

This decision reminds us that in unfair dismissal cases, reinstatement is always the primary remedy to be considered by the FWC. Any award for compensation is only considered where the FWC is satisfied that reinstatement would not lead to a viable and productive relationship such that restoration of the employment relationship is inappropriate.

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Alleged malevolent micromanaging found not to constitute bullying

The Fair Work Commission (FWC) received an application for an order to stop bullying and has found that alleged malevolent micromanaging and performance improvement plans and management did not justify the applicant's belief that the management action was motivated by a desire to establish a reason to terminate the applicant's employment.

The Applicant in *Applicant v Respondent* [2014] FWC 6285 was a senior employee with a Commonwealth department. He alleged that his senior manager, Mr PR engaged in bullying conduct that was unrestrained by upper management.

The application initiating the FWC proceedings detailed the alleged bullying behaviour to include PR:

- Telling the Applicant to go back where he came from;
- Constantly intimidating the Applicant, putting the Applicant down and criticising his every move;
- Making hurtful remarks and making the Applicant feel less important and undervalued;
- Distorting and fabricating information about the Applicant, including non-existing performance issues;
- Patronising the Applicant and putting him down under the guise of having performance issues;
- Checking the time of the Applicant's arrival to and departure from the office.

PR provided evidence that he had a number of concerns regarding the Applicant's performance. These included the Applicant's ability to use the Respondent's information system for communication and knowledge management; his ability to follow through on instructions and guidance as directed from his supervisor and other senior officers; his ability to communicate appropriately on projects or tasks; and his ability to take responsibility for managing work projects to achieve results.

The Respondent instituted a Performance Improvement Plan (***PIP***) for the Applicant which was intended to run for 5 weeks. The PIP required Mr PR to provide continual feedback to the Applicant regarding performance issues. At the conclusion of the 5 week program, the Applicant was held to have partially satisfied 1 of 5 criteria.

The Respondent's response to the Applicant's allegations of bullying was that the Applicant was underperforming at his level and that it had been attempting to manage his work for the purpose of improving his performance. It rejected the suggestion of bullying and submitted that it had engaged in ordinary management of the Applicant's performance.

The FWC found that it was not in a position to make any findings about the reasonableness of PR's concerns regarding the Applicant's performance. It did find however that some of the performance issues raised by PR appeared to be of minor significance whilst others appeared more significant.

The FWC however was satisfied that PR's concerns about the Applicant's performance were not motivated by an intention to bully him. It noted that the perception of a malevolent motivation and an apprehension of termination of employment as an outcome of that conduct gave rise to significant health issues for the Applicant and that he was concerned about his continued employment and the financial stability of his family. However, the FWC was not satisfied that the Applicant's beliefs were justified finding that the evidence demonstrated an ordinary exercise of management prerogative and that the management of the Applicant's performance proceeded in an ordinary fashion.

This case serves as a reminder that reasonable management action does not equate to bullying.

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WORKERS COMPENSATION ROUNDUP

Reinstatement of Injured Workers on Fixed Term Contracts

Part 8 of the *Workers Compensation Act 1987* allows for an injured worker to apply for reinstatement if they are terminated on the basis of their injury.

Recently, the NSW Industrial Relations Commission in *Gardner v Secretary of Treasury (Department of Justice-Corrective Services NSW)* examined the application of these provisions to a fixed term contract.

Darren Jacob Gardner ("Gardner") was employed by the Department of Corrective Services ("DCS") as an assistant accommodation support worker in the Community Offenders Support Program at Malabar. Gardner's employment commenced with the Department of Corrective Services on 30 January 2012 on the basis for a fixed term of 12 months.

On 1 December 2012, Gardner suffered a psychological injury and submitted a claim for workers compensation. At the time, Gardner's employment was due to conclude on 29 January 2013. As DCS had not made a final decision as to whether or not to accept or decline the worker's compensation claim, Gardner's employment was extended for a period of four weeks from 29 January 2013 to 24 February 2013. At that time he was advised his employment would not be extended past 24 February 2013.

Subsequently, Gardner brought a claim for workers compensation. When he recovered from his injury, he obtained a medical certificate to the effect that he was fit to resume his usual duties. His solicitor made a request to the DCS to be reinstated as he was fit for his pre-injury employment.

Section 243 of the *Workers Compensation Act* 1987 empowers the Industrial Relations Commission ("IRC") to order reinstatement if they are satisfied that the worker is fit. Section 244 presumes that the injured worker was dismissed because he or she was not fit for employment as a result of the injury received. This presumption however can be rebutted.

In the hearing of the application, DCS submitted that Gardner's temporary employment had only been extended due a delay in determining his workers compensation claim. The claim had still not been resolved by the end of the four week extension period but Gardner's employment still came to an end. This was not only because he had been told there would be no further extension but because there no other ongoing employment opportunities with DCS.

The IRC determined that the DCS had rebutted the presumption that Gardner was dismissed because he was not fit for employment as a result of the injury received. The IRC was satisfied that Gardner's injury was not a substantial and operative cause of his employment being terminated. The IRC commented that if DCS wished to terminate his employment because of the injury, it would not have extended his temporary employment contract which was to end on 29 January 2013. Instead DCS provided a further four weeks of employment, making it clear there would be no further extension.

Finally the IRC pointed out that the reinstatement provisions are only enlivened if a worker was dismissed because he or she is not fully fit for employment as a result of the injury received. Where a fixed term contract comes to an end by the effluxion of time, it is not a dismissal.

This decision appears to be the first case brought in IRC for reinstatement of a worker on a fixed term contract. The IRC has made it abundantly clear that the expiry of an employment contract does not constitute a dismissal.

Although Gardner was not dismissed the IRC provided further comment that there is no obligation of any employer to maintain the employment of a worker who has suffered an injury, if the reason for the termination is other than that the worker is not fit for employment as a result of the workplace injury. This is even in the situation where the termination takes place within six months of the date of injury. Although the legislation prescribes a presumption that the termination of an injured worker is on the grounds of the injury, it is a rebuttable presumption.

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WIRO's work capacity reviews in November – Some common themes

This month we look at WIRO's review of work capacity decisions. Common concerns are apparent and scheme agents should take heed of those concerns when drafting work capacity decisions.

The most common concern is a drafting issue concerning the giving of notice. Section 54(2)(a) of the *Workers Compensation Act 1987* provides for a "required period of notice" of three months where there is a discontinuation or reduction of weekly

compensation. As a result of Section 76(1)(b) of the *Interpretation Act 1987* and Clause 6 of the WorkCover Work Capacity Guidelines ("the Guidelines") the notice period is extended by 7 days where the decision is delivered by post.

WIRO considered the following paragraph as an *almost* adequate formulation of the notice requirements:

> *"The decision I have made will result in a discontinuation of your weekly benefits. Because you have been receiving weekly benefits for a continuous period of more than 12 weeks, section 54 of The Act requires I provide you with three months notice before this decision comes into effect. I have extended that period by a further week to allow for the delivery of this notice by post in accordance with Section 76(1)(b) of the Interpretation Act 1987 and Clause 6 of the WorkCover Work Capacity Guidelines."*

However, the shortcoming of this paragraph was in the failure to provide a specific date upon which weekly compensation would cease.

WIRO has commented in multiple decisions that insurers are treating the notice provisions as maximum payment provisions as opposed to minimum notice provisions. A failure to provide proper notice results in a misrepresentation sufficient to constitute a "demonstrable error".

Another matter for concern is the requirement to advise the worker "*that any documents or information that have not already been provided to the worker can be provided to the worker on request to the insurer"* (Guideline 5.3.2. of the Guidelines). Scheme Agents are incorrectly indicating that if further copies of documents previously provided are required contact should be made with the Scheme Agent. There is no such requirement in the Guidelines.

There have also been failures by Scheme Agents to refer to all evidence considered in making decisions. In a number of decisions, Scheme Agents have listed documents and only referred to some of the documents in the work capacity decision. The Guidelines require that "*[a]ll evidence considered should be referred to, regardless of whether or not it supports the decision."* The Guidelines require an evaluation of all available and relevant evidence. A failure to reference material considered could be inferentially considered a failure to consider all available and relevant evidence resulting in a breach of the Guidelines.

Another issue, albeit not as prevalent, is the reliance upon outdated evidence (a WorkCover Certificate of Capacity which pre-dated the work capacity decision by over eight months), which WIRO has commented is non-compliant with Guideline 3.2 which requires the insurer's decisions to be *"timely, informed and evidence based."*

A failure to provide a proper explanation also appears as a recurring theme in the WIRO review decisions. This issue predominately arises where there has been a failure to:

- Advise the exact amount of weekly compensation;
- Explain entitlement periods for weekly compensation;
- Explain ongoing medical and treatment expense entitlements as provided for in Sections 59A(2) and (3) of the Workers Compensation Act 1987;
- Provide calculations upon which the Scheme Agent has determined a reduction in weekly compensation;
- Provide a relevant date, for example, date on which the work capacity assessment was conducted; and
- Applying hours able to work as provided for in a WorkCover Certificate of Capacity rather than the actual hours the worker is working.

This is not an exhaustive list by any means.

WIRO has also referred to typographical errors or an obvious failure to complete a pre-defined field in indicating there are issues regarding quality control which should not occur particularly as work capacity decisions are made by one employee of a Scheme Agent and reviewed and confirmed by another.

A breach of the Guidelines is a failure to comply with delegated legislation and renders the work capacity decision invalid. Scheme Agents then need to reinstate the worker's entitlement to weekly compensation and make back-dated payments. Payments continue until such time as a further work capacity decision is made and comes into effect.

The work capacity decisions which are currently being reviewed by WIRO date back to mid-2013 and may not be reflective of the current practices of Scheme Agents however Scheme Agents should take heed of the recurring concerns of WIRO and address these concerns when drafting work capacity decisions to ensure decisions are consistent with the Guidelines and are not invalidated by WIRO.

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Pitfalls in declining liability - Substantial contributing factor

A recurring theme in numerous Presidential Appeal decisions we have reviewed, particularly those determined by Deputy President Roche, are comments in relation to poorly drafted Section 74 Notices. The Presidential unit has focussed particular attention on the practice by insurers in drafting Section 74 notices declining liability by asserting that the worker's employment is "no longer a substantial contributing factor to the injury". In the recent decision of *Ross v State of New South Wales* [2014] NSWCCPD 74 Deputy President Roche made the following statement about this practice:

> *"As the Commission has explained on dozens of occasions, both in its decisions and in seminars, employment only has to be a substantial contributing factor to the injury not the consequences of the injury, such as the need for treatment…It is most unsatisfactory that the insurance industry continues to repeat this fundamental mistake."*

So consider yourself warned!

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CTP ROUNDUP

Knowledge of intoxication of driver but no contributory negligence

In motor accident personal injury claims in NSW the assessment of liability and damages in governed by the *Motor Accidents Compensation Act 1999* (the "MAC Act").

Section 138 of the MAC Act provides that the common law and enacted law as to contributory negligence applies to an award of damages in respect of a motor accident.

The *Civil Liability Act 2002* ("CLA") contains provisions that regulate awards of general damages and contributory negligence.

Section 5R of the CLA provides that when determining whether a person has been contributorily negligent it is necessary to apply the principles in the CLA that apply when determining whether a person has been negligent.

Section 5B of the CLA provides that a person is not negligent in failing to take precautions against a risk of harm unless:

- the risk was foreseeable;
- the risk was not insignificant;
- in the circumstances a reasonable person in the person's position would have taken those precautions.

In determining whether reasonable precautions against a risk of harm would have been taken, the Court considers:

- the probability that the harm would occur if care were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk of harm; and
- the social utility of the activity that creates a risk of harm.

Section 138 of the MAC Act also provides that a finding of contributory negligence must be made where the injured person or deceased person has been convicted of an alcohol or other drug related offence in relation to a motor accident unless the plaintiff satisfies the Court that the alcohol or other drug involved in the commission of the offence did not contribute in any way to the accident.

A finding of contributory negligence must also be made when an injured person was a voluntary passenger in a motor vehicle and the driver's ability to drive was impaired as a consequence of the consumption of alcohol or any other drug and the injured person was aware or ought to have been aware of the impairment unless in the circumstances of the case the injured person or deceased person could not reasonably be expected to have declined to become a passenger in or on the motor vehicle.

Damages awards in respect of a motor accident are to be reduced by such a percentage as the Court thinks just and equitable in the circumstances.

Justice Hammill in the Supreme Court of NSW in *Pallier v Solomons* was recently called on to determine whether or not there had been any contributory negligence in circumstances where the evidence established that a passenger in a vehicle who had been severely injured had been aware that the driver was impaired by alcohol.

At around 11.00 pm Pallier suffered serious injuries when he was a passenger in the back seat of a motor vehicle driven by Solomons.

The most significant injury was a brain injury causing him almost total incapacity. Pallier had just turned 16 at the time of the collision.

There were five people in the car at the time of the accident.

Solomons asserted that Pallier contributed to his injuries by choosing to travel with Solomons in circumstances where he knew or ought to have known that Solomons' driving would be impaired by his intoxication from the consumption of alcohol.

Pallier argued that he was not aware of Solomons' intoxication and that the evidence would not lead to the conclusion that a reasonable person in Pallier's position ought to have been so aware.

Pallier also alleged Solomons deliberately drove his car partway off the road causing it to collide with a ditch or culvert and flip over, landing on its roof. Pallier argued that the deliberate actions of Solomons should result in a finding that the accident was not foreseeable. Pallier argued that alternatively, if the accident was foreseeable, it was just and equitable for there to be a finding of 0% contributory negligence in circumstances where the driver deliberately drove off the roadway.

On the night of the accident there was a small party in celebration of the NRL Grand Final. There were about 12 or 13 people at the party. A lot of young men were drinking beer and rum. The analysis of Solomons blood alcohol content taken after the accident revealed a BAC of 0.047.

Expert evidence was called which established that the blood alcohol level was between 0.062 and 0.084 at the time of the accident.

The Court accepted that expert evidence confirmed that there was unlikely to be any signs of frank intoxication, for example, slurred speech or impaired balance, however there may have been several signs of intoxication although those signs would only be mild.

The experts disagreed as to whether a reasonable person would or should have known that Solomon's capacity to drive a motor vehicle was impaired as a consequence of the consumption of alcohol.

A COPS report noted that Solomon smelt strongly of alcohol after the accident.

Solomons and Pallier were not known to each other before the accident, such that Pallier would have known how Solomons behaved when drinking. Pallier and Solomons had only spoken to each other for about 10-15 minutes at the party although this did provide Pallier with some opportunity to gauge Solomons' sobriety or state of intoxication.

Solomons was of the opinion he was not affected by alcohol to the extent that his driving would be impaired. He knew he was a P Plater with a zero tolerance for driving after drinking. Solomon was eligible for his full black licence whereupon he would have been permitted to drink but only to the extent of a blood alcohol reading of 0.05. Solomon believed his blood alcohol reading was less than 0.05 when he was driving.

Solomon took a most circuitous route to his end destination with his passengers. The Court noted it was or must have been obvious to all concerned that this was a deliberate action calculated to avoid the possibility of a random breath test by Police.

Balancing these factors, the Court determined that Pallier knew or ought to have known that Solomons' driving may be impaired although his knowledge of the extent of that impairment would be slight. The Court noted that it was far from satisfied that Pallier could have had any warning that Solomons would deliberately drive off the road.

The Court noted that Solomons had been driving for around half an hour before the incident. Solomons in his evidence accepted that he suggested that he would scare the boys in the back by driving off the road to take out a guide post. Shortly after making that suggestion, Solomons drove off the road. The Court accepted that Solomons' action were deliberate. He was skylarking.

The Court accepted that Solomons deliberately drove off the road to take out a guide post which constituted negligence of an extremely high order. The Court noted the boys in the back of the car including Pallier, would have no possible forewarning that Solomons might drive in such an erratic and dangerous manner, let alone he would do so deliberately.

The Court noted this factor should be taken into account when determining whether or not there was any contributory negligence of Pallier.

The Court noted the driver was mildly to moderately impaired by alcohol when he was driving.

A reasonable person in Pallier's position would know or ought to have known that Solomons' driving would be impaired to some degree by intoxication.

The initial part of the journey was unremarkable.

The accident occurred because of the deliberate act of the driver of driving the car off the roadway to hit a guide post in order to scare the passengers. Whilst the driver's actions may have been influenced by the consumption of alcohol, Pallier had no warning that Solomons might conduct himself this way.

The Court held a reasonable person in Pallier's position would not reasonably have known and could not have predicted Solomons' behaviour.

The Court noted that the risk that there would be a car accident and consequently an injury because of Solomons' impairment due to intoxication was foreseeable. However, the deliberate actions of Solomons were not foreseeable.

The Court ultimately concluded that a reasonable person in Pallier's position would not have taken precautions against the risk of harm which confronted Pallier, being a risk that a mildly intoxicated person would deliberately drive off the roadway.

In that situation the Court concluded that as the risk was not foreseeable, a finding of contributory negligence was not available. However, even if the risk was foreseeable, the Court noted that it would be just and equitable to reduce damages by 0%.

Here, it was found that Pallier was aware of the impaired capacity of the driver but the driver's deliberate actions were such that a reduction for contributory negligence was not justified.

Pallier was entitled to a judgement of $1,638,062 without discount for contributory negligence.

As can be seen, in some cases there can be a finding of 0% contributory negligence even where a driver's ability to control a motor vehicle is impaired by alcohol and an injured passenger is aware of that impairment.

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