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Statutory duty under the Mental Health Act – No duty of care

On 12 November 2014 the High Court unanimously held that Hunter & New England Local Health District, a health authority responsible for the conduct of a hospital and its medical staff in Taree did not owe a duty of care to the relatives of a man killed by a mentally ill patient who had been discharged from the hospital into the man's care.

Phillip Pettigrove was a paranoid schizophrenic. He was in New South Wales with a friend, Stephen Rose, when he was involuntarily admitted to and detained in, the Manning Base Hospital at Taree.

Dr Coombes, a psychiatrist determined that Pettigrove was a mentally ill person as defined by the *Mental Health Act 1990* (NSW) and that he should be detained under the Act.

Dr Wu, the medical superintendant at the hospital, formed the same opinion.

On the day of Pettigrove's admission to hospital the hospital obtained the medical records of Pettigrove from the Echuca Community Mental Health Service. Dr Coombes considered those records and spoke with Pettigrove, Pettigrove's mother and Mr Rose and everyone agreed that Pettigrove should be kept in hospital overnight and that Mr Rose would then drive Pettigrove to his mother's home in Echuca where he would receive continuing medical treatment.

Pettigrove was discharged from hospital on the following day, was picked up by Mr Rose and they set off to travel by car to Echuca. In the course of the journey Mr Pettigrove killed Mr Rose. Pettigrove told Police he had acted on impulse, believing that Mr Rose had killed him in a past life. Pettigrove later took his own life.

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The question for the High Court was whether or not the hospital or Dr Coombes, for whom the hospital was liable, owed Mr Rose or his relatives a duty of care that was breached by discharging Pettigrove into the company of Mr Rose.

The hospital and Dr Coombes acted under the *Mental Health Act 1990* when Pettigrove was detained in hospital.

Proceedings were commenced against the Hospital by two relatives of Mr Rose claiming damages for psychiatric injuries sustained consequent to the death of Mr Rose.

The proceedings were originally heard in the District Court before Elkaim DCJ, who determined that there had been no breach of duty by the hospital.

Elkaim DCJ found that it was not shown by the relatives that a reasonable person in Dr Coombes' position would have concluded that there was a not insignificant risk of Mr Pettigrove behaving as he did. Elkaim DCJ also found that Dr Coombes had acted in a way that was widely accepted in Australia by peer professional opinion for competent professional practice.

An appeal to the NSW Court of Appeal followed and the Court of Appeal in a majority judgement (2:1) determined that there had been a breach of duty of care.

The case did not end there. When the matter came on before the High Court the first issue was whether or not there was a duty of care, and if there was not the reasonable response to the risk did not matter.

The *Mental Health Act 1990* prohibits detention or continuation of detention of a mentally ill patient unless the medical superintendent of the hospital formed the opinion that no other less restrictive care was appropriate and reasonably available.

Other provisions in the *Mental Health Act 1990* reinforce this requirement.

The High Court noted that these features of the Act presented a medical superintendent, deciding whether a person should be or should not continue to be involuntarily admitted and detained with two questions. First, is the person a mentally ill person or a mentally disordered person? Second, if yes, is there no other care of a less restrictive kind that is appropriate and reasonably available to the person?

The High Court Confirmed that to identify whether there was a duty of care owed it was necessary to consider the *Mental Health Act 1990*. The High Court noted it was necessary to determine whether a duty of care to relatives would be consistent with the provisions of the *Mental Health Act 1990*.

The core of the relatives' complaint was that the injured person should have continued to be detained. However, the *Mental Health Act 1990* provides that a person should not be detained or continue to be detained unless the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available to the person.

The High Court noted:

> *"Performance of that obligation would not be consistent with the common law duty of care requiring regard to be had to the interests of those, or some of those, with whom the mentally ill person may come into contact when not detained."*

The High Court commented that if the suggested duty of care would give rise to inconsistent obligations that would ordinarily be a reason for denying that a duty of care existed.

If a duty of care was to be imposed on the hospital or doctor in the circumstances this would require a doctor to ask whether there was a risk that was foreseeable and not insignificant before discharging a mentally ill patient and then take whatever steps a reasonable person would take in response to that risk.

The High Court noted that the risk of a mentally ill person acting irrationally will often not be insignificant, farfetched or fanciful. That risk would come with possible adverse consequences. There would be a risk that a person would engage in conduct that may have adverse physical consequences for others. The High Court noted in some cases, perhaps many, that a reasonable person in the position of the hospital or doctor would respond to those risks by continuing to detain the patient for so long as he remained a mentally ill person thus avoiding any risk of harm to others. The High Court noted that the *Mental Health Act 1990* required "minimum interference with the liberty of a mentally ill person". This was not consistent with a duty of care.

The legislation created a situation where a doctor would have competing concerns if he had a duty of care to the relatives; the first was whether Pettigrove should be released unless there was no other care of a less restrictive kind was required under the *Mental Health Act 1990* and the second was whether he could harm others on his discharge. The *Mental Health Act 1990* prescribed the matters to which doctors and hospitals must have regard in exercising or not exercising those powers under the *Mental Health Act 1990.* The High Court noted that the provisions of the *Mental Health Act 1990* were inconsistent with the common law duty of care alleged by the relatives.

Accordingly, the claims were unsuccessful.

As there was no duty of care it was not necessary for the High Court to consider issues of the reasonableness of the actions of the doctor and the hospital.

As can be seen, where a statutory duty is imposed it is always necessary to consider the terms of that statutory duty when determining whether or not a duty of care arises to those that could be affected by the exercise of the statutory duty.

Here, the *Mental Health Act 1990* had provisions which required a concerned approach to the ongoing involuntary detention of a mentally ill patient and a duty of care was not owed if a person discharged caused harm to others.

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Direct actions against insurers - Claims made policies

In New South Wales Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* permits a claimant to take Court proceedings directly against an insurer, but only with leave of the Court, where there is a real possibility that an insured will not be able to satisfy any judgment against it. Section 6 applies to both occurrence based and claims made policies of insurance. However, when it comes to claims made policies, an action against the insurer is only available where the policy of insurance was in existence when the event that gave rise to the claim occurred.

So what must an injured person establish to bring a claim against an insurer?

The NSW Court of Appeal in *Guild Insurance Limited v Hepburn* was recently called on to consider the circumstances that might give rise to a claim direct against an insurer under a claims made policy covering professional liabilities of a dental practitioner. The judgment provides guidance on the tests that must be satisfied in secure a grant of leave to proceed against the insurer.

Dr White was a dentist and between March 2008 and September 2009 treated Ms Hepburn.

Ms Hepburn commenced proceedings claiming damages for trespass, assault and negligence of Dr White.

Dr White retired as a dentist in 2010.

Dr White had professional indemnity insurance with Guild Insurance and had entered into professional indemnity contracts with Guild Insurance Limited for the period December 2007 to 15 September 2010.

There were run off provisions in the insurance policies triggered in the last policy arranged that provided run off cover to retiring dentists.

At least four other persons had commenced proceedings against Dr White claiming damages in respect of negligent treatment. A property search showed that Dr White had two properties but there was no evidence of their value. Dr White forwarded a letter to the District Court advising that she would be representing herself as she was in severe financial hardship.

In those circumstances Hepburn filed an application seeking leave to commence proceedings against Guild Insurance under Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946*.

Section 6 provides for the creation of a charge on insurance monies in favour of an injured person when the person at fault has entered into a contract of insurance by which he or she is indemnified against liability to pay damages or compensation.

Hepburn alleged that Guild Insurance had agreed to insure Dr White against professional liability which Hepburn sought to prove in the District Court proceedings.

Macfarlan JA noted that Section 6(4) allows an injured person to take Court proceedings directly against an insurer but only with leave of the Court. Macfarlan JA noted:

> *"The Court will not ordinarily grant such leave unless the plaintiff demonstrates that he or she has an arguable case against the insured, and there is a real possibility that the insured will not be able to satisfy any judgment against it and that there is an arguable case that the insurer sought to be joined has issued a policy under which the insured is entitled to indemnity in respect to the liability alleged by the plaintiff."*

Macfarlan JA referred to the Court of Appeal's decision in *Registrar General of NSW v Law Cover Insurance* and confirmed:

> *"It is not sufficient that there be an arguable case that the policy respond if, as is the position in this case, the policy was not in existence at the time of the happening of the event giving rise to the claim for damages within Section 6(1)."*

The last policy of insurance arranged by Dr White was not in existence at the time Dr White treated Hepburn. Accordingly, Section 6 could not be used to bring

proceedings against the insurer in respect of that policy.

However, when it came to the policies which were current at the time of the treatment, that was a different issue.

These policies were discovery policies in that the critical facts under the contract were the insured's discovery of the making of a claim on it or its discovery of an occurrence which may give rise to a claim.

Dr White had not notified Guild Insurance of the claims. Hepburn argued that the failure to notify the claims could not be fatal where Section 54 of the *Insurance Contracts Act* precludes insurers from refusing to pay claims in certain circumstances and in particular, by reason of certain acts of the insured occurring after the date that the contract of insurance has been entered into, namely failing to notify a claim.

Macfarlan JA confirmed that the potential operation of Section 54 may be taken into account in the exercise of discretion of Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946*.

The Court of Appeal noted there was no evidence to suggest the insurer was prejudiced by Dr White's failure to notify potential liability of which she arguably was aware and concluded that it was at least arguable that Hepburn can rely on Section 54 to avoid the consequences in whole or in part of the absence of notification.

Macfarlan JA also considered the merits of the claim against Dr White. Macfarlan JA noted:

> *"There is no reason in principle why wrongdoers knowledge of their wrongful acts cannot constitute awareness of circumstances that might give rise to claims against them, thus enlivening insurance policy notification provisions .... however, in my view an inference is arguably available in the present case that Dr White was aware that her conduct might give rise to a claim. In particular, the excruciating pain that Ms Hepburn would have suffered as a result of procedures including the extraction of a tooth being undertaken without anaesthetic must have been obvious to Dr White and could thus constitute a basis for drawing that inference."*

The knowledge of inappropriate treatment at the time Hepburn was treated seems to have been sufficient to find that Dr White was aware of circumstances that may give rise to a claim.

Finally, the Court accepted that Hepburn had shown it was arguable that Dr White may not be able to meet a judgment obtained by Hepburn against her and although the evidence was limited, it was sufficient to satisfy the low standard of arguability that is applicable in a Section 6 claim. The letter suggesting Dr White was experiencing severe financial hardship was enough in this case.

At the end of the day Hepburn was granted leave to proceed direct against the insurer, Guild Insurance in relation to the claim for negligence based on the negligent treatment of Dr White.

Hepburn's claim is limited to a claim that Dr White is entitled to indemnity under the policy that was in existence at the time of happening of the treatment.

In order for Hepburn to succeed in the claim she will need to convince the Court that Section 54 ought to come to her aid and excuse any failure on the part of Dr White to notify circumstances of the claim during the policy period.

In NSW Section 6 is a weapon that can be used by injured persons to bring claims direct against insurers where an insured may not be able to satisfy a judgment. Actions can be brought against an insurer with occurrence based and claims made policies provided the policies were in existence at the time of the happening of the event which gives rise to the claim against an insured.

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A director's unwanted advances

When it comes to a claim for damages for psychological injuries sustained as a consequence of bullying or harassment it is incumbent on the aggrieved party to demonstrate that they have suffered a diagnosable psychiatric injury and that it was foreseeable that the injury would have resulted from the failure to take reasonable care.

For example, in *Koehler v Cerebos (Australia) Limited*, the High Court considered the situation where it was found not to be foreseeable that an employee would suffer psychiatric injury. In that case the worker was retrenched and offered re-employment as a part time merchandise representative. On the first day of her new job the worker was shown a "territory listing". When she saw the stores that were listed she said at once there was "no way" she could "do this in 24 hours". A supervisor told her to try it for one month and, if she felt she could not cope, she should let him know. The worker did this but sustained psychiatric injury. The psychiatric injury was held not to be foreseeable.

Determining whether a psychological injury is foreseeable is not always easy however the recent decision of Levy DCJ in *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd [2014] NSWDC 185* highlights some of the factors that can inform a finding of forseeability that harassment could lead to a psychiatric injury.

In the *Trolan* case Levy DCJ was required to determine whether an employer could have anticipated that a worker would have suffered from a psychological injury on a background of complaints made by the worker of unwanted offensive and sexually harassing behaviour of a director of a company. There were 2 directors, the alleged perpetrator and his wife.

Following a series of complaints about offensive behaviour of the director Trolan took time off work in the form of sick leave for psychological reasons.

The Court noted that although initially the employer, did not have "*reasonable cause to suspect the plaintiff may be vulnerable to developing a psychological injury"* this was not the case after Trolan went off on sick leave in September 2008. The Court found that where the employer knew the worker was off work for psychological reasons as a result of the offensive behaviour on the first occasion that was enough to impart knowledge of the risk of a psychiatric injury if the behaviour continued. Levy DCJ concluded:

> *"At that time, a reasonable employer in the position of the defendant, knowing there had been no physical injury in the plaintiff resulting in the need to take sick leave, nevertheless ought to have realised that the plaintiff was vulnerable to developing a psychological illness if the conduct continued. This was the very purpose of her sick leave."*

This conclusion was reached on the basis of certification obtained from the Trolan's doctor and specific complaints she made to the other director of the employer, the perpetrators wife.

Levy DCJ considered the harassment was systematic in nature due to its frequency and duration and could have been avoided by simple means. It was indicated the perpetrator could have been counselled to desist the offensive behaviour. The failure by the employer to counsel the perpetrator resulted in a failure to provide a safe place of work. The employer failed to take reasonable steps to care for Trolan's psychological wellbeing and exposed Trolan to the peril of the perpetrator's repeated sexual harassment, bullying and intimidation.

The perpetrator's status as director of the employer, and described as the "*controlling will and embodiment*" of the company meant that it was reasonably foreseeable from Trolan's rejection that continuing the offensive behaviour would be detrimental to Trolan's health. Furthermore, Levy DCJ concluded Trolan's complaints to the perpetrator's wife meant that it was reasonably foreseeable to her that continuation of the behaviour would be psychologically damaging.

The evidence on liability in the case was essentially restricted to Trolan's account of the harassment and the director's denial. There was no evidence given by other witnesses about the matters attested to by Trolan and the perpetrator's wife who was also a director of the employer did not give evidence.

The Court ultimately found that the perpetrator who gave evidence was not a credible witness and accepted the worker's account of the offensive behaviour as an accurate account.

Levy DCJ concluded:

> *"In my view, the failure of the defendant to effect by reasonable and available means a cessation on Mr Gelle's behaviour, was inexcusable."*

The Court rejected the claims that there was contributory negligence on the part of Trolan on the basis that she was in a position of vulnerability and in view of the complaints made, there was nothing else she could do. It was also not accepted that Trolan delayed reporting her psychological symptoms. Further, the court rejected the argument that Trolan should be found to have contributed to the negligence on the basis of a failure to report the offensive behaviour.

The Court then considered whether Trolan had mitigated her loss as required by Section 151L of the *Workers Compensation Act 1987*. Trolan sought appropriate medical and allied treatment. She had attempted some insurance broking work through another broker's business and subsequently tried to start her own business under the other broker although this did not work out due to difficulties she experienced with concentration and motivation. The employer sought a reduction in damages on the basis Trolan had failed to mitigate her losses as she failed to attend appointments with clients and stopped attending counselling sessions with her psychologist.

There was no evidence that the employer made Trolan aware of any steps the she was required to take to mitigate her loss as required by Section 151L(3).

The Court was satisfied Trolan had taken appropriate steps to mitigate her loss and discharged her obligation under Section 151L.

The Court then assessed damages awarding Trolan damages of $733,723.

The co-director's failure to act when the complaint was made about the actions of her husband no doubt weighed heavily in the analysis of the claim.

Interestingly, a criminal prosecution had been pursued against the perpetrator although the proceedings were dismissed as the presiding magistrate was not satisfied that the charges had been proven beyond a reasonable doubt. That did no impact on the outcome of the civil claim which has different considerations.

At the end of the day Trolan obtained a significant award for compensation met by a worker's compensation insurer.

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EMPLOYMENT ROUNDUP

Implied terms in employment contracts – Another nail in the coffin

In the most significant judgement for employers in the last few years the High Court of Australia recently determined that contracts of employment in Australia do not contain an implied term of mutual trust and confidence. However, the High Court left several issues open, in particular, whether or not there is a general requirement of good faith in contractual dealings arising from employment contracts.

Adamson J in a recent hearing in the Supreme Court of NSW in a claim against *Australia & New Zealand Banking Group Limited* by a Director was recently called on to determine whether there is an implied term that contractual powers and discretions specified in an employment contract are limited by good faith and rationality requirements.

The Director was a director of ANZ's Institutional Property Group ("IPG") for NSW.

On 15 August 2012 ANZ purported to terminate the Director's employment without notice on the basis of serious misconduct.

The Director sued ANZ for damages for breach of contract, alleging he was not guilty of misconduct and that ANZ was not entitled to terminate his employment without notice. He claimed damages in the order of $9 million.

ANZ defended the case on the basis that it had a right to terminate the Director's contract summarily. In the alternative ANZ argued that if it did not have the right to terminate summarily, it would have terminated the employment by notice and any entitlement to damages was limited to four months remuneration, being the notice required under the contract.

The most significant issue in the proceedings was whether the Director was responsible for sending a doctored internal email to a journalist in Brisbane who wrote for The Australian Financial Review.

The Director's Counsel accepted that if it was proved that the Director sent the doctored email ANZ was entitled to terminate the employment without notice as that conduct would amount to serious misconduct.

The termination provision in the employment contract provided that:

> *"ANZ may terminate your employment at any time, without notice, if, in the opinion of ANZ, you engage in serious misconduct, serious neglect of duty or serious breach of any of the terms of this employment."*

There was also a termination provision which permitted termination without cause by four months written notice.

Detailed investigations were undertaken in relation to the production of the email in question. Handwriting experts were called in to give evidence. Computer systems were analysed. A number of interviews took place between the Director and those investigating the circumstances. An investigator's report was compiled.

Mr Corbally, head of relationship banking at ANZ, was the person responsible for determining what would happen as a result of the investigations. Corbally was relevantly the mind of the ANZ at the time of termination.

Corbally held an opinion on the basis of the reports that were prepared, the evidence collected and his conversations with the Director that the Director was guilty of serious misconduct and that the Bank was entitled to terminate him.

In a meeting with the Director Corbally provided the Director with the opportunity to add to the information that had been obtained and then terminated him in a conversation.

Adamson J noted that:

> *"By reason of the gravamen of the allegation, serious misconduct, and the nature of the contract, one of employment, the ANZ bore the onus of establishing that it was entitled to terminate the contract and*

therefore that the conditions of termination for serious misconduct had been met."

The termination for misconduct clause was triggered when ANZ formed an opinion.

The Director argued that there had to be misconduct as a matter of fact rather than simply in the opinion of ANZ. Adamson J rejected that argument.

The Director also argued that the opinion was required to be reasonable, correct, formed in good faith, with proper regard for the Director's interests and in compliance with the Performance Policy of ANZ and neither capricious, arbitrary nor unreasonable.

The Director argued that this requirement was an implied term in the employment contract.

Adamson J noted that in order for a term to be implied in a contract:

- "*it must be reasonable and equitable;*
- *it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;*
- *it must be so obvious that 'it goes without saying';*
- *it must be capable of clear expression;*
- *it must not contradict any express term of the contract."*

Adamson J rejected the contention that there was an implied term that the opinion was required to be correct.

Adamson J also rejected the contention that the opinion was required to be formed in accordance with the Performance Policy. The employment contract specifically stated that unless otherwise stated, policies are not incorporated into the employment contract and accordingly no term should be implied which imports the performance policy into the contract.

When it came to an implied term that the opinion must be reasonable, formed in good faith and neither arbitrary nor capricious, Adamson J noted that it is not settled law that contractual powers and discretions are limited by good faith and rationality requirements. Adamson J was not satisfied that such a term ought to be implied.

Adamson J noted that the proposed term did not satisfy the tests for implied terms. Adamson J observed that if bad faith could be established this would tend to gainsay a conclusion that the ANZ actually held the requisite opinion which would have to be held.

Adamson J noted:

"However, to require that an opinion be held bona fide does not import the requirement that it be formed, as opposed to held, in good faith."

At the end of the day Adamson J concluded that there was no implied term in the employment contract.

Corbally had formed an opinion on reasonable grounds that the Director had been guilty of misconduct. Accordingly, ANZ were entitled to dismiss the Director summarily and the Director's claim failed.

In passing, Adamson J went on to determine the damages that would have been awarded if the Director had been successful in the event that the Director pursued an appeal so that all issues raised were dealt with in the primary hearing.

Adamson J noted that there is an assumption that a defaulting party under a contract would have acted so as to perform the contract in the most advantageous way if the contract was still on foot. ANZ contended that had it not terminated the the Director's employment for serious misconduct, it would have terminated the employment by giving four months notice. Adamson J accepted that ANZ would have terminated the employment with notice and on that basis damages should be limited to four months pay.

Adamson J also accepted that ANZ would not have awarded a bonus that was in the discretion of ANZ in the circumstances and such a decision would not have been arbitrary, capricious or unreasonable.

As can be seen, Courts are reluctant in to find that terms are implied in employment contracts particularly terms requiring the exercise of contractual obligations subject to good faith.

The case demonstrates that it is not necessary for a term to be implied in an employment contract that opinions must be correct or that they must be formed in good faith with proper regard for the employee's interests and neither made capriciously, arbitrarily or unreasonably to give business efficacy to an employment contract.

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Work Health & Safety Prosecutions

Two recent cases provide a comparative view of the stance that the judiciary is likely to take in circumstances where the provision or lack of provision, of appropriate safety procedures and manuals have

lead to failures in the safety procedures at the workplace and has resulted in significant injuries to workers.

In *WorkCover Authority of NSW v Drayton & Sons Pty Limited* [2014] NSW DC 18 (15 September 2014) Curtis DCJ found that the lack of documentation and safety implementation in place at the business premises of Drayton Family Wines in January 2008 was a significant failure which lead to an explosion which killed two workers and seriously injured another.

Drayton Family Wines was a family winery which had been in business in the Hunter Valley for a number of years. A contractor was welding plates to the exterior of a number of wine vats. One of the wine vats exploded causing the deaths and injuries. At the time the vat contained 9,000 litres of ethanol which was a highly inflammable substance.

Curtis DCJ noted that over a ten year period before the incident there were several minutes of the directors meetings recording the intention of the health and safety manager to prepare safety policies and procedures for implementation. At the time of the incident there was still no documentation in place let alone any implementation. Further, there was no policy or procedure in relation to the induction or management of contractors coming into the winery to perform hot work such as welding work and there were no documented policies, procedures and training for staff in relation to the use, storage and handling of dangerous goods.

Curtis DCJ drew attention to a number of documents which clearly showed the standards and procedures that should have been in operation including the Australian Standards for storage and handling of flammable combustible liquids; storage and handling of hazardous chemical materials and classification of hazardous areas.

Curtis DCJ noted that Australian Standard 1674.1 entitled Safety Welding and Allied processes provides procedures which should be undertaken prior to any hot welding at any location. The maximum penalty available at the time was $550,000 and Curtis DCJ considered that an appropriate penalty was $300,000 with the defendant entitled to deduction of 25% in respect of its early plea and a deduction of 5% in respect of the remorse shown.

Drayton & Sons was convicted and fined $210,000 and also ordered to pay costs of the prosecution in the amount of $25,000. This represents around 50% of the maximum penalty.

The above case differs significantly from the matter of *WorkCover Authority of NSW v Australian Native Landscapes* [2014] NSWDC 183 (11 September 2014) where the defendant had in place significant safety procedures and policies including policies which covered the work that was being undertaken when the injury occurred.

In this case a plumbing contractor attended the premises of the defendant's plant to replace certain parts of the roof and requested two employees to assist with the works. The work included gaining access to the roof by a ladder. There was no provision made for handrails or physical barriers to prevent falling from the roof and safety harnesses were not provided.

One of the employees fell through the roof a distance of approximately 5 metres suffering numerous fractures which have lead to permanent disability. The prosecutor submitted that the offence was quite serious not only because of the substantial injuries suffered but because of the possibility of even greater injuries.

The defendants submitted that it was not a case in which they failed to conduct their operations safety, it was primarily a case where the manager responsible for the implementation of the system that was in place failed in their duty to implement the system when the work was undertaken.

Curtis DCJ noted that the defendant was not in the construction industry and the work undertaken was not inherent to its nature of operations. Curtis DCJ did however find that the defendant was culpable and there was a departure by the person entrusted by the defendant company to discharge its responsibilities under the Act.

Here the maximum penalty was noted as $825,000 and Curtis DCJ believed an appropriate penalty was $90,000 however with a reduction of 25% in consequence of subjective factors. The amount was reduced to $67,500 with the defendant to pay the prosecutors costs in the sum of $34,119. The fine amounts to less than 10% of the maximum penalty.

Theses prosecutions were brought under the Occupational Health and Safety Act which has now been replaced by the Work Health and Safety Act and it will be interesting to see if the penalties imposed for offences under the new legislation bear the same proportionality to the maximum fine as the fines in these cases did. If so we can expect to see some very hefty fines in the future.

As can been seen from these 2 prosecutions fines can be significantly higher where there is a breach of the Occupational Safety Act (and no doubt the Work Health and Safety Act) and a business does not have a documented Work Health and Safety system or any real system at all.

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Confusion concerning leave entitlements and the need for considered communication

The decision in *David Johnston v The Trustee for the MTGI Trust t/as Macquarie Technology Group International* [2014] FWC 7098 concerned an unfair dismissal claim in circumstances where the applicant was alleged to have abandoned his employment. The applicant alleged his dismissal to be unfair because his absence from work was the result of the unexpected premature birth of his child and the need for him to provide primary care for his four other young children during the period his wife and newborn baby were in hospital.

Mr Johnston and his family lived in Bomaderry, a small town on the South Coast of NSW, some 160kms from Sydney. He had been employed for around 6 years in a position that involved sales support and assisting customer training and technical support.

On 7 November 2013, Mr Johnston's wife gave birth by emergency caesarean section 10 weeks prematurely at the Royal Hospital for Women in Randwick and he took approved annual leave from about 11 November 2013 until about 3 January 2014 to care for his four other children aged 2, 3, 4 and 13.

On 12 December 2013 Mr Johnston supplied his employer with a letter from the Hospital supporting his request for annual leave to be taken as personal leave on the basis that his wife and newborn baby would remain in hospital until 29 January 2014. No direct response was received from his employer in relation to this request.

On 20 December 2013, the employer's bookkeeper emailed Mr Johnston as follows:

> *"Assuming you will be on holidays your leave will take you up to Friday 03/01/14."*

The applicant did not return to work on Monday 6 January 2014 and did not contact his employer to discuss his absence.

On 11 January 2014, the CEO of the employer emailed Mr Johnston congratulating him on the birth of his new son and raising various matters concerning Mr Johnston's unsatisfactory work performance.

On 16 January 2014, Mr Johnston returned to work and sent an email to a number of officers of his employer querying the pay he received for the foregoing weeks. In various emails exchanged following this, the employer:

- Alleged that Mr Johnston was not entitled to paid personal/carer's leave as the circumstances relating to his wife's hospitalisation were not an "unexpected emergency" within the definition of the *Fair Work Act 2009* (***the Act***); and

- Claimed that Mr Johnstone abandoned his employment by not returning to work after his approved leave entitlements ran out on 3 January 2014 such that his employment was deemed at an end.

Mr Johnston brought an application for unfair dismissal, the main basis of which concerned his entitlement to paid personal/carer's leave and disputing the employer's assertion to the effect that he was not entitled to such leave in circumstances where his wife did not suffer an "unexpected emergency" within the meaning of the Act and Mr Johnston did not act as his wife's carer.

The relevant provisions of the Act relating to paid personal/carer's leave are sections 96 and 97. Section 96 sets out the entitlement to such leave and section 97 sets out the circumstances in which an employee may take leave. It provides as follows:

> *Section 97 Taking paid personal/carer's leave*
>
> *An employee may take paid personal/carer's leave if the leave is taken:*
>
> (a) *Because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or*
>
> (b) *To provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:*
>
> *(i) A personal illness, or personal injury, affecting the member; or*
> *(ii) An unexpected emergency affecting the member.*

The Commission found that the circumstances in which Mr Johnston sought to take leave involved the hospitalisation of his wife and their premature baby in Sydney, some 2.5 hours drive from their home in Bomaderry and the need for Mr Johnston to provide primary care for 4 other children justified his entitlement to take personal/carer's leave. Further, the Commission found that his employer was made aware of the circumstances relating to the proposed taking of personal/carer's leave and no issue was raised at the time in relation to the notice given by Mr Johnston.

Mr Johnston took approved annual leave and then relied upon his personal circumstances to convert that leave to personal leave which he had accrued.

Having regard to the above, it was found that Mr Johnston's conduct did not, at any time, indicate an intention to abandon his employment or to resign therefrom. It was also considered by the Commission that the facts suggested that it was in fact the employer that initiated the end of the employment relationship. The basis for this arose by reason of the employer's knowledge of Mr Johnston's family crisis, it having been brought on the premature birth of his son and the prolonged hospitalisation of his wife and newborn baby as well as the need to look after his 4 other children. Further, notwithstanding correspondence from the employer after the date it was alleged Mr Johnston was required to return to work, no indication was given by the employer to the effect that Mr Johnston's request for personal leave was denied, that he was not entitled to the leave or that he was at risk of being considered to have abandoned his employment.

In considering the unfair dismissal application, the Commission found that:

- There was no sound basis for the employer to take the approach it did in relation to Mr Johnston's request for personal/carer's leave;
- The employer did not give Mr Johnston an opportunity to respond to the accusation that he had abandoned his employment by failing to return to work in early January 2014;
- There was no scheduled meeting to discuss the termination of Mr Johnston's employment;
- The dismissal was disproportionate to any conduct on the applicant's part and having regard to the very difficult situation in which he found himself;

such that the dismissal of Mr Johnston was *harsh, unjust and unreasonable*.

In considering the appropriate remedy to grant to Mr Johnston, the Commission took various factors into consideration. Noting that reinstatement was not a viable remedy given the breakdown of the employment relationship, Mr Johnston's period of service and the absence of any substantive submission made by the employer to the effect that an order for compensation would have an adverse impact on the viability of the employer's enterprise, the Commission ordered compensation in the amount of 20 weeks' pay.

This decision demonstrates that care needs to be exercised by both employees and employers when considering entitlements to personal/carer's leave and communicating with one another to ensure that entitlements are clearly identified and confirmed. In addition, caution needs to be exercised by employers when seeking to rely upon conduct to allege abandonment of employment (or some other basis for dismissal), particularly in circumstances where the employer has failed to address and/or clarify a position taken by an employee where the employer knows that the employee is acting on a misapprehension.

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WORKERS COMPENSATION ROUNDUP

Reasonably necessary medical treatment

With the introduction of Section 60(5) to the *Workers Compensation Act 1987* in the legislative changes which commenced on 1 February 2011 and the subsequent decision of the Court of Appeal in *Zanardo & Rodriguez Sales & Services v Tolevski* [2013] NSWCA 449, it is clear any dispute concerning proposed treatment or services must be referred to an Approved Medical Specialist (AMS) consequently there has been a significant increase in the number of referrals to AMS for determination of whether proposed treatment is "reasonably necessary".

The interpretation of this phrase was recently the subject of an appeal determined by Deputy President Roche in *Diab v NRMA Limited* [2014] NSWWCCPD 72. The decision provides some timely reminders about the relevant principles applicable to determination of whether a medical procedure is "reasonably necessary" which is a pre-requisite to recovery of compensation pursuant to Section 60(1) for the cost of medical, hospital or other treatment provided for in the Section.

Deputy President Roche stated that the standard test adopted to determine if medical treatment was reasonably necessary remains as stated by Burke CCJ in *Rose v Health Commission (NSW)* [1986] NSWCC 2

> *"Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequence of injury.*
>
> *It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.*
>
> *In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of*

the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition".

It was noted that the decision of Burke CCJ in *Bartolo v Western Sydney Area Health Service* [1997] NSWCC 1 is also a guide in that case where his Honour said:

"The question is should the patient have this treatment or not? If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary".

Deputy President Roche commented that "reasonably necessary" does not mean "absolutely necessary" and it is a lesser requirement than "necessary".

Importantly, he observed:

"a worker certainly does not have to establish that treatment is 'reasonable and necessary', which is a significantly more demanding test that many insurers and doctors apply".

Adopting the matters noted by Burke CCJ in *Rose* the Deputy President indicated that the relevant matters according to the criteria of reasonableness include but are not necessarily limited to:

- the appropriateness of the particular treatment;
- the availability of alternative treatment, and its potential effectiveness;
- the cost of the treatment;
- the actual or potential effectiveness of the treatment; and
- the acceptance by medical experts that the treatment is being appropriate and likely to be effective.

The Deputy President further commented that although the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary it was certainly not determinative. Similarly, a poor outcome did not necessarily mean that the treatment was not reasonably necessary. The Deputy President reminded the profession that each case will depend on its facts.

The Deputy President indicated that whilst the above matters are *"useful heads for consideration*" the "*essential question remains whether the treatment was reasonably necessary*". This was not satisfied by simply asking whether it was better that the worker have the treatment or not.

In determining whether any treatment is "reasonably necessary", it is essential to have regard to the entire history of development of the injury for which the treatment is sought in addition to consideration of the relevant matters suggested by Burke CCJ in *Rose*.

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Foster carers – Are they employees?

In our November 2013 newsletter, we examined the unusual situation as to whether a volunteer pension officer at an RSL Club would be considered an employee for the purposes of the *NSW Compensation Act* 1987. In *Cabra Vale Ex Active Servicemen's Club Limited v Thompson* (2013), Deputy President Bill Roche commented that a person in such a position would not be considered to be a worker for the purposes of the Act.

Recently, the Deputy President was required to determine in *Secretary, Department of Family & Community Services v Bee* (2013) NSWWCCPD 66 another usual situation, namely whether a registered foster carer is a worker or a deemed worker. Ultimately, the resolution of that issue turned on whether when applying the basic principles of contract law, the parties intended to create legal (contractual) relations and if so whether the arrangement was supported by real consideration.

Carolyn Bee was a registered foster carer, having been so appointed by the Department of Family & Community Services (the "Department") under the *Employment & Workplace Relations Legislation Amendment (Welfare to Work & Other Measures) Act* 2005. Between 22 and 28 August 2010, Ms Bee undertook the care of two children, as an emergency, when another foster carer had become sick. Ms Bee alleged that she contracted H1 N1 swine flu from the children and as a result was unfit for work from 25 August 2010 to 7 May 2012.

The issue before the arbitrator was whether Ms Bee cared for children under a contract made with the Department and if so whether the contract was one of service or for services. If the contract was one of *service*, Ms Bee was a worker as defined in Section 4 of the 1998 Act. If the contract was for one for *services*, Ms B contended she was a deemed worker under Schedule 1 Clause 1 of the *Workplace Injury Management and Workers Compensation Act* 1998 ("1998 Act").

The arbitrator originally determined that Ms Bee agreed to undertake the care of two children on 22 August 2010 and entered into a contract for *services* with the Department and was a deemed employee pursuant to the provisions of Schedule 1 in the 1998 Act. It was also determined Ms Bee contracted swine flu from the children and employment was a substantial contributing factor to her injury.

The matter was appealed to Deputy President Roche. The Deputy President focused on whether the parties made a contract. Central to that issue was, amongst other things, whether the parties had an intention to enter into legal relations.

The Deputy President commented that the question to be determined was whether the parties intended the arrangement to be legally binding? The Deputy President weighed up what the parties said and wrote in light of all the surrounding circumstances and then decided whether the true inference was that the ordinary man and woman, speaking or writing in such circumstances would have intended to create a legally binding agreement. They did not.

Deputy President Roche determined that the parties were acting in accordance with their statutory obligations for foster carers and not contractual obligations. There was no obligation on the Department to provide children to Ms Bee and no obligation on her part to take the children. This is in contrast to a contract of services, which has a mutually enforceable contractual obligation. The payment of the carer allowance to Ms Bee was intended to cover the children's day to day expenses. It was not a wage or income and was not taxable. Thus, it was not a payment for services rendered. It was a payment for the care of the children, regulated by statute not through any bargain reached between the parties.

Ms Bee contended that the test on whether the parties intended to enter into legal relations should be whether the arrangement could be subject of enforcement by a Court of law. In other words, after caring for the children and at the request of the Department, the Department refused to pay the $33.00 daily allowance, Ms Bee would be entitled to sue the Department in a common law Court for recovery of that amount.

Deputy President Roche commented in the absence of an intention to create legal contractual relations, had the Department not paid the carer allowance, Ms Bee would not have been able to sue, on a contract to recover the unpaid allowance although she may well have had other rights to recover the allowance.

The allowance paid to Ms Bee was not characterised as a wage and not taxable income which pointed to the parties not intending to create a legally enforceable relationship. It was an allowance to care for the children, not a payment in return for being a carer.

Deputy President Roche went on further to say that even if he was wrong on the issue as to whether Ms Bee could sue, it was not a contract to perform *services* as required by Schedule 1 Clause 1 of the deemed worker provisions in the workers compensation legislation. It was merely an agreement that, if children are accepted by a foster carer, an allowance to care for them will be paid.

On balance, the only conclusion open was that Ms Bee had failed to establish that she was a deemed worker because there was no intention to enter into legal relations (or create contractual relations). Even if contrary to the Deputy President's findings, the parties did have such intention, the arrangement was not supported by any consideration. Thus, there was no contract to perform any work, let alone a contract to perform any work exceeding $10.00 in value which is the requirement to be a deemed worker in Schedule 1 Clause 2 of the 1998.

This decision, although relatively unique, is a reminder that more unusual purported employment circumstances should be closely examined to determine whether a contract of service or a contract for services is in existence. The absence of a legally enforceable contract between the parties will mean that a claimant will fail both on the basis of a worker and a deemed worker claim.

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Hearing Aids are caught by Section 59A

In a recent Presidential Determination Deputy President Roche confirmed that the cost of hearing aids fall within the expression "any treatment, service or assistance" in Section 59A of the *Workers Compensation Act 1987*.

Section 59A was introduced to the 1987 Act by the 2012 amendments and provides that compensation in respect of "any treatment, service or assistance" given or provided more than 12 months after a claim for compensation is made is not recoverable against the employer unless weekly payments of compensation are or have been made or are payable to the worker.

In *Rushbrook v Alan James Biggs t/as AJ Biggs Used Cars* [2014] NSWWCCPD 75 the insurer disputed liability for the cost of hearing aids by relying on Section 59A as more than 12 months had passed

since the claim for compensation was first made. Mr Rushbrook's counsel argued that Section 59A did not apply because hearing aids were an "artificial aid" or "curative apparatus" and were not "treatment, service or assistance" within Section 59A(1).

Arbitrator Paul Sweeney rejected the argument and Mr Rushbrook appealed the arbitrator's finding and determination.

Deputy President Roche found that the clear grammatical meaning of the words "service or assistance" included hearing aids by reference to the definitions of those words in the Macquarie dictionary, commenting that hearing aids are obviously a "service to" or "assistance" for a person with impaired hearing.

Further by reference to the context in which Section 59A appeared in the legislation and the purpose of Division 3 overall which was directed to the payment of compensation for treatment, service or assistance, the phrase "any treatment" must relate to "medical or related treatment" as defined in Section 59 irrespective of whether the words "medical or related" appeared in Section 59A or not.

This conclusion was also supported by reference to the second reading speech delivered by the Honourable Greg Pearce, Minister for Finances and Services on 20 June 2012 which made it clear that the Government's intention was that payment of an injured worker's expenses for medical, hospital and rehabilitation services would be limited to a 12 month period after the claim was made or 12 months after weekly payments ceased, whichever was the earliest.

Whilst the majority of industrial deafness claims will be resolved within 12 months of initial notification of the claim and the cost of hearing aids will therefore be recoverable, the provisions of Section 59A will preclude a worker from recovering the cost of hearing aids where a claim is not resolved within the relevant 12 month period.

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CTP ROUNDUP

Who is to blame when livestock cause car accidents?

Two recent judgments have highlighted the complexities involved in a motor vehicle accident claim when fault cannot be attributed to any particular person. Both cases involve livestock unexpectedly appearing on the road making a motor vehicle accident unavoidable and sadly resulting in significant personal injury to the front-seat passengers.

The cases have prompted discussion on whether drivers are required to maintain constant vigilance while driving, how drivers should react when confronted by the unexpected and appearance of an obstacle on the roadway.

In *Mamo v Surace* [2014] NSWCA 58 ("Surace") the New South Wales Court of Appeal examined an accident which involved livestock on a road. On the evening of 30 March 2008 Mr Steven Surac was driving his friend, Mr Jesse Mamo, through the semi-rural streets of Londonderry, NSW. Mr Surace momentarily diverted his attention away from the road to adjust the track on his CD player. When he redirected his attention to the road a cow suddenly darted into his vehicle's path resulting in a collision which left Mr Mamo with substantial injuries.

Although Mr Mamo claimed Mr Surace had been negligent in looking at his CD player immediately before the collision, he also provided evidence that the impact with the cow occurred instantaneously as Mr Surace fiddled with his CD player.

The question for the District Court was whether Mr Surace failed to keep a proper lookout by looking down at his CD player prior to the collision.

Delaney DCJ concluded that it was inherent in driving for motorists to regularly look away from the road to use instruments in their vehicle when they believed it was safe to do so. Given that Mr Surace was driving through a semi-rural area and he was close to Mr Mamo's home, the presence of livestock straying onto the road was unexpected. Delaney DCJ found that Mr Surace did not fail to keep a proper lookout given there was no indication of any danger on the road when he decided to look at his CD player. The accident was essentially unavoidable due to the unexpected appearance of the cow on the road.

One of Mr Mamo's arguments raised on appeal was that the primary judge focussed too narrowly on the particular risk posed by a cow straying onto the road and what should have been done in relation to that risk. Mr Mamo submitted that in focussing too narrowly on the factual circumstances at hand the primary judge failed to fully appreciate the scope of a driver's duty of care and their ability to react to a source of danger and control their vehicle.

Mr Surace contended that a driver's duty to keep a proper lookout is relative to the circumstances. In this particular case he contended that keeping a proper lookout did not involve constant vigilance. There was

no evidence to contradict Delaney DCJ's findings that had he been paying constant attention to the road he would not have seen the cow any earlier than he did.

Mr Mamo also sought leave to argue that if Mr Surace did not breach a duty of care, the "blameless accident" provisions of the *Motor Accidents Compensation Act 1999* (NSW) were applicable. Leave to rely on the "blameless accident" provision was refused on the basis that Mr Mamo had ample opportunity to run that case at the primary hearing but no such case was run.

In the Court of Appeal it was concluded on the evidence that the appropriate inference to draw was that Mr Surace only momentarily took his eyes off the road as drivers do in the ordinary course of driving. The Court of Appeal held that there was no breach of duty in circumstances where the unexpected appearance of the cow was close to the vehicle and led to the impact "straight away". It was held that the accident was unavoidable.

The second Court of Appeal case of *Proudlove v Burridge* [2014] WADC 156 ("Proudlove") in Western Australia involved Mr Proudlove sustaining catastrophic injuries as a result of Mr Burridge colliding into livestock on the road.

Mr Burridge failed to observe a fellow driver, Ms Tremayne, standing on the road flagging down drivers in an attempt to warn them of horses up ahead on the roadway. Mr Burridge proceeded past Ms Tremayne and collided with a horse.

Mr Proudlove submitted that in addition to not keeping a proper lookout, Mr Burridge was negligent by the use of his mobile phone 25 minutes prior to the collision and feeling tired.

Although it was determined that Mr Burridge failed to keep a proper lookout by failing to observe Ms Tremayne and slowing down in response to identifying her on the road, this breach of duty did not cause the accident.

In this regard, Mr Proudlove did not adduce evidence to satisfy the Court that if Mr Burridge braked sufficiently to stop he would have avoided colliding with the horse. Mr Burridge could have only avoided colliding with the horse if he was able to identify the horse on the road. It was concluded that *'it is not possible to make the leap across the gap to show that just because the defendant failed to keep a look out and observe Ms Tremayne and brake sooner, he caused or materially contributed to, as a matter of fact, the collision'.*

As with the case of *Surace* His Honour emphasised the fact that each case must be considered contextually. In *Mamo v Surace* there was no failure to keep a proper lookout wherein in *Proudlove* there was a failure to do so but that did not cause the accident.

The *Burridge* decision has sparked political discussion in Western Australia as to whether the third party scheme should be changed to a "no fault" system with a necessary increase in Third Party premiums. Western Australia does not have a scheme to compensate those injured in blameless motor accidents whereas NSW does. Unfortunately Mr Mamo could not receive compensation where there was a blameless accident in NSW as his lawyers had not made that claim in the original trial.

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