# GD NEWS / FEBRUARY 2015

## IN THIS EDITION



## No liability for fall from train

The State of NSW (Sydney Trains) recently challenged a decision of the Supreme Court awarding damages to an eight year old that fell from a train and has succeeded in its challenge with the Court of Appeal finding there was no compelling evidence to justify a finding that there was negligence in the operation of the train.

On 29 January 2001 Corey Fuller-Lyons, who was then eight years of age, fell from an intercity train near Morisset that was travelling from Sydney to Newcastle and sustained severe injuries, including significant cognitive impairment.

The train in question was comprised of four carriages which had two levels of seating and a vestibule at the front. Each side of the carriage had double doors. No one saw Corey fall from the train.

The doors were inspected both at the start and end of the train's journey and therefore it was accepted that the doors did not have any defect which would have affected their operation. However, the inspection at the conclusion of the journey demonstrated a gap of approximately 100mm at the foot of the doors on both the right and left sides of the vestibules. This indicated that someone had interfered with the doors on the journey, otherwise this would have been detected on the pre-journey inspection.

The doors were designed to close and lock whilst the train was moving. When the train arrived at the station the guard would activate an unlocking mechanism which would allow the passengers to open the door. The door closing mechanism would be activated when the train was about to depart the station which would result in pressure being applied to the doors to push them together. Once the doors were together they would lock automatically.


**Editors:**


David Newey


Amanda Bond


Ashley Waterman

GILLIS DELANEY LAWYERS
LEVEL 40, ANZ TOWER
161 CASTLEREAGH STREET
SYDNEY NSW 2000
AUSTRALIA
T: + 61 2 9394 1144
F: + 61 2 9394 1100
www.gdlaw.com.au

Sometime during the course of the train journey Nathan Lyons and his brother Dominic noticed that Corey had not returned after leaving them to get a drink of water. They reported this to the train guard. It was subsequently ascertained that Corey fell out of the train and slid approximately 20 metres down and across an embankment.

At trial in the Supreme Court Justice Beech-Jones found in favour of Corey and found it was likely that a part of his body had prevented the doors of the train from closing when it departed Morisset Station. Justice Beech-Jones found at first instance that when the train left Morisset Station, Corey must have had part of his body protruding from the train doors which ought to have been visible to the Customer Service Attendant on duty at Morisset Station. The State of NSW was vicariously liable for his actions in failing to detect this.

The State of NSW appealed. The leading judgment was delivered by His Honour Justice MacFarlan.

At trial Corey gave evidence, however the trial judge concluded that his cognitive impairment meant no weight could be given to his description of events. Justice MacFarlan noted the findings of the trial judge. Justice MacFarlan and the Court of Appeal however disagreed with the trial judge. The Court of Appeal was of the view that there were equally possible scenarios to that which was found by the trial judge.

Justice MacFarlan stated:

> *"First, there is no reason to exclude the possibility that, when the train was about to leave Morisset Station, Corey used an object to keep the doors open to a sufficient extent to enable him to put at least his shoulder into the space between the doors. The expert evidence did not indicate precisely what would have been a sufficient space for this to occur but Mr Meiforth referred to his experience of glass "Coke" or "cordial" bottles of 20-25cm in length being used to keep train doors from closing. A photograph of Corey in evidence suggests that at the time of the accident he was not a particularly bulky boy. A gap sufficient to allow Corey to push against the door could have resulted from a backpack or other bag, a shoe placed lengthways or even a ball such as a basketball or soccer ball being placed between the doors as they closed. There was no explanation in the evidence of the availability to Corey of such items but his access to one or other is a distinct possibility which this case did not exclude.*
>
> *Once a gap of that magnitude was maintained after the train left Morisset Station, Corey could have inserted his shoulder into it and sought to enlarge it by pushing one of the doors with both hands whilst obtaining leverage from part of his back leaning against the other door. It is consistent with Mr Meiforth and Mr Clemens' evidence ... that Corey may well have had sufficient strength to push the door back, at least a little, if he was in this position. Corey would have needed to make very little progress in doing this to obtain a gap sufficient for his body to slip through it. No doubt his fall was accidental, but the possibility that it occurred in this way is not at all unlikely when his struggle to get the door open is imagined and regard is had to the fact that at the time he fell, the train was negotiating a right hand curve which would have put outward pressure on his body if it was precariously placed between the left hand doors.*
>
> *Furthermore, it is possible that the wedge that initially kept the doors from closing was Corey's shoulder, arm and leg. Contrary to the primary judge's view, I do not consider that this mechanism for preventing the doors from closing necessarily involved a significant part of Corey's body protruding from the train in such a way that it would, or should, have been visible to the CSA on the platform. Corey's shoulder, and an arm and leg, may have been between the doors but not have protruded significantly.*
>
> *I do not consider that there is anything about these possibilities that makes them less likely than that found by the primary judge, that is, that Corey stopped the doors from closing by using his torso, leaving a substantial part of the torso, and an arm and a leg, protruding to a significant extent from the train doors."*

Essentially the case turned on the inferences that could be drawn from the facts presented at trial and as the possible scenarios were equally compelling Corey had not proven his case. The end result was a successful appeal for the State of New South Wales.

The Court of Appeal found that the trial judge had made a finding in relation to a particular scenario which was no more or less probable than other scenarios.

In this case, where the evidence was there was no defect in the doors, and the plaintiff was unable to prove what caused the doors to open he was therefore unable to prove any negligence on behalf of the State of NSW.

**Amanda Bond**
**asb@gdlaw.com.au**

## School liable for diving accident

The Supreme Court of NSW has recently found a school liable for injury sustained when a 12 year old girl dived into the shallow end of a public swimming pool.

On 7 January 2008 Emilie Miller attended a public swimming pool that was run by the Council. At the time she was ranked in the Top 20 Australian girls of her age and had also been a member of the Bathurst Swimming Club from 2003 until 2005. In 2005 joined the Kinross Wolaroi School Swimming Club and in early 2007 became a member of the Kinross Wolaroi School. That school was conducted by the Uniting Church in Australia Property Trust who were named as second defendant in the proceedings. Lithgow City Council was named as first defendant.

On the day of the accident Emilie was training for the NSW State Age Swimming Championships. At the time she was being supervised by Mr Brody, whose children were also members of the Club. Her grandmother had taken her to the Lithgow Pool and training then commenced. Emilie and Mr Brody's children, who were also members of the Club, initially swam laps, a distance of about 400 to 500 metres. The next part of the training which was designed by Mr Critoph, the school swimming coach, involved a series of laps where the children would dive in, swim 25 metres at a fast pace, finish the remaining 50 metres at a slower pace, leave the pool and then repeat the exercise, commencing at the end where the preceding lap had concluded. The children, including Emilie, completed the laps and the last one finished at the shallow end. Brody did not observe the plaintiff dive but subsequently observed her at the bottom of the pool.

Emilie was rendered tetraplegic.

Brody denied in evidence that he had told Emilie the type of dive she should do or the pace at which she should go. Brody also denied telling Emilie that the dive which she was performing when she was injured was to be a "race pace dive". Further, Brody denied ever telling Emilie the swim times that were expected.

The type of dive that Emilie was performing when she was injured was a "track-start" dive, the sort of dive that is executed from a starting block. Initially Emilie's training in that type of dive took place at the deep end of the school pool using blocks, however she also began to perform them at the shallow end. Emilie gave evidence that she was never told of any risks associated with diving at the shallow end or incorrectly performing the dive. Emilie also gave evidence that after early 2006 when she was trained in this diving method she would always use this method to commence both races and training swims. She had dived into the shallow end multiple times throughout the season, using the track start dive. Others would do the same. Given the extent of Emilie's training, the trial judge formed the view she must have performed the dive probably on thousands of occasions.

Unfortunately, although Emilie had performed the dive thousands of times before, on the day of the accident her back foot slipped. The Lithgow Pool had tiles at the edge which were described by Emilie as "poor". Emilie, in her evidence indicated that the pool she was accustomed to swimming in, at the Kinross Wolaroi School and Orange School, had edges that were less slippery than the Lithgow Pool.

The trial judge noted there was no direct evidence as to what caused Emilie's back foot to slip.

The depth of the pool at the shallow end when visited by the expert, Mr Beckett, was 1.03 metres.

The Council submitted that there were "No Diving" signs in place.

Ultimately the trial judge found in favour of the Council but found that Emilie was successful in the claim against her school.

Justice Hulme stated:

> *"Given these risks, it seems to me that it was unreasonable for the school, by Mr Critoph to encourage the plaintiff who, as Mr Critoph must have known, was accustomed to use the track start dive, to dive into the shallow end of the pool with the lack of gripping facilities of the Lithgow Pool and of which Mr Critoph, who had been there, was aware, or, as an incident of encouraging the plaintiff to go there, should have been aware. It is also to be inferred that this absence of gripping facilities and the shallow depth both contributed to the accident. Had Mr Critoph specified that diving was to occur at the deep end only, consistently with the plaintiff's evidence that she did what she was told, I accept that that is what would have occurred.*
>
> *…The evidence in this case indicated that a track start dive was attendant with more risks than a grab start or one where both of the swimmer's feet were placed at or partly over the edge of the pool and it seems to me that a professional swimming coach was under an obligation to take account of those additional risks and not simply follow (limited) standards, particularly given the magnitude of the potential consequences."*

Justice Hulme continued:

> *"I would however also hold the second defendant liable because of a failure to warn the plaintiffs of the risks attendant upon what she was doing and in that connection I am satisfied that the risk to the plaintiff was foreseeable, the risk was not insignificant and in the circumstances, a reasonable person in Mr Critoph's position would have given a warning of the nature of that referred to below. I can accept that even though the plaintiff was younger than 12 when she arrived at KWSC, her training and experience would have been expected by most people, including coaches, to make her safe in the ordinary incidence of swimming training. However, once the plaintiff was being taught the more dangerous track start dive, it should have been drilled into her that it was essential such dangers be minimised, for example, aborting a dive that had gone wrong and perhaps "bellyflopping" into a pool. Providing such warnings were sufficiently strong and repeated, and accompanied by appropriate warnings as to the horrendous consequences liable to flow from a mis-dive, logic suggests that the plaintiff would have aborted the dive. She was, after all, only engaged in training."*

So the end result was the school was negligent in failing to warn Emilie of the risks associated with the track start dive being performed at the shallow end, and for directing the dive to be performed in the circumstances. The Council on the other hand escaped liability.

**Amanda Bond**
**asb@gdlaw.com.au**

## "No rhyme no reason" - Court orders a retrial in a personal injury claim

For the second time in less than six months, the NSW Court of Appeal recently upheld an appeal from a District Court judgment and ordered there be a retrial due to the primary judge's failure to give adequate reasons in a personal injury claim.

In the September 2014 edition of GD News, we reported on the Court's decision in *Bunnings Group Limited v Borg* in which a retrial was ordered in circumstances where the District Court Judge had failed to grapple with competing evidence and give adequate reasons for accepting one witness over others and in respect of the provisions of the *Civil Liability Act.*

In *Welsh v Carnival PLC t/as Carnival Australia* [2014] NSWCA 430, the NSW Court of Appeal was again unanimous (Adamson J, McColl JA & Sackville AJA agreeing) in upholding an appeal from a District Court judgment in which the Court held the primary judge had failed to give adequate reasons which resulted in a miscarriage of justice for which the only available remedy was to order a retrial.

Mr Welsh was injured when part of a ceiling fell onto his head whilst he was aboard a cruise ship in the South Pacific operated by Carnival Australia. The evidence was that he did not appear to suffer any loss of consciousness or amnesia but he consulted the ship's doctor complaining of headaches and vomiting.

He was issued with a referral to have a CT head scan carried out at the next port to rule out any brain injury. Mr Welsh attended hospital for that purpose when the ship docked in Suva, Fiji. The CT scan was normal. However, upon his return to the port, the ship had already sailed.

He later boarded the ship at another port, after arranging a flight to take him to the next destination, although not without some difficulty as he did not have his paperwork with him and was evidently allowed to re-board as a result of him being insistent.

Mr Welsh expressed his displeasure towards the ship's crew for the way he was treated. Attempts were made to placate him by offering expressions of regret and two bottles of wine. Mr Welsh considered this to be insufficient without an apology which was not forthcoming.

The ship returned to Sydney and Mr Welsh went back to work in Melbourne in his highly successful role as the Victorian Building Manager for the construction company, Simonds Homes Melbourne Pty Limited. He found it difficult to concentrate and carry out problem solving activities.

He resigned from his position with Simonds and set up his own business which had a substantial turnover even though it ran at a loss and did not generate an income for Mr Welsh.

He commenced proceedings in the District Court of NSW in which he claimed damages against Carnival Australia in negligence. Liability was admitted therefore the claim proceeded as an assessment of damages only.

The hearing proceeded before his Honour, Judge Sorby over five days. Mr Welsh alleged that he had suffered a significant head injury which resulted in him losing his highly successful job and suffering permanent psychiatric disability.

He had been assessed by neuropsychologists who gave competing accounts of psychometric test results

regarding his concentration levels and whether they had returned to premorbid capacity.

Evidence was also given by numerous lay witnesses including former work managers and colleagues who attested to a change in Mr Welsh's ability to remember things. One witness stated that he had become more aggressive.

In his Judgment, Sorby DCJ held that Mr Welsh was not entitled to past or future economic loss on the basis that he he had not demonstrated a diminished earning capacity that was compensable in damages.

Nominal damages were awarded in the amount of $21,630.14 comprising non economic loss assessed at 20% of a most extreme case under Section 16 of the CLA with small amounts for past and future out of pocket expenses.

Mr Welsh appealed. The primary attack in the four main grounds of appeal was to challenge his Honour's Judgment on the basis that he failed to give adequate reasons or that his reasons were manifestly inadequate to explain the conclusions he reached.

This included a failure to give reasons why His Honour rejected the evidence of the psychiatrists whose reports were tendered and why His Honour rejected the evidence of the lay witnesses who described a change in his memory and behaviour which resulted in him resigning his position with Simonds.

In the leading Judgment, her Honour Justice Adamson was critical of his Honour, not for providing inadequate reasons, but for giving no reasons at all in respect of these matters.

Her Honour noted that His Honour's reasons merely recounted a large portion of the evidence without disclosing the basis for making findings on critical matters where competing cases had been presented by the parties.

Adamson J was quick to conclude that in all the circumstances, the parties and the Court were left to speculate the reasons for his Honour's conclusions which was an unsatisfactory situation for which a retrial was the only recourse.

Her Honour noted:

> *"The overriding purpose in s 56 of the Civil Procedure Act is relevant. However, one cannot ignore the adjective "just" in the phrase "just, quick and cheap resolution". Justice demanded that the primary judge consider all the evidence, address the significant evidence, make findings sufficient to adjudicate between the cases put by each party and give reasons that sufficiently recorded these matters. The primary judge's reasons did not fulfil those requirements. Even in so far as the primary judge did give reasons, they do not permit this Court to discern on what basis the award was made. The case did not admit of only one assessment as to the various heads of damages. The extent to which the applicant's injuries sounded in damages involved an assessment of evidence of experts and credibility of witnesses, as well as a consideration of documents, including clinical notes and other business records."*

The other members of the Court, who agreed with her Honour's Judgment, provided their own stinging criticisms of the primary judge's decision.

Sackville AJA remarked:

> *"The outcome of this appeal is unsatisfactory and was avoidable had the primary Judge provided adequate reasons for his decision"*

McColl JA noted that His Honour had formed a view concerning Mr Welsh's earning capacity based on his own assessment of his demeanour in the witness box without any reference in his reasons to an analysis of Mr Welsh's pre and post accident abilities and whether or not there had been a change caused by the subject accident.

Her Honour held that it was not open to his Honour to make a finding on that basis as his Honour had no experience of Mr Welsh before the accident.

It is troubling for insurers to see these decisions emanating from the NSW Court of Appeal.

There has been no shortage of decisions of the Court in the past five to ten years where particular emphasis has been given to the fundamental importance of a trial judge's obligation to give sufficient reasons for accepting or rejecting the evidence of one witness over another, or one party's witnesses over another and for reaching conclusions which lead the judge to the ultimate decision in the case.

In this case liability was admitted and the only issue for consideration was quantum however this was not properly considered by the trial judge.

**Darren King**
**dwk@gdlaw.com.au**

## NSW home building law changes

In our July 2014 newsletter we reviewed the changes to the *Home Building Act* 1989 (NSW) which were introduced by the *Home Building Amendment Act 2014*. More than 50 changes to the Home Building Act 1989 ("the Act") were made with the aim of ensuring that appropriate levels of consumer protection are maintained and unnecessary red tape was cut.

Most of the changes came into force on 15 January 2015 and those changes are now supplemented by the introduction of the *Home Building Regulation* 2014. The amendments have retrospective application.

The changes that commence from 15 January 2015 include:

### Licensing

The threshold for requiring a licence for building and general trade work is raised from over $1,000 of work to over $5,000 of work including labour and materials.

Contractors performing specialist works such as plumbing, electrical and air conditioning will still need a licence regardless of the cost of the work.

Contractors performing stand alone contracts for internal paintwork, work related to tennis courts, ponds and water features no longer need a licence unless done as part of other home building works.

Contractors will now face a penalty of up to 12 months in prison for a second or subsequent offence for unlicensed contracting or not having the required statutory insurance.

### Owner/Builders

Owner builders will be required to name all other owners of the land on an application for an owner builder permit to prevent people using the system to carry out commercial unlicensed building.

Any owners named cannot apply for another owner builder permit for a different property for five years.

Owner builders will be prohibited from getting a permit for a dual occupancy except in special circumstances.

Owner builders will not be able to get statutory insurance and if the property is sold within the warranty period the contract for sale must clearly state that there is no statutory insurance on the property.

The threshold for requiring an owner builder permit has increased to work valued over $10,000.

### Home Building Compensation Fund

The Home Warranty Insurance Scheme will be renamed as the Home Building Compensation Fund.

This change was introduced to prevent the confusion surrounding the implication that the insurance operated in the same manner as usual insurance when in fact it is entirely different. In this case the builder takes out the warranty insurance but is not covered under the policy, it is the owner who is covered under the policy.

### Statutory Warranties

Major defects are now defined as defects that are:

- in a major element of the building;
- defects which prevent all or part of the building from being lived in or used for its intended purpose;
- defects that threaten the collapse or destruction of building or part of it.

Licensees will have a legal defence in proceedings for a breach of statutory warranties if they reasonably relied on the written specialist's advice of an independent professional engaged by the owner.

Builders who seek to fix defects cannot be unreasonably refused access to a property by the homeowner.

### Payment of Outstanding Money

Fair Trading inspectors through a Rectification Order can oblige consumers to pay the builder any money owed under the contract.

### Completion

The definition of completion for strata buildings will change so that completion occurs on the issue of an Occupation Certificate allowing the whole building to be used and occupied.

Changes that will be implemented from 1 March 2015 include:

### Contracts

The threshold is being raised for the more detailed contract requirements from $5,000 to $20,000. Home building work under $20,000 will still need a written minor works contract.

The cap on deposits for work over $20,000 will be increased from 5% to 10%.

Builders will only be able to request a maximum of 10% for a deposit for all projects regardless of the value.

Contracts over $20,000 will need a progress payment schedule and a termination clause.

**Claims Register**

The Home Building Compensation website will also contain a certificate register of policies issued under the scheme. Searches can be made as to what certificates are registered to a property and what claims may have been made on that certificate.

In summary the changes should provide the builder with better cash flow, more options for recovery of outstanding payments and protection against claims for defective work which occurred as a result of another parties faulty advice or instructions.

The owner should have the benefit of more stringent licensing enforcement and stricter control of payments for work done.

**Kelvin Keane**
**kdk@gdlaw.com.au**

## EMPLOYMENT ROUNDUP

### Is a complaint or inquiry the exercise of a workplace right?

Sections 340-341 of the *Fair Work Act 2009* (the Act) protect an employee from dismissal or other adverse action where the reasons or basis of an employer's action includes the fact that an employee has exercised a "workplace right", including circumstances where the employee has made a complaint or inquiry.

Section 341(1) of the Act provides a definition of meaning of "workplace right" as:

*"Meaning of workplace right*

*(1) A person has a workplace right if the person:*
*(a) Is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or*
*(b) Is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*
*(c) Is able to make a complaint or inquiry:*
*(i) To a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument;*
*(ii) If the person is an employee – in relation to his or her employment."*

There is an unresolved tension in the cases as to the required nexus of a complaint or inquiry to the employment for it to constitute a workplace right. Specifically, the meaning of workplace right and whether something is "in relation to" employment has been unclear.

In a recent decision in *Evans v Trilab Pty Ltd* [2014] FCCA 2464, the Federal Circuit Court refused an employer's application to strike out an adverse action claim alleging dismissal in contravention of the general protection on the ground of a "complaint" or "inquiry".

The employer was a company undertaking soil and rock classification testing. It engaged Evans as State Manager in Engineering and as part of that role, he was required to conduct classification tests.

Within a matter of days of commencing employment, Evans raised concerns with a Senior Laboratory Manager as to the testing procedures, noting that the testing methods adopted by the employer were not in accordance with the relevant Australian standards. In response to this, Evans was required to meet with the employer's Chairman who directed him to use the existing testing procedures and to cease telling other staff members that they were using incorrect testing methods and policies. Only 4 days later, Evans was required to meet with the Chairman again at which time he was informed that he was to be dismissed on the basis that he refused to comply with instructions to use the existing testing methods and that his performance review "was a disaster". Evans had been employed for only 3 weeks.

Consequently, Evans brought an adverse action claim alleging that he had been dismissed for exercising his workplace right to make a "complaint" or "inquiry" arising from his questioning of the testing methodologies. In answer to this, the employer argued that Evans had been dismissed because of performance issues and concerns, and sought an order that Evans' application be summarily dismissed arguing that Evans' questions concerning the tests did not constitute a workplace right pursuant to section 341 of the Act.

In reaching its decision, the Court had regard to existing case law and the divergence in views. Specifically, the Court noted the narrower view to the effect that:

- A complaint or inquiry must originate or be an incident of the contractual arrangements or statutory framework surrounding the employment; and

- A complaint or inquiry made by an employee must be based on a genuine objection and justification rather than for any ulterior purpose.

In considering the broader view, the Court noted authorities demonstrating that:

- A complaint or inquiry by an employee will suffice to attract the protection against adverse action despite any absence of or recourse to formal complaint mechanisms and policies for the complaint or inquiry; and
- Section 341 was not confined to the making of complaints or inquiries to employers but also extended to complaints or inquiries with legal representatives concerning that employee's employment and rights and entitlements arising from that employment.

In considering the competing narrow and broad views, the Court found that the breadth of the meaning of the words "*in relation to"* adopted in section 341(1)(c)(ii) of the Act meant that it was arguable that Evans' complaint or inquiry related to his employment, particularly in circumstances where his duties included managerial responsibilities and the correctness of testing procedures would have arguably been a matter of concern to a manager.

Ultimately, the Court recognised that the words "*in relation to"* used in section 341(1)(c)(ii) do not extend to tenuous or remote relationships but that it was not necessary for a complaint or inquiry to arise from a statutory, regulatory or contractual provision before it can be deemed a complaint or inquiry in relation to a person's employment within the meaning of the Act.

Further, the Court held that a complaint or inquiry need only have "an indirect nexus with a person's terms and conditions of employment to come within the scope of section 341(1)(c)(ii) and may be a complaint about the conduct of another person in the workplace or about a workplace process which concerns or has implications for an employee's employment."

It followed that the employer's application was dismissed and Evans' adverse action application could proceed to be heard on its merits.

The decision demonstrates an adverse action claim may be available where employees make complaints or inquiries about systems of work, equipment or plant, the conduct or performance of others or their entitlements as the complaint or inquiry concerns their employment. It ought be remembered that the right to bring an adverse action claim arising from action taken by an employer following a complaint or inquiry will not be limited to complaints or inquiries made directly to the employer but may capture those made to third party advisors or bodies.

Employers must exercise caution when undertaking any disciplinary or performance management steps in respect of employees who raises any employment related concerns or make any complaints or inquiries as adverse action following a complaint or inquiry may lead to the employer subsequently having to defend its decision and decision making process to demonstrate that any decision was based on legitimate grounds rather than flowing from the complaint or inquiry.

**Victoria-Jane Otavski**
**vjo@gdlaw.com.au**

## WORKERS COMPENSATION ROUNDUP

### The ever expanding domain of the approved medical specialist

The recent determination of Deputy President Roche in *Jaffarie v Quality Castings Pty Limited* [2014] NSWWCCPD 79 has reversed the decision in *Peric v Chul Lee Huang & ors t/as Pure and Delicious Healthy* [2009] PD 47 finding it is not open to an arbitrator to make an award for the respondent in circumstances that because the effect of the injury has ceased, the worker has suffered a nil permanent impairment as a result of the injury. As a consequence of the decision we are likely to see a further increase in the number of matters which are referred to an approved medical specialist prior to final determination of all matters in issue by an arbitrator.

At first instance Arbitrator Harris accepted that the worker suffered an injury to his lumbar spine in the nature of a strain and he found the worker had recovered from the effects of that strain by January 2010. Arbitrator Harris declined to refer the assessment of whole person impairment of the lumbar spine to an AMS as the effects of the injury to the lumbar spine had ceased.

After considering *Peric* and various other authorities Deputy President Roche expressed the view the following principles apply to proceedings in the Commission:

> *"(a) questions of causation are not foreign to medical disputes within the meaning of that term when used in the 1998 Act. Assessing a degree of permanent impairment "as a result of an injury", and whether any proportionate permanent impairment is "due" to any previous injury or pre-existing condition or abnormality, both call for a determination of a causal connection;*

*(b) it is for the Commission to determine whether a worker has received an injury within the meaning of Section 4 of the 1987 Act and whether there are any disentitling provisions, such that compensation is not payable for that injury;*

*(c) the Commission's jurisdiction is restricted by Section 65(3) of the 1987 Act, which precludes the Commission (an arbitrator or a Presidential Member) from awarding permanent impairment compensation if there is a dispute about the degree of permanent impairment, unless the degree of impairment has been assessed by an AMS;*

*(d) the determination of the degree of permanent impairment that results from an injury is a matter wholly within the jurisdiction of an AMS or, on appeal, the Appeal Panel and is not a matter for determination by an arbitrator;*

*(e) a finding made by a person without jurisdiction cannot bind a person or persons who have jurisdiction; and*

*(f) it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues."*

In a claim for lump sum compensation the physical consequences of the injury in relation to the assessment of whole person impairment as a result of the injury are within the exclusive jurisdiction of an AMS irrespective of whether the matter involves a disputed claim for weekly compensation and disputes about causation which the Commission is required to determine. It is for the Commission to determine whether a worker has received an "injury", which includes the injurious event and the pathology caused by that event. He explained that an injurious event is only a mechanism for suffering an injury and is not a Section 4 injury in itself. The relevant "injury" in Section 4 is the pathology that has arisen out of or in the course of the employment. The important matter is the consequence of the injury both in terms of pathology and in terms of economic consequences.

The Deputy President indicated that although the definition of medical dispute in Section 319 of the 1998 Act included "the worker's condition" and "aetiology of the condition" it must be remembered that an AMS' opinion on those matters is not conclusively presumed to be correct. The only matters that are "conclusively presumed to be correct" are those listed in Section 326, namely:

- the degree of permanent impairment of a worker as a result of an injury;
- whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality;
- whether impairment is permanent;
- whether the degree of permanent impairment is fully ascertainable; and
- the nature and extent of loss of hearing suffered by a worker.

Apart from hearing loss claims an opinion of an AMS on matters such as the nature of the injury or the condition or aetiology of that condition are not conclusively presumed to be correct. Thus, the "nature of the injury" is a matter for the Commission to determine.

Once the Commission, either by consent or after a contest, has determined the nature of an injury it is for an AMS to determine the degree of whole person impairment that has resulted from that injury. It is not open to an AMS to find that a worker suffered no injury or has suffered a different injury to that found or agreed. It is however open to an AMS to determine that no whole person impairment has resulted from the agreed or found injury.

In relation to the matters in issue in the particular decision under consideration the Deputy President found that where there is a claim for weekly compensation and lump sum compensation, and an arbitrator decides that because the effect of the injury has ceased there is no entitlement to weekly compensation, thereby entering an award for the respondent in respect to that part of the claim, the assessment of whole person impairment must still be referred to an AMS.

If the AMS then determines the worker suffers a permanent impairment there will be an entitlement for the worker to have an award entered for lump sum compensation consistent with the MAC. This will then give rise to an inconsistency with the arbitrator's finding that so far as the weekly compensation is concerned the effect of the injury had ceased. Whilst the conflict could be addressed by the worker requesting a reconsideration of the arbitrator's decision this would result in further delay and expense which would undermine the Commission's core statutory objectives of the provision of a fair and cost effective system for the resolution of disputes and the provision of a timely service ensuring worker's entitlements are paid promptly.

This uncertainty and delay could be reduced in claims for weekly compensation and lump sum compensation where the arbitrator found the worker had suffered a Section 4 injury by referral of the matter to an AMS for assessment of whole person impairment resulting from the injury before the arbitrator makes final orders. This is far better than forcing the worker to make a reconsideration application.

As a consequence of the determination we are bound to see an increase in the matters being referred to AMS's for determination of the degree of whole person impairment before disputed claims for weekly compensation are finally determined. Whilst Deputy President Roche acknowledges that a finding of whole person impairment by an AMS in circumstances where the arbitrator considers the effect of the injury to have ceased will not automatically mean the worker is entitled to a continuing award of weekly compensation, such a finding of WPI by an AMS will necessarily be further evidence that can be relied upon to justify such an award of continuing weekly compensation.

Further the two step process suggested by Deputy President Roche to avoid injustice to workers will necessarily involve not insignificant extra work for legal practitioners in a fixed cost jurisdiction with little flexibility for arbitrators to award additional costs. We anticipate an increase in the number of awards for separate determinations which may serve to drive up overall costs.

**Belinda Brown**
**bjb@gdlaw.com.au**

## Inconsistencies in medical assessments – Relevant to whole person impairment?

It is not unusual to read in a medical assessment certificate prepared by a MAS assessor that the claimant demonstrated some inconsistencies upon examination but does this excuse the MAS assessor from making a determination with regards to whole person impairment? This question was examined by His Honour Justice Garling in the Supreme Court review of *Huni v Allianz Australia Insurance Limited* (2014) NSWSC 1584.

Memory Huni ("Huni") was injured in a motor vehicle accident on 29 November 2012. The CTP insurer disputed that Huni had reached the 10% whole person impairment threshold in order to sustain a claim for non economic loss. Huni applied to MAS to seek a determination that the injuries to the cervical spine, lumbar spine, left hip, left shoulder and left leg were sufficient to exceed the 10% threshold.

The MAS assessor (Dr Sally Preston) assessed that Huni sustained injuries to the cervical and lumbar spines which resulted in 5% whole person impairment. In conducting the examination, Dr Preston determined there was no discreet left shoulder injury. Repeated testing was carried out on the left shoulder during the medical examination but a consistent range of movement was not detected and Huni demonstrated a significant variation of movement on repeat testing.

Dr Preston asked Huni to explain the inconsistency of the left shoulder examination. Huni suggested increasing pain in the left shoulder was the issue. Despite this explanation, Dr Preston ignored the evidence of decreased range of motion in the left shoulder and declined to assess left shoulder impairment due to the inconsistencies.

Huni applied to MAS to review the assessment but this was returned by the Proper Officer. Huni then filed a summons for judicial review. Justice Garling, whilst accepting Dr Preston's finding that there was no discreet left shoulder injury, concluded Dr Preston had fallen into error when applying the medical assessment guidelines ("guidelines") when faced with an inconsistent examination.

Justice Garling determined the medical assessor ought to have made a clinical judgment about the degree of permanent impairment using the range of her clinical skills and judgment and applying the history, examination and all other relevant facts. This would then be in accordance with clause 1.42 of the guidelines.

Even if there are inconsistencies in examination, a medical assessor cannot decline to assess an injury. The medical assessor must reach a conclusion.

Justice Garling ordered the matter to be remitted to MAS for determination of the review application by a different Proper Officer.

The important aspect of this decision when reviewing a medical assessment certificate is to carefully examine whether there has been a proper application of the guidelines when there is an inconsistency in the examination carried out by the medical assessor. Whilst gross inconsistencies that are completely incongruous with the balance of the examination process may have some bearing on the assessment of impairment, a medical assessor cannot refuse to assess permanent impairment due to inconsistencies on examination.

**Stephen Hodges**
**sbh@gdlaw.com.au**

## CTP ROUNDUP

### Blameless Accidents - The Assessment Of Contributory Negligence - Davis v Swift

The NSW CTP Scheme includes a compensation regime for those injured in a motor accident where there is no fault on the part of the owner or driver of any motor vehicle involved in the accident. Section 7 of the *Motor Accidents Compensation Act 1999* defines a blameless accident as:

> *"A motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person."*

The Courts have held that a blameless accident includes one where there has been contributory negligence on the part of the injured person.

In *Axiak v Ingram* the NSW Court of Appeal confirmed that a 14 year old school student who was struck by a vehicle as she ran out from behind a school bus was entitled to compensation where there was no fault on the part of any driver involved in the accident, however the Court prescribed a regime for assessing the extent of any reduction for contributory negligence of the injured person.

In *Axiak* the Court held that the reference in the definition for blameless accident - "and not caused by the fault of any other person" referred only to the tortious conduct of a person other than the injured person.

In *Axiak* the Court of Appeal unanimously held that the assessment of contributory negligence of an injured person in a blameless accident which reduces the damages that are awarded must be carried out in a different manner to the usual comparative analysis of responsibility undertaken in personal injury claims where a defendant is at fault.

The Court of Appeal determined the relevant enquiry was how far the plaintiff had departed from the standard of care he or she was required to observe in the interests of his or her own safety and the contributory negligence will be determined by assessing the extent to which the plaintiff departed from that standard.

Since the decision in *Axiak* lawyers and the Courts have been wrestling with the way in which to approach the assessment of culpability of an injured person in a blameless accident.

In June 2013 a judgment in *Davis v Swift* was delivered in the District Court with a finding that it was possible for there to be a finding of 100% contributory negligence in a blameless accident. However that determination was challenged in an appeal and the Court of Appeal was once again been called on to consider the blameless accident provisions and the assessment of contributory negligence.

Davis was a pedestrian who was struck by a parked motor vehicle that began to move away from the kerb. The motor vehicle ran over her right foot. The accident occurred in Vincent Street, Cessnock which has four lanes running in a north/south direction. At the relevant time the two kerbside lanes were occupied by parked vehicles. Swift's vehicle was parked on the east side, facing south. Davis decided to cross the street from the east side, stepped off the kerb in front of Swift's parked vehicle and walked to the middle of the road. Traffic travelling in the outside northbound lane made it unsafe for her to cross and she ran or stepped backwards very quickly without looking, into the southbound traffic lane and into the path of Swift's vehicle.

In the seconds before this happened Swift was sitting in her vehicle with the engine on, preparing to leave the kerb and had looked over her shoulder, then forward and as she did she turned her wheel to the right and slowly began to drive from the kerb. Swift felt a bump that was Davis colliding with the front of her vehicle and catching her right foot under the driver's side wheel.

Davis conceded that she had not noticed whether there was anyone in Swift's vehicle and had not heard the engine start. She agreed she had not seen Swift's car indicate or start to move before the collision. She conceded that she had not seen Davis prior to the collision.

The trial judge found that the evidence pointed to a pedestrian unfamiliar with the road, looking for a shop on the other side of the street and not attending to the busy state of the road, going to the middle of the road before realising she was in danger, hesitating momentarily and then running or stepping back very quickly without looking. The trial judge accepted there was nothing Swift could have done to avoid the collision and there had been no breach of duty of care by Swift. The trial judge went on to determine that Davis' departure from the standard of care was such as to warrant a finding of 100% contributory negligence.

There were two issues that came before the Court of Appeal and they were:

- whether Swift had breached her duty of care by failing to keep a proper look out as she commenced to drive her vehicle from the kerb;
- if the accident was a blameless accident, whether contributory negligence should be assessed at 100%.

In the appeal neither party submitted that *Axiak* was wrongly decided, either as to what constitutes a blameless motor accident or the approach to be applied when assessing any reduction in the injured person's damages for contributory negligence.

The Court of Appeal disposed of the challenge to the finding that there was no negligence concluding that the evidence of four witnesses and Swift's evidence did not justify a finding that from Swift's position in the driver's seat, had she looked forwards, backwards and forwards as she asserted, she must have seen Davis in time to take some action to avoid colliding with her.

The Court of Appeal confirmed the trial judge did not err in inferring no fault on the part of Swift.

However, when it came to the finding of contributory negligence, in this blameless accident, the Court of Appeal found that the trial judge had fallen into error.

In Davis' case the trial judge set out five factors that she considered in the assessment of contributory negligence before concluding:

> *"The facts in the present case are far stronger (than those in Axiak) as the plaintiff is an adult who showed complete disregard for other road users and was the sole cause of the accident. Accordingly a reduction of 100% is called for in relation to the blameless accident claim."*

The five factors were:

- the plaintiff entered the road quickly with the obvious intention to cross;
- she took no account of the traffic coming the other way when entering the roadway - it must have been visible to a prudent pedestrian;
- she did not bother to look as to whether the defendant was in her vehicle, whether the engine was running (as it must have been at some stage before the accident), whether her indicator was on, whether the traffic on her right had stopped for the defendant to leave the kerb - all signs of the defendant's proposed conduct;
- she moved quickly into the road and then suddenly and quickly stepped or ran backwards without looking and turning;
- she stepped backwards into the side of the defendant's car with her foot making first contact with the tyre at a time when the defendant's car was barely moving off.

Meagher JA noted that the trial judge did not undertake any consideration as to the significance of each of those factors to the question of apportionment.

Meagher JA observed the first three factors were not relevant to an assessment of the extent to which Davis' conduct which caused her injuries, departed from that of a reasonable person in her position.

It was Davis' conduct having reached the middle of the road and then stepping backwards very quickly without looking that had to be addressed.

Meagher JA noted that the trial judge fell into error when she looked at the conduct of Davis as the sole cause of the accident. This was an impermissible consideration.

The accident was a result of both Davis' conduct in walking backwards and Swift's conduct of driving the vehicle.

Davis' conduct could only be the sole cause if it was directed to identifying culpable conduct which caused the accident and that approach was rejected in the decision in *Axiak*.

It was therefore necessary to reassess the apportionment.

It was necessary to determine apportionment by reference to the extent to which Davis' conduct failed to conform with the standard of care expected of a person in her position.

Meagher JA noted:

> *"Such a person acting reasonably would not have walked backwards from the middle of the road, and, at the very least, would not have done so without first having looked to make sure it was safe to do so. To that extent the appellant's behaviour involved a significant departure from the standard of care expected."*

Meahger JA went on to note:

> *"However, in the range of possible departures from that standard of care, the appellant's conduct is not an example of a worst possible case. It was not such as to make it inevitable that the respondent's vehicle would run over her foot. Although the evidence did not establish that the accident could have been avoided if the respondent had been keeping a proper look out, in the same circumstances a different driver may have seen the appellant on the roadway and avoided the collision. Nor did the appellant consciously place itself in a position of danger or attempt to cross the road when her judgment was affected by alcohol or*

*drugs. Taking these matters into account her damages should be reduced by 80%".*

Accordingly, Davis' appeal succeeded in part, with the damages that were assessed being reduced by 80%. The finding of 100% contributory negligence was not appropriate.

Whilst it is permissible for there to be a finding of 100% contributory negligence with the end result that a blameless accident claim will fail, this was not a case where a finding of 100% was appropriate.

However, there must now be some doubt as to whether or not the principles laid down in *Axiak* will be with us forever.

Meagher JA questioned whether the assessment of contributory negligence should be undertaken in the manner laid down in Axiak. As it was not argued in the case that the decision in Axiak was incorrect it was not permissible for the Court of Appeal to revisit the decision in Axiak even if it was thought to be wrong. However it appears that both Meagher JA and Leeming JA, who agreed with judgment of Meagher JA noted that it may be desirable for the Court to revisit the approach stated in *Axiak v Ingram*.

No doubt the Court of Appeal will patiently wait for the next case which involves a blameless accident and an argument that Axiak was wrongly decided and when that case comes up it will be five Court of Appeal judges that will determine whether the decision in *Axiak* is correct. For now the principles in Axiak will be continue to be applied in NSW.

**David Newey**
**dtn@gdlaw.com.au**



*Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any Court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.*