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The principal's liability for an injury to an independent contractor's employee

Businesses that retain contractors to carry out work are often confronted by claims from injured employees of the contractor. In NSW the damages that will be recovered from an employer will generally be substantially less than the amount that can be recovered from a negligent third party and this will focus an injured worker's thoughts to a damages claim against a principal who engaged the injured person's employer.

This often seems unfair when the principal has engaged a specialist contractor with expertise the principal does not have.

Can a principal defend the case on the basis that it is the contractor's fault or does the principal retain some residual responsibility?

This month the NSW Court of Appeal has delivered a judgement in Cartwright v Bluescope Steel Limited, a case we reviewed in our August 2013 newsletter which has provided clarity on the approach the Court will take on claims of this nature.

The decision serves as a reminder that the control exercised by a principal over tasks carried out by employees of an independent contractor can create a liability for the principal in the event that the employee of the contractor is injured but to have a liability an injured person must show that the acts or omissions of a principal were a causal factor in the accident.

Cartwright was a truck driver employed by Mannway Logistics Pty Limited. He was injured in a motor vehicle accident whilst driving a prime mover and transporting coils of steel for BlueScope Steel Limited.

BlueScope manufactures steel and engaged Mannway to transport steel in containers from Port Kembla to Port Botany. The steel was delivered by BlueScope in

cylindrical coils on the back of trucks and stored in the Mannway warehouse. The coils of steel were varied somewhat in size and extremely heavy. Mannway employees would load the coils into containers and then transport the containers by truck to Port Botany.

Cartwright simply needed to attach his prime mover to a trailer and complete his journey.

Cartwright was travelling in the centre of three lanes when he heard a loud bang and a thud and his truck started to tip and rolled. He suffered injury. He was travelling at approximately 55kmh in a 70kmh zone and was negotiating a bend when he tipped.

When the coils were delivered by BlueScope to Mannway they were strapped to wooden pallets. The weight of the coils was required to be evenly distributed and centred in the containers and chalk marks were placed on the floor of the containers to guide the forklift operators when they were loading the pallets into the containers.

It transpired that the coils had been loaded by BlueScope onto the pallets by a crane and to accommodate the chains on the crane, the coils were not loaded as they had been in the past and two extra pieces of timber runners had been placed on the pallets to accommodate the chains. BlueScope had not informed Mannway of this change.

The coils moved whilst Cartwright was transporting them and the trailer overturned.

The trial judge concluded that both Mannway and BlueScope failed to exercise reasonable care. The lion's share of liability however attached to BlueScope.

The trial judge noted that the system design lay at the heart of BlueScope's duty which included the proper design of the loading and packing system. The duty also included maintaining the efficacy of the system when circumstances changed and required BlueScope to notify Mannway of the change, which it failed to do.

The trial judge determined that a proper apportionment of liability between the two defendants was 85% to BlueScope and 15% to Mannway, the employer.

In this case it was thought Bluescope devised an inadequate system and compounded it by insisting on strict adherence to it by Mannway. BlueScope altered the configuration of the pallets and did not notify Mannway of the change. The trial Judge concluded Mannway was entitled to expect BlueScope to draw its attention to any material change in the pallets that BlueScope delivered. It did not. Therefore BlueScope was principally liable for the loss.

As can be seen the trial judge determined it is not enough for a principal to defer to an independent contractor to ensure that loads are properly stowed for transportation. The decision suggested that where loads are not properly stored in the first place and are delivered to independent contractors for transportation, the consignor of loads is likely to have the lion's share of responsibility for accidents which occur and injured employees of independent transport contractors have good claims against the principals who have been engaged the transport operators.

However an appeal followed an in an unanimous decision of the Court of Appeal it was determined that Bluescope had no liability, not because it had no duty of care but because it had not been shown that it had breached its duty.

In the leading judgement Emmett J, with who the other judges agreed, described the nature of the duty of a principal and why a duty arises. Emmett J observed:

"The primary judge considered that the fact that Mannway also owed a duty to Mr Cartwright did not alter the fact that BlueScope itself, by its own acknowledgement, owed a duty directly to Mr Cartwright. Her Honour considered that, in maintaining control over the method of packing, BlueScope disentitled itself from relying upon the separate duty that Mannway owed to Mr Cartwright and was not relieved of that duty.

The common law does not impose a duty of care on principals for the benefit of independent contractors engaged by them of the kind that they owe to their employees, although, in some circumstances, a principal will come under a duty to use reasonable care to ensure that a system of work for one or more independent contractors is safe (Leighton Contractors Pty Ltd v Fox [2009] HCA 25; 240 CLR 1 at [20]). If a principal fails to engage a competent contractor, it may not avoid liability for the negligent failure of the contractor to take reasonable care to adopt a safe system of work. However, provided that the principal retains a competent contractor, and the relevant activity is placed in the contractor's hands, the principal is not subject to an ongoing general law obligation with respect to the safety of the work methods employed by the contractor or by those with whom the sub-contractor has subcontracted (Leighton Contractors v Fox at [59]).

An entity that organises an activity involving a risk of injury to those engaged in the activity is under a duty to use reasonable care in organising the activity to avoid or minimise that risk. Such a duty is imposed whether or not the entity is under a further duty of care to servants employed by it to carry out that activity. The duty arises simply because the entity is creating the risk. However, the duty is more limited

than the duty owed by the entity to an employee. The duty does not extend to retaining control of working systems, if it is reasonable to engage the services of independent contractors who are themselves competent to control the system of work without supervision by the principal entity. The circumstances may be such that the entity will be obliged to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors, if confusion about those areas gave rise to a risk of injury. However, once the activity has been organised, and its operation is in the hands of apparently competent independent contractors, any negligence of the independent contractors, within the area of their responsibility, is not the vicarious responsibility of the principal entity. If a principal entity takes reasonable care in the retainer of independent contractors who are competent to control their own systems of work, in retaining a supervisory power (where appropriate) and in defining the contractors' respective areas of responsibility, the principal entity will not be liable for damage caused merely by negligent failure of an independent contractor to adopt or follow a safe system of work, either within the area of responsibility of the contractor or in an area of shared responsibility (see Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1; 160 CLR 16 at 47-48).

When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case. For example, a motorist may reasonably assume that other road users will be reasonably careful. On the other hand, it is sometimes reasonable to expect a motorist to allow for the possibility that some other road users will be inattentive or even negligent. The obviousness of a risk and the remoteness of the likelihood that other people will fail to observe and avoid it may be factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, then there would be little room for the doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration (Thompson v Woolworths (Qld) Pty Ltd [2005] HCA 9; 221 CLR 234, at [35]-[37])."

In this case there was an admission by Mannway of breach of the duty that it owed to Mr Cartwright and that Mannway knew or ought to have known that the wedges to support the pallets holding the coils were not in contact with the relevant coils or the pallets on which they were mounted, with the consequence that Mannway knew or ought to have known that the lack of contact gave rise to a risk of injury to Mr Cartwright.

Emmett J noted this highlighted the fact that BlueScope's duty did not extend to warning Mannway of the inadequacy of standard size wedges by reason of the additional runners under the pallets. Mannway's supervisors should have checked the wedges. Mannway had an obligation to pack the coils and there was no confusion between Mannway and BlueScope as to who had that obligation. Mannway did not need BlueScope looking over its shoulder.

Emmett J observed:

"Mr Cartwright's submissions, taken to their logical conclusion, would require BlueScope to have its own employees on site at Mannway's depot to supervise Mannway in everything that it did. That would effectively equate BlueScope's duty with that of an employer, which BlueScope clearly was not, in relation to Mr Cartwright."

The Court of Appeal also noted:

"It is not sufficient to say that one of two defendants must have been negligent and that either of them may have been negligent. A plaintiff must be able to point, on the balance of probabilities, to the particular defendant who was negligent."

Emmett J observed:

"There was no suggestion in the present case that the circumstances made it necessary for BlueScope to retain and exercise a supervisory power over the performance by Mannway of its obligations under its retainer from BlueScope to pack coils into containers and transport them to Port Botany. There was no suggestion that BlueScope failed to prescribe the areas of responsibility of Mannway such that there was confusion about areas of responsibility that might involve a risk of injury."

The Court of Appeal determined that the evidence did not support a conclusion that BlueScope was in breach of its duty to Mr Cartwright. Bluescope had specified in unequivocal terms in its Guidelines, which Mannway was bound by to follow, that wedges were required to be in contact with a coil or the pallet on which the coil is mounted. In particular, the use of the word "forced" in the instruction about the placement of the wedges rendered it clear that physical contact was to be made between the wedge and the pallet or coil.

BlueScope was entitled to expect that its competent independent contractor would comply with those detailed instructions. The trial judge erred in concluding to the contrary.

As can be seen there is no duty to retain control over the functions performed by a specialist independent contractor however if supervisory functions are maintained by a principal a duty of care may arise.

Where a special contractor is engaged to carry out work it is reasonable for the principal to expect the contractor to carry out its instructions and if the contractor departs from clear instructions blame cannot be left at the feet of the principal.

This judgment contains a clear statement of the law as it applies to the liability of a principal for injuries to employees of independent contractors and no doubt we will see the judgment referred to many times in cases that come before the Courts where claims are made by injured workers against principals that engaged the worker's employer.

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Establishing negligence in slip and fall cases requires proof of the cause of the slip

Plaintiffs in slip and fall cases must establish what caused them to fall and its precise location. The mere fact that a person fell is not sufficient to establish negligence.

This was illustrated recently in a unanimous decision of the New South Wales Court of Appeal in which the Court overturned a judgment in favour of an injured plaintiff who fell in a Coles Supermarket but who failed to establish what caused her to fall.

In *Coles Supermarkets Australia Pty Limited v Bright*, the plaintiff, Sharon Bright, commenced proceedings in the District Court claiming damages from Coles and a contractor, Lynch Group Australia Pty Limited ("Lynch") as a result of injuries sustained when she allegedly slipped and fell in the Banora Coles Supermarket, on the NSW North Coast.

Bright fell near a flower display within the supermarket approximately 10 minutes after the display was arranged by an employee of Lynch which was confirmed on CCTV footage.

The District Court hearing proceeded before the then Chief Judge, Justice Blanch who found in favour of the plaintiff. His Honour focused on a single issue namely whether or not there was a puddle of water on the ground in front of the flower display.

His Honour found that there was and that accordingly both Coles and Lynch were negligent.

Coles and Lynch both appealed, challenging a number of the findings and the reasoning of the trial judge.

The trial judge was presented with evidence that was inconsistent with the allegation that Bright's fall was caused by water on the ground.

Firstly, the CCTV footage included the setting up of the flower display and did not show any obvious activity which could have led to water falling on the floor. The footage showed a customer taking a bunch of flowers from the display a few minutes before Bright's fall but from a different area of the display. Further, the CCTV footage showed a significant number of customers walking across the area of the fall between the time the flower arrangement was completed and the time of Bright's fall. There was no indication that any of these customers noticed any water on the floor and Bright herself traversed the area in the opposite direction before she returned and fell.

Secondly, there was evidence about the presence of a "skid" mark on the floor surface purportedly caused by the plaintiff's shoe in the course of her fall.

Bright herself had some difficulty establishing precisely where the slip and fall occurred.

Basten JA, with whom Hoeben and Ward JJA agreed considered the reasons of the trial judge in arriving at his findings regarding causation and made the following remarks:

> *"…the reasoning provided in the judgment is of limited assistance. Apart from the supposed slip mark on the ground in the vicinity of the water, there was nothing at all beyond the fact of the fall to support the view that the floor was wet. The CCTV footage did not demonstrate that the plaintiff had any opportunity to inspect the floor where she thought she had slipped before she was surrounded by people offering assistance. Her evidence alone established no more than the possibility that there was water there before she fell."*

Accordingly, the Court held that the trial judge's finding that the floor was wet before Bright's fall could not be sustained.

The defendants also argued that his Honour failed to do more than stating that if there was water on the floor both defendants must be liable.

The Court of Appeal considered that there was no analysis as to whether, if there was a puddle of water on the ground, either of the defendants was negligent for failing to remove it.

The Coles manager gave evidence at the trial about the procedures that were in place to address spillages at the store and what would have been done in this instance if a spill had been identified.

The trial judge found that the manager was a *"conscientious manager who ensured that the safety precautions necessary were taken."*

The Lynch employee also gave evidence that her practice involved her being conscientious in making sure the floor was clean and dry and to make sure that if there had been a spill she would have seen it and cleaned it up. This evidence was not challenged at trial.

Accordingly, the Court of Appeal held that there was no evidence before the trial judge that either of the defendants had been negligent or could be found to be negligent if there had been a puddle of water present.

Basten JA noted:

> *"There was no finding that they [the defendants] failed to take reasonable care: the judge accepted the evidence of each, that the risk of spillage was well understood and that they were conscientious in identifying and clearing up such spillage if it occurred."*

His Honour also found that:

> *"The mere fact of a spillage of a small quantity of water did not necessarily entail a failure to take reasonable care."*

The Court of Appeal found that his Honour's conclusions could not be supported by the evidence presented at the trial. The Appeal was allowed and the orders made in the District Court were set aside. Bright was ordered to repay monies paid to her as a result of the original judgment.

This serves as a useful reminder of the fundamental elements that must be established in a slip and fall claim including the precise location of the incident and the cause of the slip.

The Court of Appeal emphasised that trial judges cannot engage in mere guesswork to establish a finding of negligence. There must be evidence to show that the defendant has failed to exercise reasonable care.

The Court of Appeal also highlighted the need for trial judges to give proper consideration to the requirements under the *Civil Liability Act* to establish whether or not there has been a breach of duty of care.

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Unnecessary dental treatment - What are your rights?

When you place yourself in the hands of a professional you expect honest advice. We do not expect to receive advice motivated by financial gain for the professional. We do not expect to receive treatment that has no therapeutic benefit. So what happens when you have doubts about your dentist?

In White v Johnston the NSW Court of Appeal was called on to review a decision of a trial judge that had awarded $140,000 for pain and suffering and $160,000 for aggravated and exemplary damages to Johnston who had received dental treatment from White.

Between June and December 2009 Johnston, attended the dental surgery of the Ms Jasmin White to receive treatment.

It was alleged that the treatment performed constituted assaults on Johnston as the treatment was unnecessary and ineffective. Johnston also had her teeth built up and it was alleged that the building up of the teeth was negligently performed.

Evidence of other malpractice, which included a previous conviction indicating that White had fraudulently obtained payments from health authorities for services never rendered, was admitted by the primary judge on the basis that it was relevant to proving that White had a tendency to perform work that was unnecessary and to make claims for services not rendered.

The Trial Judge held that there was no therapeutic purpose in performing the treatment and White had failed to prove that her patient's consent was valid. The claim for assault and battery was therefore made out. The primary judge relied on the evidence of malpractice which had been admitted on the basis that it showed a tendency to perform work that was unnecessary.

Damages were awarded by the primary judge on the basis that the Civil Liability Act 2002 (NSW) did not apply and concluded that Ms Johnston was entitled to damages at common law because the actions of Ms White were not negligent, but were deliberate.

Section 3B(1)(a) of the Civil Liability Act 2002 (NSW provides that the provisions of the Civil Liability Act do not apply to or in respect of civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury.

There are thus two prerequisites for the application of s 3B(1)(a) of the Act. The primary judge did not address both issues.

White challenged the findings in an appeal. On appeal it was contended that the evidence did not establish an absence of therapeutic purpose in the treatments performed by White and that the primary judge erred in relying on the evidence admitted to demonstrate a tendency to charge for services not performed in determining an absence of therapeutic purpose.

It was argued by White that:

- the onus of proving that there was no valid consent rested on Johnston;
- the Civil Liability Act did apply as the treatment was not intended to cause harm and the Section 3B exemption did not apply and therefore exemplary damages should not have been awarded; and
- the award of exemplary damages was assessed before the damages necessary to compensate Johnston were calculated and this was an error.

Unfortunately for Johnston the Court of Appeal came to a different view to the Trial Judge.

The leading Judgement was provided by Leeming JA. Leeming JA noted:

"A patient's consent to medical treatment is invalid if the medical practitioner's unrevealed purpose is wholly non-therapeutic, with the result that the medical practitioner is civilly liable for assault and battery (and may also have committed a crime)."

The Court of Appeal ultimately concluded that the Primary Judge erred in the factual finding as to the nature and purpose of the treatment and in the award of exemplary damages.

The regrettable result was that the judgment must be set aside and a retrial was ordered on the undetermined claim in negligence, unless the parties can otherwise resolve their dispute.

Leeming JA noted:

"The starting point is that consent is vital lest medical treatment be tortious and indeed criminal. As was said in X v The Sydney Children's Hospitals Network [2013] NSWCA 320 at [12] (Basten JA, Beazley P and Tobias AJA agreeing):

"The general principle of the common law is that non-consensual medical treatment involves an assault, thus constituting both a criminal offence and a tort. That 'principle of personal inviolability', as noted in Secretary, Department of Health and Community Services v JWB (Marion's Case) [1992] HCA 15; 175 CLR 218 at 234, echoes the well-known words of Cardozo J in Schloendorff v Society of New York Hospital 105 NE 92 (1914) at 93:

'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault.'"

Leeming JA observed:

"Consent may and often will be oral, particularly if the procedure is relatively minor. Much dental work will fall within this category., …

Consent may be express or implied, and in each case whether it has been given is a question of fact…

Consent may be either express or implied from the claimant's conduct. If a doctor tells a patient that he wants to give him an injection and the patient silently bares his arm and holds it out for the needle he will be taken to have consented….

Speaking generally, defects in obtaining consent tend to go to negligence rather than to establishing assault and battery…

Although negligent disclosure by a medical practitioner will not of itself vitiate consent, there are circumstances in which a patient's prima facie consent will not be an answer to assault and battery"

In this case there was no dispute that Johnston consented to fillings. That was her original purpose in attending White. Likewise, Johnston's unchallenged evidence was that when White proposed to "build up" her lower incisors, she "thought it was a good idea".

There was no evidence that the filling and building up was incapable of constituting a therapeutic response to Ms Johnston's condition.

The findings that the work was wholly unnecessary, and exclusively for a non-therapeutic purpose could not be supported by the evidence. Those findings were necessary to sustain the crucial conclusion that Johnston's consent was invalid.

The Court of Appeal determined that the legal burden remained at all times on Johnston to prove that White's treatment bore no therapeutic purpose, if that was how an absence of valid consent were to be established.

The evidence did not stack up on that issue. There was no evidence to support a finding that none of White's treatment was therapeutic or that White's purpose was wholly non-therapeutic, so as to shift an evidentiary burden to White.

Leeming JA observed:

> *"where a patient's consent is said to have been rendered invalid by reason of the fraud, or conduct tantamount to fraud, the onus remains with the patient to establish fraud. If what I have outlined above be correct, then the broader position is straightforward: a patient who sues in assault and battery in all cases bears the legal burden of establishing an absence of consent on his or her part."*

Barrett J in his judgment concluded:

> *"It was for Ms Johnston, as plaintiff, to prove that the treatment administered to her by Ms White was devoid of therapeutic purpose, that being an essential element of the particular tort that consists of absence of the plaintiff's consent. ….For the reasons elaborated by Leeming JA, some genuine therapeutic outcome was intended by Ms White to be achieved – and was achieved – by the course of dental treatment to which Ms Johnston subjected herself at Ms White's hands; and any purpose that Ms White may have had of "over-servicing" for her own financial gain was irrelevant to the issue of liability for assault."*

Further the Court of Appeal concluded the Civil Liability Act exemption did not apply. Leeming JA with whom Barrett J and Emmett JA agreed concluded there are 2 elements to be satisfied to trigger the exemption that the act was intentional and it was intended to cause harm.

The Court of Appeal agreed that White's conduct was intentional, but it was also necessary to establish that the dental procedures were performed "with intent to cause injury". It did not follow that because an intentional tort is alleged and made out that s 3B applies. It was noted "[I]t is not a necessary element of assault (and battery) that the defendant intended to injure the plaintiff"; it is the act and not the injury which must be intentional. Here there was no intention to cause injury. The exemption from the Civil Liability Act could not apply. Exemplary and Aggravated damages could not be awarded.

Finally the Court of Appeal noted:

> *"The objectives of punishment, deterrence and condemnation which inform an award of exemplary damages are distinct from the considerations applicable to compensatory damages. Even so, it is necessary to determine compensatory damages (including aggravated damages) before deciding whether or not a further award of exemplary damages is warranted, and, if so, its amount. This is well-settled law."*

Here the primary judge determined aggravated and exemplary damages before compensatory damages and this was also an error.

At the end of the day the claim for assault and battery failed as there was no proof that there was no valid consent to the treatment and the question of negligent treatment will need to wait for another trial.

The Court of Appeal has confirmed:

- Where a medical practitioner is solely motivated by an unrevealed non-therapeutic purpose, the patient's consent is not valid and there will be an assault and battery.
- Where the question is whether the medical practitioner has fraudulently procured a patient's consent, the onus lies on the patient to establish fraud.
- In order for s 3B to displace the Civil Liability Act's exclusion of exemplary damages, there must be an intentional act and the act must be done with intention to cause injury.
- The discretion to order exemplary damages miscarries where those damages are determined before compensatory damages are determined.

So where do you sit with the treatment you have received if you are unhappy with the outcome or believe the treatment had no therapeutic outcome?

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Dangerous recreational activities: Can the activity be "dangerous" if the risk that materialised was not "obvious"?

Section 5L of the *Civil Liability Act 2002* (NSW) ("CLA") provides that a defendant is not liable in negligence for harm suffered by a plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity in which the plaintiff was engaged.

Is it possible to be engaged in an activity that is dangerous but the risk of harm which eventuates is not obvious?

If so, can the defence under Section 5L CLA succeed or must a defendant prove that the activity was "dangerous" and the risk was "obvious"?

In *Stewart & Ors v Ackland* [2015] ACTCA 1, the ACT Court of Appeal unanimously dismissed the defendant's appeal from a judgment of Burns J who, following a ten day hearing in the ACT Supreme Court, found that the plaintiff had engaged in a dangerous recreational activity but the risk which materialised was not an obvious risk, therefore the defence was not made out and damages were awarded to the plaintiff for $4,626,241.84.

Mr Ackland, who was a 21 year old arts/law student at the University of New England "UNE"), broke his neck causing permanent tetraplegia when performing a backward somersault or backflip on an amusement device called a "jumping pillow". The jumping pillow was situated on a farm near the NSW country town of Tingha where the Stewarts operated the amusement park called "Green Valley Farm".

As a young child, he enjoyed using a trampoline at home and he had experience using it for manoeuvres including inverted ones. He was also taught some aspects of gymnastics at school.

He gained entry to UNE in 2007. At university he lived on campus in Austin College.

In 2009, the college social committee arranged a social function for college members described as a "mystery tour".

Ackland went on the tour along with 36 other students from the college. They left UNE at 9.00 am. There were several stops along the way to allow the students to disembark and have a few alcoholic drinks. Alcohol did not, however, play a part in the findings of the Court.

The bus arrived at the farm at 12.15 pm. After performing some manoeuvres on the jumping pillow for 45 minutes, Ackland and the others had some lunch.

At about 3.00 pm, Ackland and a friend decided to return to the jumping pillow to perform back flips, something Ackland had not performed that day.

After completing one or two back flips, he performed another one but landed heavily on his neck, although on the surface of the jumping pillow.

An expert gave evidence at the Supreme Court hearing to say that the jumping pillow presented with dangers to users because it was firmer than say a trampoline.

The expert concluded that performing a back flip on a jumping pillow exposed a person to a risk of catastrophic physical harm if that person failed to execute the manoeuvre perfectly.

It was not in dispute that Ackland was engaged in a recreational activity. However, the trial judge relied on the evidence of the expert and concluded that the activity was a dangerous one.

However, the trial judge held that he was not persuaded that it would have been obvious to a reasonable person in the position of Ackland that there was risk of serious neck injury in attempting to perform a back flip as Ackland had done.

Accordingly, Ackland succeeded at first instance.

The defendants appealed.

The Court of Appeal comprising Penfold, J, Walmsley & Robinson AJJ dismissed the appeal.

Penfold J and Walmsley AJ wrote separate judgments providing different reasons but arriving at the same conclusion in the result.

Robinson AJ wrote a one paragraph judgment agreeing with the reasons given by Walmsley AJ.

Penfold J expressly agreed with the defendants' submission on appeal that the legislation should not be interpreted as contemplating a scenario where the activity engaged in by an injured plaintiff could be considered dangerous recreational activity despite on an objective and prospective assessment, it carried no obvious risk.

However, his Honour looked to the authorities handed down in the NSW Court of Appeal including the seminal decisions of *Falvo v Australian Oztag, Fallas v Mourlas* and *Streller v Albury City Council*.

In each case, the Courts had determined the appeal by considering the relationship between "significant risks" and "obvious risks". Also, whether Section 5L CLA only protects a defendant if the obvious risk of a dangerous recreational activity that materialises is the risk, or one of the risks, by reason of which the activity is found to be a dangerous one.

Penfold J held that for an activity to be considered "dangerous" it must have carried with it an "obvious risk" of significant physical harm. Otherwise, a trial judge may fall into error by engaging in after the fact identification of non-obvious but significant risks. This would lead to unfairness according to his Honour.

In the present case, Penfold J held that the trial judge had fallen into error in classifying the activity as dangerous. This conclusion, his Honour stated, was the result of a failure to apply the prospective test required by the authorities.

As his Honour found that the activity was not "dangerous" the other appeal grounds on that section of the CLA did not arise.

His Honour considered the other appeal grounds relating to duty, breach and causation but still found that there was no error in the trial judge's approach.

Walmsley AJ also considered the NSW authorities referred to by Penfold J but came to a different conclusion, finding that the trial judge was correct to hold that the activity was a dangerous recreational activity by reason of the expert evidence satisfying the burden of proof that the risk of physical harm must be more than trivial.

On the question of "obvious risk" his Honour also found that the trial judge was not in error in his approach. Walmsley AJ considered that Section 5L requires two quite distinct assessments regarding "dangerous" and "obvious' and that it is possible, as this case illustrated, for there to be one but not the other.

In that event, the defence was not made out and the appeal was dismissed.

By reason of Robinson AJ concurring with Walmsley AJ's reasons, the decision of the Court on this issue is authority for the proposition that there can be a dangerous recreational activity without it carrying an obvious risk of significant physical harm.

However, a defendant will not succeed in establishing a defence under Section 5L CLA in that event.

Whether the NSW Court of Appeal will decide this issue, if and when it arises, will be interesting noting the authorities which state that an appellate Court must follow a decision of another appellate Court within the Australian federation unless the decision was glaringly incorrect.

If the rational behind the ACT Court of Appeal's decision prevails, it will give trial judges more scope to defeat the defence if raised making it almost impossible for defendants to ever succeed under Section 5L.

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EMPLOYMENT ROUNDUP

Reinstatement of dismissed injured workers

The "reinstatement" obligations found in the *NSW Workers Compensation Act 1987* (with equivalents in other states) (the Act) can present unexpected consequences for employers, and disturb the orderly arrangement of human resources planning.

In broad terms, the legislative scheme is to prohibit the dismissal of an injured worker within 6 months of becoming unfit for employment by reason of a compensable injury.

Thereafter, an employer is free to dismiss an injured worker in accordance with any relevant express or implied term of the employment contract. Most often, employers rely on the "inherent requirements of the position" as a basis for terminating the employment.

This is an assertion, really, that performance of the contract has become frustrated by the injury sustained by the employee. The principle asserts that an employee is engaged to perform specific duties of their role/position; if, through physical incapacity, they are no longer able to carry out all these duties, then they are no longer able to satisfy the inherent requirements of the position.

So much is clear. Employers cannot disturb the employment of an injured worker for at least 6 months, but may then, if appropriate medical and functional evidence is available, move to terminate an injured worker who is no longer capable of fulfilling the inherent requirements of the role for which they were hired.

It is after any such termination that the "reinstatement" provisions kick in.

Section 241 of the Act provides:

- If an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of a kind specified in the application.
- The kind of employment for which the worker applies for reinstatement cannot be more advantageous to the worker than that in which the worker was engaged when he or she first became unfit for employment because of the injury.

- The worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement.

Effectively, a worker has 2 years from the date of dismissal to bring such an application.

If an employer does not reinstate the worker, then the worker may apply to the Industrial Relations Commission for an order for reinstatement. Under sub-sections 243(1) and (2) of the Act, the Commission can order reinstatement to the kind of employment for which the applicant has applied, but only if it is satisfied that the worker is "fit for that kind of employment".

Alternatively, under sub-section 243(3) it may order the worker to be reinstated to employment of any other kind for which the worker is fit, being:

- employment of a kind that is available but that is less advantageous to the worker, or
- employment of a kind that the Commission considers that the employer can reasonably make available for the worker (including part-time employment or employment in which the worker may undergo rehabilitation).

How does all this work in practice?

In New South Wales Nurses and Midwives Association (on behalf of Jennifer Cox) v Manchester Unity Australia Limited [2015] NSWIRComm 1003 the applicant worker had been employed as an Assistant in Nursing (AIN). Prior to termination she had been employed on a permanent part-time basis working 16 hours per week, comprising one Saturday afternoon shift and one Sunday afternoon shift each week.

The worker sought reinstatement:

- to employment of a kind in areas of nursing duties that she is capable of performing to the level of Assistant in Nursing Team Leader, in conformity with her medical restrictions and functional assessments; or
- employment of a kind in areas of recreational duties that she is capable of performing to the level of Recreational Activities Officer, in conformity with her medical restrictions and functional assessments.

It was clear that it was thought that to whatever employment Ms Cox be reinstated it was to be subject to medical restrictions, including a limitation that she not lift more than 8 kg.

A number of important issues were highlighted by the Commission.

First, the question is not whether there is a vacant position. 'Available' for the purposes of sub-section 243(3) does not mean 'vacant'. The evidence was that the employer continued to require the work of an AIN and a Recreational Activities Officer to be performed. As such work was available there was no basis for the Commission to consider alternate employment under sub-section 243(3).

Second, the question of fitness for work is to be determined having regard to all the medical evidence before the Commission at the time of the hearing – it is not confined to the medical certification provided by the worker with the application to the employer for reinstatement.

Third, in determining fitness for work, and specifically in the context of reinstating an injured worker, the Commission may properly assess that fitness by asking whether the worker is fit to carry out a 'timely, safe and durable return to work'.

Fourth, the statutory scheme does not permit ordering reinstatement to work for which a worker is not fit by ordering reinstatement to the employment for which the worker applied, on a basis limited by medical restrictions, that is, carrying out less – in this case significantly less – than the inherent requirements of the work.

A worker who cannot carry out a part of the inherent requirements of the work for which they have made application for reinstatement is not fit, within the meaning of subs.243(2), for reinstatement for the work for which they have applied.

On the evidence, the worker was not fit to carry out all the duties of an AIN, mainly because of the medical restrictions on her lifting capacity. Her application for reinstatement was refused.

The case highlights, however, that an employer's obligations to an injured worker – even if they have been dismissed – can be long lasting.

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WORKERS COMPENSATION ROUNDUP

Jurisdictional limits of the Workers Compensation Commission in weekly payment claims

In *Rawson v Coastal Management Group Pty Limited* (2015) NSWWCCPD 3, Deputy President Bill Roche has determined that a worker's entitlement to weekly compensation after 130 weeks must be determined by an insurer and not the Workers Compensation Commission.

Mr Rawson suffered serious injuries on 18 December 2004 when the truck he was driving left the road and collided with a tree. The workers compensation insurer of Mr Rawson accepted liability and made payments of weekly compensation and accepted Mr Rawson had a whole person impairment (WPI) of 31%.

Despite the payments continuing for eight years, in 2012 the insurer denied liability for Mr Rawson's injury and ceased payments of weekly compensation. The declinature was based on a contention that Mr Rawson's injuries were solely attributable to serious or wilful misconduct as he was allegedly under the influence of alcohol and other drugs at the time of his accident. This was despite the charges of driving under the influence of drugs and alcohol having been dismissed.

The arbitrator found in favour of Mr Rawson and overturned the declinature. The arbitrator commented that the denial of liability was unconscionable. The arbitrator however did not make any orders in relation to the payment of weekly compensation as the insurer had not disputed that Mr Rawson had no work capacity.

A further arbitrator was allocated to deal with the question of weekly compensation and by consent the insurer agreed to pay Mr Rawson's weekly compensation benefits from 27 January 2012 to 16 September 2012. Although the insurer resumed payment of weekly compensation from 24 September 2014 in accordance with a work capacity decision that Mr Rawson had no capacity to work, no payments were made by the insurer between September 2012 and September 2014.

The arbitrator determined that Mr Rawson's entitlement to compensation within that period fell within Section 38 of the *Workers Compensation Act* 1987 ("The Act") and was outside the 130 week period of weekly compensation. Accordingly, the Commission did not have the jurisdiction to determine Mr Rawson's entitlement to weekly compensation.

Mr Rawson appealed and Deputy President Bill Roche confirmed the findings of the arbitrator. He determined that the Commission did not have the jurisdiction to determine Mr Rawson's entitlement to weekly compensation during the period from 2012 to 2014 as it had been subject to a "work capacity decision" by the insurer, despite no official work capacity decision having been issued.

The Deputy President commented that although no official work capacity decision was issued in September 2012 the insurer who delayed making the official work capacity decision should not obtain a windfall through its tardiness. Despite the official work capacity decision applying from September 2014, the Deputy President considered the work capacity decision of "no capacity" in September 2014 should apply from the date that weekly compensation benefits were claimed, namely September 2012 when the amended weekly compensation provisions applied.

The Deputy President assumed that the insurer had failed to make payments in the September 2012 to September 2014 period because it had not made a "work capacity decision" until September 2014. In addition, the Deputy President considered the phrase adopted by the insurer with regards to capacity as at September 2012, that is, a *present inability* fell within the definition of *no current work capacity* as set out in Section 32A of the Act.

The determination by the insurer at that time that of *present inability* of Mr Rawson to work was a work capacity decision. The claimant's work capacity had not changed between 2012 and 2014 as he had been assessed at 31% WPI. Although the Deputy President considered Mr Rawson was entitled to weekly compensation in the closed period, he was unable to order the insurer to pay weekly compensation as it fell outside the 130 week period.

Deputy President Roche was particularly scathing of the insurer and confirmed that insurers must comply with the WorkCover Work Capacity Guidelines. This includes notifying a worker of a work capacity decision and explaining its implications. This is particularly in situations wherein in a worker has been assessed at greater than 30% WPI and protection of entitlements for such workers was a cornerstone of the amendments.

The decision makes it clear that a worker's entitlement to weekly compensation after the second entitlement period (130 weeks) must be determined by the insurer and the Workers Compensation Commission does not have the power to determine a work capacity decision dispute in those circumstances.

Furthermore, the comments by Deputy President Roche suggest that a work capacity decision can apply to periods prior to the "official" work capacity decision in circumstances when an insurer made an assessment that the worker had a *present inability* to work. This is an assessment of work capacity and tantamount to a work capacity decision.

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Assessments of work capacity & the meaning of suitable employment

Deputy President Bill Roche recently determined in *Hume v CSR Limited* (2015) NSWWCCPD 7 what constitutes the concept of "capacity" with regards worker's entitlement to weekly compensation in the first and second entitlement periods contained in the amended NSW workers compensation legislation. He also determined the meaning of "suitable employment" in the context of the amendments introduced in June 2012.

The appellant worker, Thomas Hume, worked as a glass production worker with the employer (CSR Limited). He injured his back on 17 September 2012 when attempting to move a heavy trolley. He was certified fit for lighter duties and CSR provided suitable duties for Mr Hume within the scope of his restriction. When his symptoms did not improve investigations revealed disc damage at two levels of his lumbar spine. Mr Hume was terminated by CSR on 15 November 2012.

Mr Hume then unsuccessfully sought suitable employment as a mortgage broker but then gained full time employment with K&K Glass on 2 October 2013 as a glass worker. He was subsequently terminated on 15 May 2014 due to excessive absenteeism. Mr Hume asserted the absenteeism was due to symptoms in his back caused by the back injury with CSR. On that basis the employment with K&K Glass was not suitable employment and he should receive weekly compensation for that period.

The arbitrator who originally determined the matter found that Mr Hume had no capacity for employment from 16 November 2012 until he commenced employment with K&K Glass and awarded Mr Hume weekly compensation for that period.

CSR appealed the decision and submitted although the arbitrator accepted that Mr Hume was still convalescing from his injuries when he was dismissed by CSR, the arbitrator failed to give any reasons as to why he found Mr Hume was entitled to the weekly compensation he was awarded. CSR submitted there was no evidentiary basis for the arbitrator to make a finding of no work capacity when Mr Hume himself had provided evidence that he was a current work capacity in that period.

Furthermore, the arbitrator failed to consider the question of "suitable employment" between 16 November 2012 and 1 October 2013 wherein Mr Hume would have been fit to perform either work he eventually secured with K&K Glass had it been available or a wide variety of work within his lifting restriction of 20kg.

Deputy President Roche accepted CSR's contention that the arbitrator did not consider whether the Mr Hume had work capacity. Instead, the arbitrator assumed, without explanation or reference to the evidence or submissions that Mr Hume had no current work capacity in the period from 16 November 2012 to October 2013. This was a fundamental error.

If Mr Hume had a work capacity the amended weekly compensation provisions require an assessment of whether the worker would be able to return to work in either his or her pre-injury employment or in suitable employment. Suitable employment is defined as employment in work for which the worker was currently suited, having regard to certain specified matters, regardless of whether the work or employment "is available" or is of a type or nature that is generally available in the employment market. The Deputy President noted Mr Hume was working suitable employment with CSR until his retrenchment and then was actively seeking suitable employment as a mortgage broker. Noting the modest lifting restrictions placed on Mr Hume for that period, the Deputy President found it difficult to reconcile there was a finding of no current work capacity from November 2012 and this continued beyond the slightly lighter employment with K&K Glass which commenced October 2013. Mr Hume failed to adduce any evidence that his work capacity had changed significantly between leaving CSR and starting with K&K Glass.

Mr Hume submitted in the appeal that his employment with K&K Glass was "artificial" as he had obtained the position without disclosing on his job application that he had a back injury. Mr Hume contended that he would have not obtained the employment had he advised of his back injury and his ultimate dismissal was due to absenteeism caused by the back injury.

Deputy President Roche dismissed this argument. The job with K&K Glass was a "real job in employment for which Mr Hume was suited having regard to his age, education, skills and work experience." The fact that Mr Hume undertook this work for over seven months and was one in which he would have continued had he not been dismissed meant it was

suitable employment for the purposes of the legislation.

Just because Mr Hume did not reveal his previous back injury when he applied for work with K&K Glass did not mean the job with that company was artificial. What needs to be considered was whether the employment with K&K Glass was employment for which Mr Hume was suited. Even if it was accepted that had Mr Hume disclosed his previous back injury and that the employment would not have been offered to him, this was not the test. Provided it is a real employment for which the worker is suited, it does not matter if suitable employment is not available to the worker.

This decision is pleasing from an employer perspective in that the Workers Compensation Commission will closely examine the question of work capacity when determining claims for weekly compensation under the amended legislation. Provided a worker has a capacity, entitlements will then be assessed having regard to the nature of injuries, age, education, skills and work experience. Submissions by workers' relying upon the pre-amended provisions that if no employment is available on the open labour market they should be determined to have no capacity and be awarded weekly compensation will fail. This approach ignores the new legislation and demonstrates a fundamentally flawed approach to the weekly compensation provisions. Section 32A of the *Workers Compensation Act* 1987 which was introduced as part of the 2012 amendments makes it clear that suitable employment means employment in work for which the worker is currently suited *regardless* of whether the work or the employment is available.

The decision also indicates a willingness by the Workers Compensation Commission to deal with questions of capacity which to date have largely been dealt with under the work capacity regime and the WorkCover Independent Review Office.

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The further erosion of section 59A provisions

The amendments to the workers compensation legislation in 2012 in Section 59A of the *Workers Compensation Act* 1987 ("The 1987 Act") sought to restrict an injured worker's entitlement to expenses for medical, hospital and rehabilitation treatment. Effectively these expenses would not be paid 12 months after a claim for compensation was first made or 12 months after weekly compensation payments ceased, whichever was the latter. An exception was made for seriously injured workers with more than 30% whole person impairment ("WPI"). Those workers had their expenses preserved until retirement age.

The introduction of the amendments brought a collective sigh of relief amongst claim managers for Scheme Agents as "medical only" files which had been open for many years cases could finally be closed after expiry of the relevant 12 month period.

Following lobbying on behalf of injured workers and extensive scare-mongering in popular media the impact of the changes was softened by the Workers Compensation (Existing Claims) Regulation 2014 which commenced on 3 September 2014. The regulations exempted existing claims (made before 1 October 2012) from the operation of the section until an injured worker reached retiring age provided the worker's injury had resulted in WPI of greater than 20%. It also preserved the payment of expenses with regards to the provision of crutches, artificial members (limbs), eyes or teeth and other artificial aids or spectacles. Finally expenses relating to hearing aids, hearing aid batteries and modification of a worker's home or vehicle were preserved.

The impact of the legislative changes has been further eroded by a number of arbitral determinations in the Workers Compensation Commission. The first determination was by Arbitrator Josephine Snell in *Christopher Vella v Penrith City Council* on 8 October 2014. It was accepted by the arbitrator that Mr Vella suffered a disease of gradual onset of carpal tunnel syndrome as a consequence of the nature of his work duties as a motor mechanic with the Council for over eight years with an accepted deemed date of injury of 12 December 2012.

In addition to a claim for two closed periods of weekly compensation, Mr Vella made a claim for the cost of proposed bilateral carpal tunnel release surgery together with associated medical and related treatment as recommended by the treating hand surgeon. An Approved Medical Specialist (AMS) supported the proposed treatment as reasonably necessary and related to employment. Arbitrator Snell agreed with the AMS' assessment findings.

The main issue in the case was whether Section 59A precluded the worker from obtaining compensation for the treatment. As Mr Vella had not made any claim until 12 December 2012 the transitional regulations did not apply to his claim. The employer argued the day the worker took off work to consult Dr Yee on 11 December 2012 when Dr Yee issued a certificate of incapacity was a day for which the worker was entitled to have been paid weekly compensation and he thereafter ceased to be entitled to further weekly

compensation because he returned to work. As a consequence he was unable to receive compensation in respect of any treatment service provided more than 12 months thereafter, i.e. by 12 December 2013. As Mr Vella had made further claims for weekly compensation for closed periods in March and July 2014 Section 59A(3) applied to limit treatment to periods in respect of which weekly payments were payable. As the treatment was not undertaken during the periods of weekly compensation the Commission could not make an order that the employer pay for the treatment.

Arbitrator Snell approached the issue on two different bases. Noting that the employer's doctor supported the surgery as "entirely sensible" and accepted that there would be a period of incapacity following the surgery, it was implicit from the insurer's own doctor that having the surgery would entail the worker having time off work which would be compensable by weekly compensation because the worker had not even exhausted the first entitlement period of 13 weeks in Section 36. Consequently, in the future when the worker had the surgery he would be entitled to recover the costs of the surgery as he would be unable to work on the day of the surgery and entitled to weekly compensation. Practically this situation would force a worker to pay for the surgery himself (if he could afford it) and then make a further claim for weekly compensation and for reimbursement for the cost of surgery undertaken during that period of weekly compensation. This would result in a "pyrrhic" victory for the employer because ultimately the worker could be reimbursed for the surgery.

Adopting an alternate approach the arbitrator considered the text of Section 59(2) which provides:

"If weekly payments of compensation are or have been paid or payable to the worker compensation is not payable under this division in respect of any treatment, service or assistance given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation."

The crux of the argument was how the phrase "ceased to be entitled to weekly payments of compensation" should be applied. By reference to Sections 37 and 38 the arbitrator found the phrase needed to be interpreted in accordance with Section 38(1) so the entitlement of a worker to weekly compensation ceased at the end of the second entitlement period (130 weeks) unless the worker had further entitlement under the exception in Section 38. As the worker had only received aggregate weekly compensation for less than 13 weeks he had not ceased to be entitled to weekly payments of compensation within the meaning of Section 59A(2) and thus he was entitled to the cost of the proposed surgery.

This decision was followed by a decision of Arbitrator John Harris in *Collet v Flying Solo Properties Pty Limited* on 21 October 2014. Mr Collett had suffered a back injury in the form of an aggravation to pre existing spinal pathology caused by an incident at work on 18 January 2012. It was agreed Mr Collett had been paid weekly compensation from 18 January 2012 to 12 August 2012 after which Mr Collett returned to work performing lighter duties for a significant period without any loss of wages.

Arbitrator Harris agreed with Arbitrator Snell that the meaning of when a worker "ceased to be entitled to weekly payments of compensation" must be by reference to the worker's entitlement to receive weekly compensation as provided by Sections 36-40 and 43 of the 1987 Act. That is where the insurer has made a valid work capacity decision in accordance with Section 43 that there is no entitlement to weekly compensation or after a worker has received 130 weeks of compensation payments. As neither of these criteria had been fulfilled Mr Collett was entitled to receive payment for his medical expenses.

We are not aware of any appeal being lodged from these decisions seeking to have the issue ventilated before the Presidential Unit. Consequently the decisions remain good law and will have a significant impact on a worker's potential entitlement to ongoing medical treatment expenses incurred more than 12 months after weekly compensation payments ceased in circumstances where the 130 week entitlement period has not expired and where the insurer has not made a work capacity decision finally determining the applicant's entitlements to weekly compensation.

Clearly the decisions are contrary to Parliament's intention to terminate a worker's entitlement to ongoing medical treatment expenses incurred or sought to be incurred more than 12 months after payments of weekly compensation cease.

Apart from the potential for increased claims for medical treatment expenses leading to a renewed growth in "medical treatment only" files, we believe the impact of the decisions from an insurer's perspective will result in an onerous requirement on insurers to make work capacity decisions in circumstances where workers have made no claim for weekly compensation or where workers return to employment duties with no ongoing wage loss inside the relevant 130 week period.

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A proactive offer by an insurer is as good as the worker making the claim themselves!

In the matter of *Joanne Eaton v Kerry Ingredients Australia Pty Limited t/as Kerry Ingredients* [2015] NSWWCC 21 Arbitrator Grahame Edwards was required to determine whether a proactive offer made by the insurer with regards to whole person impairment could be construed as a claim having been made by an injured worker.

The importance of this decision arises in the context of the effect of the legislative amendments and particularly Section 66(1) of the *Workers Compensation Act* 1987 introduced on 19 June 2012. The amendments preclude a worker from being able to recover lump sum compensation if the assessment of whole person impairment (WPI) is 10% or less. Critically, the amendments applied to claims wherein there had not been a specific claim for lump sum compensation by the worker prior to 19 June 2012. But what is the situation where an insurer had made a proactive offer for lump sum compensation prior to 19 June 2012. Could this be is considered a "claim" for lump sum compensation and therein Ms Eaton would be entitled to lump sum compensation?

Briefly, the facts of the case are that Ms Eaton sustained an injury to her right shoulder as a result of the combination of an injury on 2 November 2010 and the nature and conditions of her employment. Liability for the right shoulder injury was accepted. The insurer sent Ms Eaton to Dr Panjratan for an assessment of WPI which may have arisen as a result of the injury. By letter dated 17 October 2011, the insurer made an offer to Eaton in the amount of $4,125 with respect to 3% WPI of the right shoulder. The offer was open for 90 days.

Ms Eaton subsequently instructed solicitors who arranged for her to be assessed by Dr Tong, orthopaedic surgeon, for the purpose of assessing WPI. By letter dated 11 April 2014, Ms Eaton's solicitors wrote to the insurer making a claim for lump sum compensation consistent with the assessment of Dr Tong. The assessment included an assessment of the cervical spine which was later withdrawn. Once the cervical spine was removed the WPI was less than 10%.

The insurer disputed the claim on the basis that the legislative amendments applied as the claim was made post 19 June 2012 and Section 66(1) precluded Ms Eaton from making a claim for lump sum compensation.

In submissions by both parties reference was made to the decisions of *Halloran v Rail Corporation NSW [2013] NSWWCC 85* (*"Halloran")* and *White v Royal Society for the Prevention of Cruelty to Animals* [2013] NSWWCC 28 ("*White"*). In both *Halloran* and *White,* the Workers Compensation Commission was satisfied that the information held by the insurer at the time the proactive offer was made, exceeded the information required by Section 282 of the *Workplace Injury and Workers Compensation Act* 1998 ("the 1998 Act") and the *WorkCover Guidelines* (*"Guidelines"*). On that basis the claim for lump sum compensation was made at the time the insurer received its medical report or at the time that all relevant particulars had been received allowing the insurer to determine the claim and make a proactive offer.

Arbitrator Edwards was satisfied that the insurer had arranged for Eaton to see Dr Panjratan for the purpose of assessing WPI. At such time as Dr Panjratan's report came into existence, the insurer had all relevant information required by the 1998 Act and the *Guidelines.* As all of relevant information was to hand, the insurer determined Eaton's claim for lump sum compensation. It was of no consequence that the offer was only valid for 90 days. Arbitrator Edwards agreed with the reasoning in *White*, citing:

"[I]t is the determination of the claim by the insurer and the expiration of the offer within one month which gives rise to the right to commence proceedings prior to 19 June 2012 which is decisive."

Arbitrator Edwards further indicated that it was the determination of the claim by the insurer that allowed the worker to commence proceedings. He cited Section 289(3) of the 1998 Act which allowed a worker to commence proceedings one month after the offer was made. It was of no consequence that proceedings had not been commenced until two and a half years after the offer was made.

The decisions in *Halloran, White* and now *Eaton*'s case, indicate that where a proactive offer has been made or an insurer has determined a claim for lump sum compensation, then a claim has been made.

WIRO have issued a WIRE bulletin dealing with the determination in Eaton's case. The bulletin queries the affect of the decision particularly in cases where proactive offers are made after 19 June 2012. WIRO are concerned that the proactive offer will become the "one claim" for the purposes of Section 66(1A) and possibly prevent a worker from making a further claim. Workers will need to be mindful of accepting offers from insurers particularly in the context of the one claim restriction in Section 66(1A).

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CTP ROUNDUP

Grossly negligent driver still successful

The Supreme Court of New South Wales has recently determined a plaintiff driver (Zheng) was still able to recover part of her assessment of damages even though she had been grossly negligent and her departure from a reasonable standard of care for herself had been high.

Zheng suffered serious injuries including a severe traumatic brain injury in a collision with a prime mover driven by Wallace in December 2009. She was 41 years of age.

There was an agreement as to Zheng's damages in the sum of $3,032,368.00. The questions before the Court were:

- Did Wallace breach his duty of care?
- If Wallace had breached his duty of care, what was the assessment of Zheng's contributory negligence?

Wallace was driving a Kenworth prime mover which was towing two empty B-Double trailers in a northerly direction along the Great Northern Highway, Middle Swan in the State of Western Australia. The prime mover was travelling towards the intersection of Great Northern Highway and Dale Road. This was a T-intersection on the prime mover's left. The combined weight of the prime mover was approximately 32 tonnes.

Zheng was driving her Toyota Camry in an easterly direction along Dale Road towards the T-intersection with the Great Northern Highway.

Zheng made a right hand turn onto Great Northern Highway in order to travel in a southerly direction. The prime mover collided with the right hand side of the Camry. Zheng claimed in the Statement of Claim that it was open to Wallace to modify the movement of the prime mover in a timely fashion as she drove her Camry slowly into the intersection. Zheng claimed there was a foreseeable risk of injury which was not insignificant and a reasonable person in Wallace's position would have realised the risk of harm to Zheng had Wallace continued to operate the prime mover in the manner.

It was necessary for the Court to consider the effect of the Civil Liability Act 2002.

It was determined from the Police Officer who attended the scene that there was a line of sight from Dale Road along the Great Northern Highway of a distance of 400-500 metres. Wallace's evidence was that he was driving the prime mover at about 70kph. He recalled seeing Zheng's vehicle waiting to turn right onto the Great Northern Highway. He noticed Zheng was looking left and not towards the prime mover. The Camry started to creep forward. At that stage Wallace stated that he took his foot off the accelerator in anticipation of her actually pulling out in front of his prime mover. He sounded his horns and applied the brakes full lock.

An independent witness confirmed the southbound traffic on the Great Northern Highway was banked up and that the plaintiff continued to move slowly across the path of the northbound traffic even though there were no vehicles letting Zheng's vehicle into the southbound lane.

The independent witness stated she heard the truck sound its horn and brake heavily.

Importantly Wallace observed the Camry stop over the Give Way line, took his foot off the accelerator and put it over the brakes but was not depressing the brake pedal. Wallace then moved his prime mover further to the right in his traffic lane.

Expert evidence agreed that the prime mover would have been visible to the plaintiff at approximately 150 metres from the intersection and for a time in excess of 7.5 to 8 seconds.

It was determined Wallace immediately applied his brakes and sounded his horn when he Zheng moving from the Give Way line.

It was observed by Senior Counsel for Zheng that the High Court of Australia in Silbley v Kais [1967] HCA 43, that:

"Therefore, it is, in our opinion, rightly said that the "right hand rule" is not the be all and end all in relation to questions of civil responsibility. The obligation of each driver of two vehicles approaching an intersection is to take reasonable care. What amounts to "reasonable care" is, of course, a question of fact but to our mind, generally speaking, reasonable care requires each driver as he approaches an intersection to have his vehicle so far in hand that he can bring his vehicle to a halt or otherwise avoid an impact, should he find another vehicle approaching from his right or from his left in such a fashion that, if both vehicles continue, a collision may reasonably be expected."

It was noted Meagher JA's summary in Marien v Gardiner [2013] NSWCA 396, on the obligation of a driver to take reasonable care:

"The duty of a driver of a motor vehicle who uses a roadway, including pedestrians, is to take reasonable care for their safety having regard to all the circumstances of the case. Under the common law and the Civil Liability Act, the standard by which reasonable care is measured is an objective and impersonal one.

The question whether there has been a breach of that duty is to be addressed prospectively and by reference to what a reasonable driver in the appellant's circumstances would have done, if anything, by way of a response to any foreseeable risk of injury or sources of danger to other road users. A person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable, not insignificant and a reasonable person would have taken those precautions in those circumstances.

The driver is not required, however, to know or predict every event which happens in the vicinity of the vehicle so as to be able to take reasonable steps to react to such events. The driver is only required to take reasonable steps to be in a position to know what is happening or might happen in the vicinity of the vehicle."

The Trial Judge determined that when Zheng's vehicle moved off the Give Way line, the risk of harm Zheng was foreseeable and not insignificant. The question was what precautions would a reasonable person in Wallace's position have taken against the risk of harm. In the Trial Judge's view, a reasonable driver would have immediately applied the brakes and sounded the horn. The Trial Judge found this is what Wallace did and was not satisfied, on the balance of probabilities, that after the Camry moved off from the Give Way line, Wallace breached his duty of care that he owed to Zheng.

However, the Trial Judge found that Wallace had observed the Camry approaching the Give Way sign quickly, braking late and coming to a stop with the front bonnet and front wheels over the Give Way line. Further when the Camry was about two car lengths from the Give Way line, Wallace saw Zheng's head was facing the opposite direction and that she did not turn her head to the right until after she started moving from the Give Way line.

The Trial Judge determined that after having Zheng approach the Give Way line in the fashion that she did – stopping over the give Way line and looking left, the risk that she may drive out onto the highway without looking to her right was foreseeable. Whilst a driver is not required to know or predict every event which happens in the vicinity of his vehicle, in this case Wallace's attention was focused on Zheng due to the manner in which she had approached the intersection.

In these circumstances, the risk could not be diminished as being insignificant nor did Wallace consider that it could not happen. He took his foot off the accelerator and put it over the brakes at that time. He also moved the prime mover to the right.

The Trial Judge found that it was reasonable to infer, on the balance of probabilities, the speed of the prime mover would have reduced. However His Honour determined that having seen Zheng approach the Give Way line and that her head was facing to the left, a reasonable driver in Wallace's position would have done more to avoid the risk of harm than the precautions taken by Wallace.

The Trial Judge was satisfied, on the balance of probabilities, that a reasonable driver would have sounded the prime mover's horn to alert Zheng to his vehicle's oncoming presence. In failing to take this precaution, the driver of the prime mover breached his duty of care owed to Zheng.

His Honour reviewed the decision of T and X case about the relevance of the capacity of a vehicle to cause greater damage when assessing contributory negligence:

"Each should be equally conscious of the factor and adjust his or her behaviour accordingly: by taking greater care for the pedestrian; the pedestrian by taking greater care for his or her own safety. It appeared to have been this factor, however, which led the trial judge to place a greater share of responsibility on the driver than the pedestrian."

Having determined Wallace had breached his duty of care owed to Zheng, the Trial Judge went on to consider the issue of contributory negligence.

His Honour observed the determination of apportionment once contributory negligence is found, involves comparison both of the culpability, that is the degree of departure from the standard of care of the reasonable person, and of the relative importance of the acts of the parties in causing the damage. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination.

The Trial Judge noted that after stopping her vehicle over the Give Way line, Zheng proceeded onto the highway without looking to the right. Had she looked, the prime mover would have been visible at a distance of 150 metres and for a time of in excess of 7.5 to 8 seconds. Zheng was obliged to give way to the prime mover and the traffic in the lane into which she was driving which was "bumper to bumper". In those circumstances, by proceeding onto the highway Zheng was grossly negligent and endangered the driver of the prime mover and the drivers on the highway who were

travelling south. In those circumstances the judge gave little weight to the fact Wallace was driving a heavier vehicle. A reasonable driver in the position of Zheng would not have proceeded onto the highway and would have remained at the Give Way line.

The Trial Judge determined the plaintiff's degree of departure from the standard of reasonable care was very high and was the prime reason for the collision between the Camry and the prime mover whereas the failure by Wallace to sound the horn was a slight departure from the standard of care of a reasonable person.

Zheng's contributory negligence was assessed at 80%.

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The nominal defendant – Take a closer look at the evidence

A claim under the *Motor Accidents Compensation Act 1999* (the "Act") can be brought against the Nominal Defendant in circumstances where the alleged vehicle at fault cannot be identified after due search and enquiry. However a claimant bears the onus of proving there was an unidentified vehicle and the driver of the unidentified vehicle breached their duty of care owed to the claimant.

In the recent decision of the New South Wales Court of Appeal in *Nominal Defendant v Mokbel,* the Nominal Defendant challenged the finding on liability and the inadequacy of the assessment of contributory negligence on the part of Mokbel. By cross appeal Mokbel challenged the finding of contributory negligence as being grossly excessive.

On 5 June 2000 Mokbel was severely injured when he lost control of his car colliding with a street light pole in Bankstown. Mokbel brought proceedings against the Nominal Defendant on the basis that there was an unidentified vehicle, the negligent driving of which caused him to lose control of his vehicle.

The Trial Judge, Judge Norton SC, found in favour of Mokbel and awarded the sum of $350,000.00 being the agreed damages reduced by 30% for contributory negligence.

The Nominal Defendant challenged this finding.

Often with Nominal Defendant claims there are no witnesses to the accident and therefore the vehicles remain unidentified. In the matter of Mokbel there were three witnesses to the accident although Mokbel, due to the severity of his injuries, was unable to recall the events immediately preceding the accident. However Mokbel had a passenger in his vehicle. The Trial Judge preferred his evidence over the other witnesses.

The case had an interesting history in that the name of Mokbel and the passenger in his vehicle also varied in the various trials. The Police report prepared at the time of the accident identified Mokbel as the owner and driver of the vehicle. His name was identified as Khodor Mokbel. The Statement of Claim filed in the District Court issued in March 2004 identified him as Rodger Mahony previously known as Khodr Mokbel and in the most recent trial he was identified as both Khoda Selah and Khoda Mokbel.

His passenger was also named as Khaled Jaouhar but by the time he gave evidence in March 2014 he was known as Carl Michaels ("Michaels").

The Court of Appeal examined the objective evidence in the matter including the location of the accident, the location of the light pole with which Mokbel collided and a witness account as to what occurred which was obtained by one of the Police Officers that attended the scene of the accident.

It was also accepted by the various experts retained on behalf of the Nominal Defendant and Mokbel that the loss of control which caused the car to fishtail was probably caused or at least accentuated by Mokbel engaging the handbrake whilst travelling at some speed.

In the course of giving their joint evidence, the experts agreed on a pre-skidding speed of 60kph plus or minus 5kph with the maximum speed in the area being 70kph.

The various witnesses who gave evidence did not see the unidentified vehicle. Mokbel's case depended almost entirely upon the evidence of Michaels.

The Trial Judge initially found that there were limitations on perceptions of the witnesses due to their different circumstances and locations at the scene of the accident. The most important witness, Michaels, gave various accounts as to what caused Mokbel to lose control. This was not necessarily surprising as he was 15 years of age at the time, was concussed and not being a driver may have a perception which was inaccurate.

The Trial Judge found however that there was another vehicle involved which caused Mokbel to take action to avoid a collision and that vehicle did not stop after the accident. This vehicle was never identified.

An appeal followed.

The Court of Appeal found there was a degree of implausibility about Michaels and the alleged unidentified vehicle which he described flew past and actually came into contact with Mokbel's car. It was unclear how if the car was so close it could have passed in front. It was also unclear if the car flew past how it could have been so close in front of Mokbel that he had to brake to avoid hitting it and presumably braked to an extent which could not be achieved by using the foot brake.

The Court of Appeal noted there were further problems with Michael's evidence as it was contrary to the evidence given by the experts.

Upon reviewing the entirety of the evidence, the Court of Appeal found that the evidence did not support a finding that there was an unidentified vehicle involved in the accident.

The Court of Appeal could not properly be satisfied on the balance of probabilities that selected aspects of Michaels' evidence should be preferred.

The Court of Appeal could not be satisfied that an unidentified vehicle cut across Mokbel's vehicle without warning, forcing him to take evasive action. Accordingly, the claim against the Nominal Defendant was dismissed.

In this case the independent witnesses demonstrated that the explanation of the passenger was simply improbable. However, as we all know, independent witnesses are not that common in Nominal Defendant claims.

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