Gillis Delaney Lawyers

GD NEWS / APRIL 2015

IN THIS EDITION

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

Is a host liable for the attempted murder of a labour hire employee?

The Supreme Court of NSW has recently considered an unusual claim which considered whether or not a host employer could be liable for attempted murder by a fellow employee (*Wright BHT Wright v Optus Administration Pty Limited*).

Glenn Wright and Nathanial George were undertaking training that was provided by the defendant, Optus Administration Pty Limited ("Optus") for work in an Optus call centre. Wright and George had not met each other prior to the training. There was no suggestion throughout the course that they had any animosity towards one another and in fact they had had little contact with each other apart from minor conversations.

Training took place at Optus' premises in Gordon which had four storeys. Unfortunately for Glenn Wright, George had decided he wished to kill someone. The evidence established that the intended victim had walked away from the railing of the fourth floor balcony before George could act, however he later determined he would attempt to murder Wright. Fortunately for Wright, Paul Dee intervened and was able to physically restrain George but not before he had assaulted Wright and caused physical injuries from blows to his head in addition to post traumatic stress disorder. After the incident Wright told Dee, who was a team leader employed by Optus, *"I thought about it all last night and only got about three hours sleep"*. George provided similar statements to Police Officers who interviewed him.

Wright sued Optus for damages as a consequence of the attack. Wright argued that Optus owed him a duty of care that was analogous to that owed by an employer to an employee.

Wright was in fact employed by IPA Personnel Pty Limited ("IPA") who were a labour hire company.

Wright argued that he was lent on hire by IPA to Optus and whilst he was undertaking the training course he was working under the direction, supervision and control of Optus. Wright initially sued IPA as well, however that claim was discontinued, but IPA remained in the proceedings as a cross defendant and cross claimant.

Nathanial George however had a different employer, Drake International Pty Limited ("Drake"). Drake were not a party to the proceedings, presumably because Drake would not have been found to have been vicariously liable for George's actions as the actions would have been outside the course of his employment.

Perhaps not surprisingly Optus denied liability to Wright and contended the only relationship was as occupier of the premises. In these circumstances Optus relied on decisions such as *Modbury Triangle Shopping Centre Pty Limited v Anzil* (High Court) given that Wright's injuries had occurred as a consequence of a criminal offence. In *Modbury Triangle* the Court held that an occupier was not liable for the criminal conduct of a third party. Optus also argued that it was not negligent in any event.

In considering the relationship between Wright and Optus, His Honour Justice Campbell considered the personnel agency agreement between IPA and Optus. Wright argued that he undertook the training course under that agreement, however Optus argued this was not the case. In this regard the trial judge found that Wright was at work during the hours specified by Optus and subject to the direction and control of Optus.

On the day of the accident Wright saw George when they both alighted from the train at Gordon Railway Station at about 8.25 am. At around 9.15 am George left the training room and not long after he left, another trainee handed Wright a note which said *"Tell Glenn 2 come with me"*. Wright ignored the note but was then approached by another trainee, Beau. Beau said to Wright, *"Nathanial wants to see you upstairs"* and when Wright asked why, Beau replied *"He just wants you to go upstairs"*. Wright also ignored this request. Ms Hedges who was running the training, went to see where George was and saw him on Level 4, wandering around the balcony. At that time George's presentation was unusual and Hedges thought that he might have been on drugs. Ultimately George was approached by Paul Dee. At this time George was still pacing. Eventually he said to Dee, *"I'm waiting for Glenn, I want to see Glenn"*. According to Dee, George appeared to be in a *"trancelike state"* at that time. Hedges then approached Wright and asked him to come up to the balcony. There was an issue in the trial as to whether or not he was ordered to come to the roof or whether he did so voluntarily. The trial judge noted that in Wright's Evidentiary Statement he indicated that he felt pressured to go given this was the third time he had been asked and he was now being asked by the trainer to accompany her. In relation to this issue, Justice Campbell stated:

"It is clear that he was not asserting that Ms Hedges was "ordering" him to accompany her to the roof. Nor was he asserting that at any time he in plain terms sought to refuse to go. In my view, the correct findings is that Ms Hedges wanted him to accompany her to the roof and sought to obtain his cooperation by a degree of cajoling (let's see what he wants and take it from there). I also find that he succumbed to that cajoling although he would have preferred not to get involved. He at no time frankly declined to cooperate. But, given that Ms Hedges was in a supervisory position over him, I accept that he felt a degree of compulsion in complying with her request. He did not volunteer to help. I accept he expressed doubts that he could be of any assistance. His reluctance to become involved, in my view, is amply demonstrated by his undisputed evidence that he refused to have anything to do with George's earlier approaches to him by note and the intercession of other fellow trainees. His refusal to comply with those earlier requests is corroborated by Ms Hedges' statement.

In any event, in the context of this claim for damages for negligence, the question is not whether he was ordered to help by Ms Hedges on one hand, or whether he freely chose to assist on the other; the real question is whether it was reasonable, as between him and Optus, in the legal context of his claim for damages, for him to comply with the request to assist made of him by the persons Optus had placed over him, notwithstanding that it may have been open to him to refuse: Medlam v State Government Insurance Commission. Given the nature of the legal relationship amongst Optus, IPA and Mr Wright discussed above, I conclude that it was reasonable in that sense. I also find that he would not have gone to the roof to talk to George but for the intervention of Ms Hedges which was prompted by Mr Williams. Although in a sense he went voluntarily, he also went reluctantly."

When Wright went to the balcony George called him to the extremity of the balcony away from the others and invited him to look over the railing at a car. At that time it occurred to Wright that George may be intent on getting him to the edge of the balcony and he put his hands on the underside of the railing. He was suddenly grabbed by George and lifted upwards and George then started to punch him. This version of events was confirmed by Dee, who rushed to intervene.

Although it was necessary for the Court to consider a number of issues, perhaps the most interesting issue

was whether or not the risk of personal injury including mental harm, was reasonably foreseeable. In this regard the trial judge stated:

"Section 5B applies to cases where the negligence is said to consist in the failure to take precautions against a risk of harm. It applies to the present case. Bearing in mind the need to identify the risk of harm at the appropriate level of particularity, the risk is that George behaving aberrantly as he was may inflict personal injury on Mr Wright, extending to the impairment of his physical or mental condition. It is also important to focus on the suggested precautions given that the plaintiff carries the onus of proof. In the case at hand, they are:

(a) adopting a policy for dealing with potential violence in the workplace that was made known to all staff and available to them in training manuals;
(b) removing George from the premises; it was said either by way of security or police involvement; and finally
(c) not putting Mr Wright in harm's way by exposing him to George's aberrant behaviour on the roof.

I have already rejected the idea that adoption of a policy of a publication of a training manual is reasonable and I will not deal with it further. I will deal with the remaining two options when I consider s 5B(1)(c).

Turning to s 5B(1)(a) Optus knew, or ought to have known, through the actual knowledge possessed by its employees, relevantly Ms Hedges and Mr Williams that George had absented himself from his training room where he was supposed to be; taken himself to the roof where he was not supposed to be at that time; was behaving in an aberrant manner, pacing and acting, in lay terms, as though he was psychotic or on drugs; he was non responsive to most questions; he refused to follow directions to leave the roof and return to class; his behaviour was such as to cause distress in Ms Hedges and cause a mature person like Mr Williams, at least, initially, to fear for George's safety and his own; his aberrant behaviour created an appreciation that something had to be done to deal with it, that is bring it to an end; that even when Mr Williams was somewhat reassured that George had not jumped from the roof or threatened him personally he considered it necessary to leave the fit Mr Dee to keep an eye on him whilst Mr Williams continued to make inquiries; that from the time his absence from class was first noticed up until the time Mr Williams decided to leave the roof to continue his inquiries he was repeatedly asking for Mr Wright; Mr Wright said to Ms Hedges, and would have told Mr Williams had he asked, that he did not really know George and was not his friend; ordinary people placed in their situation would have an apprehension that a psychotic person or a person so drugged as to behave as George was behaving posed a risk of harm to the personal security of himself and others. This last point is consistent with common experience, and for what it is worth, with the evidence of Dr Roberts I have accepted. Clearly, Mr Williams continued to have such an apprehension.

Bearing in mind those facts which I take to be firmly established by the evidence to which I have referred, and which I have accepted, and considered in the light of the normative standards of the law of negligence as informed by the objects of the CLA, the risk of harm to Mr Wright was foreseeable as a real possibility being neither far-fetched nor fanciful."

In relation to employer liability, the judge considered that IPA had no liability. The events that occurred were solely within the control of Optus. In this regard the trial judge noted that the employer could not be liable for the injury, "which resulted from circumstances of which it was not aware, and which could not have been identified by it by the exercise of reasonable care". His Honour assessed quantum in the vicinity of $3.8 million.

We anticipate that there will be an appeal from Optus. It will be interesting to see what the Court of Appeal ultimately determines.

Amanda Bond
asb@gdlaw.com.au

Responsibility Equals Liability – The Liability of Principals For Injuries To Independent Contractor Employees

Independent contracting arrangements often give rise to disputes where a contractor's employee is injured and they seek to claim damages for the injuries received from both the employer and the principal. Principals often argue they have no control over a system of work implemented by the independent contractor and that they owe no duty of care or the injury was the result of a casual act of negligence of the independent contractor and there was nothing that the principal could have done to prevent the injury. The recent decision of *Central Darling Shire Council v Greeney* [2015] NSWCA 51 highlights that control that is retained by the principal over the work performed by the independent contractor weighs heavily when determining apportionment of liability.

In 2008 Mr Greeney injured his back while working as a roller driver at a remote location in outback New South Wales maintaining and repairing roads. Greeney was employed by Greg Wilkinson Industries Pty Limited (GWI) a company engaged by Central

Darling Shire Council (Council) to perform roadwork in the location. Greeney was injured while attempting to couple a fuel tanker to the rear of a caravan after uncoupling it from the rear of a four wheel drive vehicle. There was one other person present at the time and that was a Council employee, Mr Hocking.

Pursuant to an agreement between Council and GWI, GWI provided a road roller and driver to be operated as directed by the Council. Due to the remote location of the work GWI also provided a caravan for its employees to sleep in, a fuel tanker and a four wheel drive vehicle. Hocking was on site to direct what work was to be done and where. This involved Hocking directing when the camp at which the workers including Mr Greeney slept overnight was to be moved. Greeney's practice was when the campsite had to be changed Greeney moved the four GWI vehicles in one trip by coupling them together with the roller at the front followed by the four wheel drive, the caravan and the fuel tanker. Hocking was aware of this practice and the Primary Judge found that he in fact directed that the move be undertaken in this fashion.

The fuel tanker was a trailer with only two wheels, one on either side of the tanker, about its middle and it contained around 1,100 to 1,200 litres on the day Greeney was injured. The tanker was designed to rest with its front end on a small jockey wheel and the coupling mechanism had a handle which was designed when turned to raise or lower the trailer to facilitate the tanker being coupled to the ball of the coupling device at the rear of another vehicle without the front end of the tanker having to be lifted manually. The jockey wheel however had been missing for 12 months and consequently the weight of the tanker rested at the front on two pieces of metal described as prongs or forks. Because the tanker's coupling mechanism was lower than the caravan's coupling and the winding mechanism was incapable of fully bridging the gap Greeney had to lift the tanker coupling and accordingly take the weight of the front end of the tanker to connect it to the caravan. This would have been necessary even if the jockey wheel had been present but the distance to be lifted was slightly greater as a result of the absence of the wheel. Considerable effort was required to lift the tanker's front end. Greeney's evidence was that over the 12 month period that the jockey wheel had been missing he had complained to GWI a number of times about its absence and requested the wheel be replaced. This request was made every time he took the trailer into town which was every 10 or 11 days. GWI's response was to the effect that they would get around to it.

An expert report confirmed that because of the absence of the jockey wheel there was increased manual handling involved and once the prongs fell out of the pipe connecting them to the trailer all the weight would have been transferred to Greeney placing him at risk of injury.

The Primary Judge concluded that Council through Hocking knew or ought to have known there was a not insignificant risk that the deficient coupling on the fuel tanker could cause injury to Greeney. His Honour noted that the grader driver could also have assisted and the Council had full control of the work system including the moving of the camp. Greeney had advised Hocking that he was not happy to move all the vehicles at once but Hocking on behalf of the Council instructed him to do so. His Honour found that it was clearly foreseeable that the coupling structure was compromised by its absent jockey wheel. His Honour noted that it was clear that GWI had a duty to its employee and breached that duty by permitting Greeney to carry out his work with defective equipment. GWI had ample notice of the defect and chose not to remedy it therefore exposing Greeney to the risk of injury.

In the first instance the trial judge found in Greeney's favour and assessed damages at $726,106.00. His Honour apportioned responsibility for the injury as 60% to the Council and 40% to GWI. Section 151Z of the *Workers Compensation Act 1987 NSW* was applied which reduced Greeney's damages to $435,664.00.

The Council was not content with the apportionment of liability and subsequently appealed the findings on duty of care, breach of duty, causation and damages.

However on appeal, in a unanimous decision the Court of Appeal upheld the Trial Judge's determination albeit with some reservations on the part of one judge who thought the apportionment was at the very border of the range which called for appellate intervention and the others noting that a different apportionment may have been made by others. Sackville AJA noted on the uncontradicted evidence before the Trial Judge, Mr Greeney made repeated complaints about the absence of the jockey wheel, all of which seemed to have been ignored. Sackville AJA was of the view the failure of the employer to respond to Mr Greeney's complaints suggested a high level of culpability.

We note where an apportionment determination is within the range of acceptable determinations an appellate court will not interfere with the determination even though the appellate judges may have come to a different apportionment.

So how did the Court of Appeal approach the analysis of liability and what were the determining factors?

In this case the determination of apportionment took place in the absence of the employer who was not a party to the proceedings as the threshold to bring a work injury damages claim had not been reached. Whilst there was no argument from the employer,

Greeney's legal team no doubt argued the employer had little culpability in an attempt to minimise the reduction of damages that occurs when an employer is liable and section 151Z of the Workers Compensation Act comes into play.

Did the principal owe the independent contractor's employee a duty to prevent injury?

In the leading judgemnt MacFarlan JA observed:

"If Mr Greeney had been a Council employee, the Council would have owed to him a non-delegable duty to take reasonable care to avoid exposing him to unnecessary risks of injury, including an obligation to take reasonable care to avoid real risks of injury "by devising a method of operation for the performance of the task that eliminate[d] the risk, or by the provision of adequate safeguards" .

The law does not however impose a duty of that type upon a principal in favour of independent contractors, or employees of independent contractors such as Mr Greeney."

However the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1; 160 CLR 16* confirmed:

" … An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organizing the activity to avoid or minimize that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he is creating the risk (Sutherland Shire Council v. Heyman … and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organizing an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimize other risks of injury"

MacFarlan JA noted the Court in *Sydney Water Corporation v Abramovic 2007 NSW CA248* concluded a principal owed a relevant duty of care to an employee of a subcontractor where:

"(a) the principal directs the manner of performance of the work;

(b) the work requires the coordination of the activities of different contractors;

(c) the principal has or ought to have knowledge of the risk and the employer does not and cannot reasonably be expected to have such knowledge;

(d) the principal has the means to alleviate the risk and the employer cannot reasonably be expected to do so;

(e) although the employer has or should have the relevant knowledge and can be expected reasonably to take steps to alleviate the risk, it does not, to the knowledge of the principal, do so."

In this case it was the "degree of control in fact exercised by the principal", as distinct from the mere existence of a right to exercise a degree of control,

MacFarlan JA concluded:

" First, Mr Hocking, on behalf of the Council, was in a position where he was able to, and did, exercise relevant control over Mr Greeney. It was Mr Hocking's responsibility to give the direction to move camp and he either ordered that that occur by the four vehicle road train method or gave the movement direction knowing that that is how it would occur. In either case, Mr Hocking knew that compliance with his direction would involve use of the fuel tanker's defective coupling mechanism. This was not, as was Stevens v Brodribb, a case where a principal had to coordinate the activities of subcontractors but instead a case, to use the language of Brennan J in that case (see [25] above), where the principal created the risk. Here, the Council did that by way of Mr Hocking's positive conduct in giving the relevant direction.

Secondly, Mr Greeney was vulnerable because he had no choice but to obey Mr Hocking's direction. He had complained to both Mr Hocking and his employer about the absence of the jockey wheel but nothing had been done to rectify the problem. Both had made it clear to Mr Greeney that he would lose his job if he did not comply with their instructions."

The Primary Judge's finding as to apportionment was not so unreasonable as to warrant appellant interference.

As can be seen where principals are directly controlling the work undertaken by an employee of a subcontractor they are likely to be found liable for injuries that result as they have retained control over the work.

As they say sometimes you are darned if you do and darned if you don't. Retain control and you retain responsibility. Delegate to an independent contractor and you may still owe a duty of care.

Kelvin Keane
kdk@gdlaw.com.au

David Newey
dtn@gdlaw.com.au

Duty of disclosure: Did the insurer "clearly inform" the insured

The duty of disclosure under Sections 21 and 21A *Insurance Contracts Act 1984* (Cth) ("ICA") regarding contracts of general insurance and eligible contracts including comprehensive motor vehicle insurance covering theft of a motor vehicle is well known and relatively straightforward.

The key factors are:

- The duty applies before entering into a contract of insurance.
- The insured must disclose to an insurer every matter relevant to the insurer's decision whether or not to accept the risk.
- Each "matter" must have been known to the insured or a reasonable person in the circumstances could be expected to know.
- Matters which diminish the risk or are common knowledge are not required to be disclosed.
- Matters which the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know are not required to be disclosed.
- If the insurer issues a proposal form containing questions to which an insured gives no answer or an obviously incomplete or irrelevant answer and the policy is issued without further enquiry by the insurer, the insurer is deemed to have waived compliance with the duty of disclosure about that or those matter(s).
- If the insurer issues a proposal form requesting the insured to answer one or more specific questions and any other matter that would be covered by the duty of disclosure, and the insured provides answers to those questions and/or provides information about other matters without further enquiry by the insurer, the insurer is deemed to have waived compliance with the duty of disclosure about those matters.

Similar provisions relating to the duty of disclosure are set out in Section 21B regarding the renewal of a contract of general insurance and eligible contracts of insurance.

Often overlooked is the insurer's obligation under Section 22 of the ICA to inform the insured of the duty of disclosure.

The key factors of that section are:

- The obligation applies before entering into a contract of insurance.
- The insurer must "clearly inform" the insured of the general nature and effect of the duty of disclosure and, if applicable, the general nature and effect of Section 21A ICA.
- The insurer must do so in writing.
- The insurer can issue a form prescribed by the regulations to satisfy its obligation.
- Failure to satisfy its obligation renders an insurer unable to challenge a failure to comply with the duty of disclosure unless that failure involved fraud by the insured.

In *O'Farrell v Allianz* the NSW Court of Appeal considered Section 22 of the ICA and revisited the authorities regarding what is meant by "clearly inform".

O'Farrell entered into a contract of insurance with Allianz which extended cover in the event of the theft of his motor vehicle.

The insured vehicle was stolen and O'Farrell submitted a claim which Allianz refused on the ground that O'Farrell had failed to disclose two sets of convictions for offences arising out of brawls.

O'Farrell brought proceedings in what was then the CTTT (now "NCAT") in which he succeeded. Allianz was ordered to pay $20,000 to O'Farrell being the insured value of the stolen vehicle.

Allianz appealed to the District Court which proceeded before Lerve DCJ who overturned the decision of the CTTT and dismissed the application to the tribunal.

By way of summons filed pursuant to Section 69 *Supreme Court Act 1970* (NSW), O'Farrell challenged the decision of the District Court in the NSW Court of Appeal by seeking to invoke the Court's supervisory jurisdiction to correct an error of law on the fact of the record or jurisdictional error as there is no available appeal from such a decision of the District Court.

In a unanimous decision, the Court of Appeal (per Basten JA, Macfarlan & Gleeson JJA agreeing) overturned the decision of the District Court and reinstated the decision of the CTTT.

Before the CTTT, O'Farrell swore an affidavit on which he was not cross examined in which he gave evidence regarding his conversation with an insurance broker that was said to be the agent of Allianz.

That conversation involved the broker having a policy questionnaire in front of her which she made notes on from answers which he gave. She told him that she would log the answers into the computer at a later time.

O'Farrell gave answers which included disclosing a negligent driving offence, a DUI offence and speeding fines.

He stated that he could not recall anything being said about the duty of disclosure

She did not ask questions about criminal convictions.

After payment of the premium, O'Farrell was then issued with a tax invoice which included details of his policy and the premium, together with a stamp indicating the premium had been paid.

There was also a note about the duty of disclosure which contained 11 headings with information under each one that were set out on the back of the tax invoice.

Allianz did not lead direct evidence about these matters. Instead, it read an affidavit sworn by a technical manager employed by Allianz which annexed an email from an employee of the insurance broker stating what questions would have been asked.

Also before the CTTT was a five page proposal form signed on the last page by O'Farrell. Whilst it was unclear, the Court of Appeal accepted that this was probably the computer printout of the policy questionnaire that the broker read through and asked O'Farrell questions from to which he gave oral answers.

The document contained statements including that O'Farrell had been shown the disclosure document, had read it and understood its contents and that his attention had been drawn to the general nature and effect of the duty of disclosure.

The CTTT member noted the absence of direct evidence from Allianz about the matters on which O'Farrell had given evidence in his affidavit. It therefore preferred the evidence of O'Farrell.

In relation to whether or not Allianz had complied with Section 22 of the ICA, the tribunal member held that there was no satisfactory evidence before it to establish that Allianz "properly advised" O'Farrell of the general nature and effect of his duty of disclosure or of the general nature and effect of Section 21A ICA.

It followed that Allianz could not rely on the non-disclosure of previous convictions by O'Farrell in seeking to deny payment of the claim.

In the District Court, Allianz challenged the test applied by the CTTT member as erroneous by reference to the phrase "properly advised" instead of "clearly informed".

Although Judge Lerve found that this really was a matter of semantics, his Honour nevertheless held that the decision of the CTTT had miscarried by reason of the member having applied an incorrect test in determining whether or not Allianz had complied with Section 22 ICA by clearly informing O'Farrell in writing of the general nature and effect of the duty of disclosure, before the contract of insurance was entered into.

The Court of Appeal held that this finding by the primary judge lacked internal coherence and set aside the decision of the District Court.

The Court of Appeal issued a timely reminder that, since the Court's decision in 1999 of *Suncorp v Cheihk*, "inform" was held to mean "make known" and "clearly" is a plain English word its ordinary meaning being to convey the need for some precision in the making known of the relevant duty.

In the same earlier decision of the Court, it was held that the statutory language does not involve a term of art, it requires a fact-specific analysis of the language of the notice given, the context in which it is to be found in the insurer's documentation and the circumstances in which the documentation was provided to the prospective insured.

Quoting a statement of Giles JA in *Cheihk* the Court reminded the parties that:

> *"The purpose of s22 is to ensure that the insured is informed of the significant and important matters of [the] duty of disclosure and the consequences of failure to comply … so that [the] insurance cover will not be imperilled by ignorance of those matters. The insured is to be informed clearly. Both the purpose of s22 and its terms call for insistence on a proper standard of information giving."*

The Court of Appeal held in this case that the primary judge was correct in concluding that the formulation "properly advised" did not demonstrate a misapprehension as to the statutory test.

However, the primary judge overturned the CTTT's decision in any event, despite this conclusion.

That was in error according to the Court of Appeal which therefore set aside the District Court's judgment and reinstated the orders of the CTTT.

Because Allianz had not complied with s22(1) it was not entitled to exercise any right it might otherwise have enjoyed with respect to a failure on the part of O'Farrell to comply with the duty of disclosure.

Allianz was ordered to pay O'Farrell's costs both in the District Court and Court of Appeal.

Section 22 is just as important for insurers as the duty of disclosure is for an insured.

Failure to comply with the section results in an insurer losing any right to challenge an alleged failure to comply with the duty.

In a sense, it is the first question that must be answered in the affirmative when undertaking an inquiry into an insurer's entitlement to raise such a challenge.

There must be evidence that will prove that an insured has been informed clearly about the nature and effect of the duty of disclosure in a written notice issued to the insured before the contract of insurance was entered into.

A sign off on a proposal by an insured that they have read a notice concerning the duty of disclosure will not give rise to an estoppels and will not in itself be enough to establish that the insurer has complied with its obligations under section 22 of the ICA.

The onus rests upon the insurer and its importance cannot be overstated.

Darren King
dwk@gdlaw.com.au

Credit issues in a trial and challenging credit findings on appeal

Insurers are quick to take up with claimants and their solicitors inconsistent information provided by a claimant during the investigation of a claim. The Court of Appeal's decision in *Singh v McKay* this month is an example of the evidence required to succeed on issues of credit at trial when there are competing versions of events between parties.

The appellant plaintiff Mr Singh was trying to argue that his injury resulted from the use or operation of a motor vehicle and was caused by the negligence of his employer, as this would then result in a work injury claim to which the *Motor Accidents Compensation Act* 1999 (NSW) applied. Mr Singh's case was that he was injured at work in a storage area when a ride-on forklift hit him. He claimed he was moving backwards as he pulled shrink wrap around a pallet when *"someone drove from behind me and knocked me over ".* He heard and saw nothing before the impact.

The employer's case was that a forklift was being driven by another employee, Mr Darmalingam, who stopped the forklift close to the row of pallets where Mr Singh was working, but had not seen Mr Singh at the time. Mr Darmalingam sounded his horn, looked around and then saw Mr Singh to his right, moving backwards as he shrink wrapped the pallet. His evidence was that Mr Singh then collided with the side of the stationary ride- on and fell to the ground.

The trial judge had before him in evidence three reports of the accident:

- A Register of Injuries and Treatment completed straight after the accident on 1 April 2008 by Mr Darmalingam and his supervisor, which was then signed by Mr Singh and the supervisor. "Cause of Injury (as stated by injured worker)" was stated as "hit side of ride-on.
- A Workers Injury Claim Form completed by Mr Singh and another employee Ms Weston on 7 April 2008, in which the plaintiff stated he was shrink wrapping when he was hit from behind by the ride on forklift.
- An Employer Injury Claim report prepared in July 2008 by another employee Mr Zarb, stating the employee was hit by a ride-on pallet mover.

The trial judge had to choose between the versions of events given by Mr Darmalingam. Mr Singh's counsel argued at trial that the Register of Injuries and Treatment was just a self-serving explanation by Mr Darmalingam that Mr Singh never accepted. The trial judge instead preferred Mr Darmalingam's evidence as to the circumstances of the accident and that he consulted with Mr Singh before inserting the description of the accident into the Register. The two later documents supporting Mr Singh's version of events were found less reliable because they were completed later than the Register, and the entries made by Ms Weston and Mr Zarb were made without reference to contemporaneous documents.

The trial judge formed the view that Mr Darmalingam's demeanour in the witness box was of someone attempting to tell the truth and answered his questions in a straightforward manner and without evasion. Conversely, Mr Singh's counsel had conceded that his client had given evidence with long pauses, "unbalanced rants", straying from the question, crying and frequent breaks, but explained them as being the result of Mr Singh's pain and psychiatric condition. The trial judge concluded that the vagueness and unresponsiveness of Mr Singh were not as a result of suffering from depression but a desire to further his claim.

The trial judge preferred the evidence of Mr Darmalingham and found there was no fault on the part of the driver. In coming to this conclusion, the trial judge also took into account:

- The inconsistent accounts Mr Singh gave of the collision to various doctors, including that he was

knocked to the ground, that he fell on a pallet, that he avoided falling and that his leg was swept from under him.

- Inconsistent accounts of the number and location of pallets in the storage area.
- His lack of full disclosure about previous injuries and medical conditions.
- His inconsistent accounts of symptoms to his general practitioners after the accident.

Mr Singh appealed the decision to the Court of Appeal but was unsuccessful. The decision of Justice Meagher, with agreement from Justices Ward and Beech-Jones, was that there was no doubt Mr Singh's credibility was put in issue and that there were difficulties in the way that he gave his evidence. As is so often the case, the Court of Appeal found that the trial judge was best placed to make the assessment of whether the appellant plaintiff in doing so was trying to answer the questions put to him truthfully. In this case, the Court of Appeal also placed importance on the fact the trial judge took into account the contents of the three documents reporting the circumstances of the accident when coming to his conclusion as to the credibility of Mr Singh, as well as the circumstances in which the reports were made.

The case is a good illustration of how inconsistencies in accident reports can be successfully used to undermine the credit of a witness, but it is important to note that the circumstances in which those reports are made may also need to be put into evidence.

Similarly, the inconsistent histories provided to medical doctors need to be fully investigated and if necessary the authors of medical reports be available to give evidence. In this appeal, when considering Mr Singh's inconsistent accounts given to doctors, the Court of Appeal stressed the need to be cautious when concluding whether an entry in the report came from information from Mr Singh, the letter of instruction from his solicitor or extracted some other report briefed to the doctor. There was a criticism made that no doctors were called for cross examination on this issue, and as a result there no opportunity to clarify with them the source of any particular item of information. The same general caution was made in relation to the comments by the trial judge to a lack of full disclosure about prior medical conditions and injuries by Mr Singh.

The case is also a reminder once again of how difficult it can be to disturb a trial judge's findings as to credit and the importance of wining on credit issues at first instance.

Fiona Hornsby
fjh@gdlaw.com.au

Ensure your offer of compromise is compliant with the amended rule 20.26 UCPR but don't forget to make it a valid *Calderbank* offer just in case

Whether or not an offer of compromise is compliant with rule 20.26 *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") shot to prominence in December 2011 when the NSW Court of Appeal delivered its decision in *Old v McInnes & Anor* in which it was held that an offer which refers to "costs" was invalid.

The Court upheld the correctness of that decision in June 2013 when it handed down *Whitney v Dream Developments Pty Ltd*. During the intervening 18 months between these two judgments, significant amendments to rule 20.26 UCPR were introduced, principally to clarify when it is permissible to refer to "costs" in an offer of compromise.

In two decisions handed down this month, the Court of Appeal provided further guidance regarding the validity of offers of compromise under the rules, as well as some of the other factors impacting on a Court's discretion to order indemnity costs.

State of NSW v Abed: Recap

Ms Abed sued the State and others claiming damages for malicious prosecution.

At the District Court hearing before Sorby DCJ, she brought additional claims in trespass and false imprisonment that were made only for the first time during her counsel's opening address.

Sorby DCJ entered a verdict in favour of Ms Abed and awarded damages in respect of all three claims totalling $215,089.00.

The State appealed.

The Court of Appeal unanimously set aside the damages awarded in respect of malicious prosecution but Ms Abed held onto her damages for trespass and false imprisonment which represented only a fraction of the overall damages awarded at first instance.

State of NSW v Abed (No2): Costs Judgment

The State applied for indemnity costs of the District Court proceedings, relying upon its offer of compromise dated 23 February 2010 in the following terms:

> *'Verdict for the State with each party to bear their own costs".*

The State argued that it was entitled to indemnity costs because the claims in trespass and false imprisonment were not brought until the District Court hearing.

The Court of Appeal rejected the State's argument. It found that the damages ultimately awarded to Ms Abed represented a better outcome than the offer of compromise even though her claims in trespass and false imprisonment were brought very late.

Further, the Court of Appeal held that, although the claims in trespass and false imprisonment were advanced for the first time during the course of counsel's opening address, this did not of itself render the pursuit of other unsuccessful claims "unreasonable", so as to attract the consequences of an indemnity costs order.

However, the Court held that Ms Abed was not entitled to an order for the State to pay her costs prior to the hearing.

Curtis v Harden Shire Council: Recap

Mr Curtis brought two actions against the Council claiming damages in respect nervous shock and compensation to relatives for himself and his children following the death of his partner when her motor vehicle struck a tree at high speed.

Fullerton J entered a verdict in favour of the Council on liability.

The Court of Appeal unanimously overturned her Honour's decision and entered a verdict in favour of Mr Curtis in respect of liability, remitting the matter to the Supreme Court for an assessment of damages in both actions.

Curtis v Harden Shire Council (No2): Costs Judgment

The Court of Appeal was asked to determine appropriate costs order for the Supreme Court and Court of Appeal proceedings.

In the Supreme Court proceedings before Fullerton J, Curtis had served an offer of compromise in both actions dated 22 August 2011 in the following terms:

> *"Verdict for the Plaintiff, with damages to be assessed but reduced by 10%, plus costs as agreed or assessed."*

Curtis accepted that these were non-compliant with rule 20.26 in light of *McInnes* and *Whitney* as they referred to "costs".

However, it was submitted on his behalf that he was entitled to indemnity costs in any event because the non-compliant offers represented a genuine compromise of the proceedings.

He contrasted his offers, which the Council accepted were genuine, with the Council's conduct.

Firstly, the Council did not acknowledge service of Curtis' offers.

Secondly, it was contended for Curtis that the Council's offers of compromise (that were in terms of a verdict for the Council with each party to pay his/its own costs) were not a reasonable or genuine attempt to compromise but required his unconditional surrender.

The Court of Appeal held that the Council's offers were genuine because the rules specifically permitted an offer to be made in those terms. The compromise was that each party bear its own costs.

The Court gave examples where such an offer may not be a genuine compromise such as a defendant making an offer shortly after receipt of a statement of claim when only minimal costs have been incurred or where no evidence has been served so as to enable a plaintiff to assess the reasonableness of the offer.

Further, the covering letters serving the non-compliant offers of compromise in the lower court proceedings merely confirmed they were served pursuant to rule 20.26 UCPR.

No reference was made in the covering letter, or within the terms of the offer, that Curtis intended to rely upon them as *Calderbank* offers if they were held invalid under the rules.

The Court of Appeal rejected the application for indemnity costs as Curtis gave no forewarning to the Council that he intended to make such an application. The Court stated:

> *"The [Council] should not, therefore, be penalised by indemnity costs orders as a matter of the Court's discretion when it was not put on notice of any such application."*

In the appeal proceedings, Curtis had served identical offers of compromise on 23 September 2013, two days before the appeal hearing, replacing "Plaintiff" with "Appellant".

Curtis applied for indemnity costs in both actions, relying upon both offers.

The Council opposed the application and submitted that the offers were made only 48 hours before the appeal hearing commenced, that Curtis did not provide the Council with an assessment of damages nor did he

provide the Council with an estimate of costs incurred by prosecuting the claim up to that date.

The Court of Appeal rejected each of these grounds in support of the Council's application for the Court to exercise its discretion to "otherwise order.

On timing, the Court emphasised that rule 42.14(2)(b)(ii) UCPR allows for the making of "late" offers. Therefore, a party seeking to invoke the Court's discretion to "otherwise order" bears the onus and must adduce evidence, or otherwise submit that, the time allowed for consideration was unreasonable or that it was not reasonably possible to give proper consideration to the offer.

The Council's submissions did not specifically raise these objections, they merely referred to the offers being served 48 hours before the appeal hearing.

The failure to provide an assessment of damages or a breakdown of costs was also insufficient to "otherwise order". The Court held that there is nothing in the rules which requires such assessments to be provided. Indeed, had a breakdown of costs been provided, the Court noted that it would have required care to avoid contravening rule 20.26(2)(c) which provides:

"20.26 Making of offer …

(2) An offer under this rule …

(c) must not include an amount for costs and must not be expressed to be inclusive of costs…"

In relation to whether or not the offers were compliant with the rules despite them referring to "costs", the Court held that the offers neither contained an amount for costs nor were they expressed to be inclusive of costs and were therefore valid.

The Court of Appeal also held that Curtis had obtained an order that was no less favourable than the terms of his offers served in the appeal proceedings.

As those offers were held valid, despite their reference to "costs", the Court ordered indemnity costs against the Council in respect of the appeal proceedings from the date after the date of each offer.

Conclusion

Curtis v Harden Shire Council (No2) is authority for the proposition that for any offer of compromise now served under rule 20.26 as amended, parties can return to the traditional wording which includes the phrase:

"plus costs as agreed or assessed".

This is on the proviso that the offer does not contain a reference to a monetary amount for costs and it does not state that the offer is inclusive of costs.

However, the validity of an offer of compromise under the rules is not the end of the enquiry when determining an entitlement to indemnity costs. Other relevant factors include:

- Was the offer (whether an offer of compromise or *Calderbank* offer) a genuine compromise?
- Was sufficient time given for the party served with the offer to consider it?
- Was the offer served when there was sufficient evidence to properly assess it?
- Was it unreasonable not to accept it?

Notice should always be included in the covering letter serving an offer of compromise of an intention to rely upon the offer as a *Calderbank* offer if it is later held to be non-compliant with the rules.

An offer, whether served under the rules or as a *Calderbank* offer, must be a genuine compromise considering the risks and vagaries of litigation.

Darren King
dwk@gdlaw.com.au

EMPLOYMENT ROUNDUP

Reinstatement of injured workers – Not if the damages claim is settled

Part 8 of the Workers Compensation Act 1987 contains a series of sequential and interconnected provisions which set out the grounds on which an injured worker can seek reinstatement from their employer after they are terminated as they are not fit for their duties due to an injury sustained at work.

A failure by the former employer to immediately reinstate the injured worker in work of a particular kind specified in an application to the employer (or any other kind of employment with that employer that is no less advantageous) confers a right in the employee to apply to the Industrial Commission for reinstatement.

A worker must demonstrate that they are fit for the kind of employment sought or arising for consideration under the application to be successful in the claim for reinstatement.

Part 8 of the Workers Compensation Act is in the following terms:

"Part 8 Protection of injured workers from dismissal

241 Application to employer for reinstatement of dismissed injured worker

(1) 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.

(2) 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.

(3) 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.

242 Application to Industrial Relations Commission for reinstatement order if employer does not reinstate

(1) If an employer does not reinstate the worker immediately to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), the worker may apply to the Industrial Relations Commission for a reinstatement order.

(2) An industrial organisation of employees may make the application on behalf of the worker.

(3) The Industrial Relations Commission may not make a reinstatement order, except in special circumstances, if the application to the employer for reinstatement was made more than 2 years after the injured worker was dismissed.

243 Order by Industrial Relations Commission for reinstatement

(1) The Industrial Relations Commission may, on such an application, order the employer to reinstate the worker in accordance with the terms of the order.

(2) The Industrial Relations Commission may order the worker to be reinstated to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), but only if the Commission is satisfied that the worker is fit for that kind of employment.

(3) If the employer does not have employment of that kind available, the Industrial Relations Commission may order the worker to be reinstated to employment of any other kind for which the worker is fit, being:

(a) employment of a kind that is available but that is less advantageous to the worker, or

(b) 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).

(4) If the Industrial Relations Commission orders the worker to be reinstated, it may order the employer to pay to the worker an amount stated in the order that does not exceed the remuneration the worker would, but for being dismissed, have received after making the application to the employer for reinstatement and before being reinstated in accordance with the order of the Commission.

244 Presumption as to reason for dismissal

(1) In proceedings for a reinstatement order under this Part it is to be presumed that the injured worker was dismissed because he or she was not fit for employment as a result of the injury received.

(2) That presumption is rebutted if the employer satisfies the Industrial Relations Commission that the injury was not a substantial and operative cause of the dismissal of the worker.

The purpose of those provisions is to "provide a mechanism to assist an injured worker to return to work either in his or her previous position or such other position for which he or she is fit".

The Commission is required to take into account the question of whether or not the worker could safely perform that type of employment when considering a

reinstatement application. Work health and safety considerations are relevant in assessing the workers' fitness to be reinstated to work.

However until recent times it was not clear whether the right to seek reinstatement continued after an employee had brought a work injury damages claim against their employer and had received compensation. Fortunately the recent decision of the Industrial Relations Commission in The Industrial Relations Secretary on behalf of Department of Justice (Corrective Services NSW) v Public Service Association and Professional Officers Association Amalgamated Union of New South Wales (on behalf of Darren Rudd) [2015] NSWIRComm 11 clarifies the issue and confirms that a settlement of a common law claim for damages against the employer brings to an end the rights a worker has under Part 8 of the Workers Compensation Act.

The workers' compensation scheme in New South Wales enables an injured worker to claim compensation for a workplace injury pursuant to Pt 3 of the *Workers Compensation Act 1987* ('WC Act') whilst preserving a right, subject to some modifications, to recover an award of workplace injury damages at common law under Pt 5 of that Act. However, in circumstances where an injured worker recovers damages from their employer in respect of such an injury, that worker ceases to be entitled to further compensation under the WC Act.

Mr Rudd sought work injury damages from CSNSW pursuant to Pt 5 of the WC Act. After mediation in the Workers Compensation Commission the parties executed a document entitled 'Common Law Deed of Release' whereby CSNSW agreed to settle Mr Rudd's claim for the sum of $220,000.00 inclusive of costs but clear of the workers' compensation paid to that date.

Approximately 18 months after that settlement Mr Rudd sought reinstatement to his pre-injury position pursuant to s 241 of the WC Act. His request was refused on 16 October 2013. On 25 November 2013, the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales filed an application for reinstatement on behalf of Mr Rudd under s 242 of the WC Act. The former employer challenged the jurisdiction of the Industrial Relations Commission of New South Wales to hear that application. For the purposes of that challenge, the parties accepted that Mr Rudd was an injured employee who was fit to return to pre-injury duties.

The Commissioner found that the right to seek reinstatement under Pt 8 of the WC Act should not be removed without express or implied legislative intendment, particularly as Parliament had plainly considered exclusions in s 151A of that Act. The right remained alive.

However an appeal followed which was heard by the Full Bench with the Court finding that the settlement of a common law claim against an employer extinguishes the right to seek reinstatement under Part 8 of the WC Act and the Industrial Relations Commission has no jurisdiction to hear a reinstatement application after the settlement of the common law claim.

The Full Bench noted:

> *"We find that no aspect of the legislation evidences an expressed intention to override these common law principles. Rather, a literal approach to the provisions of the WC Act indicates an intention … that such a duplication of entitlements is to be avoided. …"*
>
> *"the common law principles of finality associated with an action for damages, support the conclusion that the legislature intended the recovery of common law damages pursuant to Pt 5 of the WC Act to bring to an end an injured worker's entitlement to compensation under that Act.*
>
> *"The WC Act also provides that damages are recovered in full satisfaction of an employer's obligation under that Act regarding compensation for that worker's injury. For the WC Act to permit an injured employee to be reinstated and remunerated by the employer from whom they have already received damages would be contrary to these well-established common law principles.*
>
> *"As a matter of logic, there would be an overlap between the recovery of damages at common law, particularly those for future economic loss, and an order for reinstatement."*
>
> *" it would be anomalous for the right to reinstatement to survive the recovery of common law damages "*

At the end of the day the settlement of a common law damages claim against an employer brings to an end the workers rights under the Workers Compensation Act 1987 including any right the worker had to seek reinstatement under Part 8 of the Act. As can be seen the settlement of a work injury damages claim has its advantages.

David Newey
dtn@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Workers continue to win damages for "artificially confined periods"… for now

The timing of the contraction of an occupational disease often impacts on a claim for compensation especially when the disease is contracted over a period of time when multiple insurers are on risk.

The NSW workers compensation legislation contains deeming provisions that deem the injury, the disease, to have occurred on the last day of employment or last day of exposure to the conditions that caused the disease.

But what happens if a worker limits their claim to a disease contracted over a period that does not extend up to the deemed date?

The Court of Appeal has recently dismissed two appeals from the Dust Diseases Tribunal of NSW which both raised the issue of construction of the deeming provisions in relation to a worker's common law claim for damages. The appeals centred on the construction of Section 151AB (1)(a) *Workers Compensation Act* 1987 which provides:

> *(1) If an employer is liable independently of this Act for damages for an occupational disease contracted by a worker, the following provisions have effect for the purposes of any policy of insurance obtained by the employer:*
>
> *(a) the liability is taken to have arisen when the worker was last employed by the employer in employment to the nature of which the disease was due…*

The first appeal determined was *Allianz Australia Insurance Ltd v Pomfret* [2015] NSWCA 4.

Mr Pomfret was employed by Ceeco in 1974 and from 1976 until 23 December 1978 he carried out roles as a dye setter and operator. Mr Pomfret was exposed to asbestos during these periods.

Allianz was Ceeco's workers' compensation insurer for those periods but only up to 31 January 1978. Ceeco's workers' compensation insurer between 31 January 1978 and 23 December 1978 was unknown and Ceeco has since been deregistered.

Mr Pomfret amended his pleadings to limit the allegations of negligence, breach of contract and breach of statutory duty against Ceeco to a period of employment and exposure which ended on 31 January 1978.

Mr Pomfret asserted the pleadings sought damages for harm or injury only resulting from exposure to asbestos during the pleaded period and did not include any harm or injury resulting from exposure after that period.

Allianz submitted that it was not liable because there was no policy of insurance in force with Ceeco when Mr Pomfret "was last employed by the employer in employment to the nature of which the disease was due". Allianz argued that the "disease" referred to in subsection (1)(a) is the whole of any relevant occupational disease contracted by the worker and includes any injury or harm due to asbestosis or asbestos related pleural disease caused by exposure after 31 January 1978.

Allianz sought to have the Court of Appeal reconsider its reasoning in the previous decisions of *FIA Traders Insurance Co Ltd v HIH Winterthur Workers' Compensation (NSW) Pty Ltd* (1998) 45 NSWLR 257 and *MMI Insurance Compensation (NSW) Ltd v Baker* (1990) 41 NSWLR 289 wherein the Court upheld claims limited to injuries received before the commencement of new legislation which fettered the recovery of common law damages. Basten JA noted that in FIA, even though the plaintiff was exposed to industrial noise after the date of a claim for damages for industrial deafness, the "liability" in s 151AB was said by the Court to be the liability established in the proceedings.

As to the construction of s 151AB (1)(a), Meagher JA referred to subsection (2):

> *"which contemplates a "claim" for damages being made by the worker and that the insurer "primarily responsible" for indemnifying the employer in respect of that claimed liability may be identified and act "in respect of" that claim before it has been finally determined or resolved."*

His Honour concluded s 151AB (1)(a) applies to the disease and liability which is the subject of the worker's claim. Therefore, the Court rejected Allianz's interpretation because it sought to circumvent the ambit of Mr Pomfret's claim.

Although this reasoning is consistent with that adopted in earlier decisions, Allianz argued it was inconsistent with the intended operation of paragraph (a) to allow the plaintiff to "manipulate" his or her pleadings to restrict a claim to a period which guarantees insurance cover or a solvent employer.

The Court of Appeal determined that the defendant cannot seek to have proceedings dismissed on the grounds of a selective approach by the plaintiff.

According to Meagher JA, the accepted construction followed by the court in decisions such as *FIA* and *MMI* is consistent with the purpose of the current form of s 151AB. His Honour also referred to Handley JA's observations in *FIA* that to limit the plaintiff's ability to amend pleadings to limit a claim for damages to a certain period would produce a '"startling" outcome:

> *"If the worker continued in employment of the same nature, the insurer on risk when the proceedings were commenced could go off risk and one or more other insurers could go on and off risk while the action was pending."*

The appeal was dismissed and the primary judge's finding that there was an arguable case that Allianz was liable to indemnify Ceeco in respect of the claimed liability to the worker was confirmed by the Court of Appeal.

In the second appeal of *CGU Insurance Limited v Davies* [2015] NSWCA 5 the worker, Mr Davies, was employed as a pottery caster by R Fowler Ltd from July 1940 to August 1979. He was then employed by Seapip Pty Ltd from August 1979 when it acquired Fowler's pottery business. Mr Davies was exposed to and inhaled silica dust during these periods, and commenced proceedings in the Dust Diseases Tribunal for damages after contracting silicosis and progressive massive fibrosis as a result. Similar to the approach of *Pomfret*, Davies amended his claim for silicosis and progressive massive fibrosis caused by exposure to silica dust up to 30 June 1979 because no workers compensation insurer of Fowler has been identified thereafter.

CGU adopted the same reasoning as Allianz, contending that it was not liable because the policy that applied for the period ending 30 June 1979 and Mr Davies worked until August 1979. Again, CGU was found liable for the reasons provided in Meagher JA's judgment in *Pomfret*.

Basten JA also discussed CGU's reliance on the decision in *WorkCover Authority of New South Wales v Chubb Australia Ltd* [2000] NSWCA 221, wherein the Dust Diseases Tribunal considered a claim for damages due to mesothelioma. Mesothelioma, being an 'indivisible' disease, meant the court was bound to examine the evidence of any exposure to risk of contracting mesothelioma after the date claimed. Basten JA doubted the distinction between "divisible" and "indivisible disease" was relevant in the present case and rejected the reasoning in Chubb as it was not "firmly based in the statutory language."

A special leave application to the High Court was filed on 6 March 2015.

Insurers have attempted and failed to persuade the Court to adopt a literal construction of Section 151AB which would fetter a workers entitlement to bring the claim that best suits them. A literal approach would strictly confer liability on the employer or insurer on risk at the time of the last date the worker was exposed to occupational disease in their employment, rather than an "advantageously" limited claim period pleaded by a worker.

In both cases the Court of Appeal held firm to previous decisions which interpret Section 151AB in a favourable way to assist workers to restrict claims in a way that ensures there is insurance available to pay any damages recovered. There seems to be little doubt that the Courts have no appetite to force workers to rely upon a "deemed" date of injury where there is no insurance cover in place on the last day of exposure to the risk. We will wait and see what the High Court thinks about this.

Karmen Cindric
kxc@gdlaw.com.au

Restrictions on the payment of medical expenses

In our March 2015 newsletter we considered two arbitral decisions which reduced the effectiveness of Section 59A in restricting an injured worker's entitlement to medical expenses to twelve months after weekly compensation ceased.

The decision of Arbitrator Harris in *Collet* has been the subject of a recent Appeal Determination by Deputy President Roche. It may be recalled that Mr Collet suffered aggravation to pre-existing spinal pathology in an incident at work on 18 January 2012. He was paid weekly compensation from the date of injury to 12 August 2012 following which he returned to work performing lighter duties for a significant period without any loss of wages. The insurer relied upon Section 59A to dispute liability for proposed surgery to the cervical spine. The decision by Arbitrator Harris turned on the interpretation of when a worker "ceased to be entitled to weekly payments of compensation" within the meaning of Section 59A (2), finding in Mr Collet's favour.

Deputy President Roche did not accept the approach of Arbitrator Snell in *Vella* and Arbitrator Harris in *Collet* was correct because Section 59A (1) does not talk about a "potential" entitlement to weekly compensation in the future.

Deputy President Roche found the claim was deemed to be made immediately before 1 January 2013, that is, 31 December 2012. It was agreed that no weekly compensation had been paid to Mr Collet in the

12 months after this date. Therefore no compensation was payable for treatment under Division 3 as it was a claim. More than 12 months after the claim for compensation in respect of the injury was first made.

Nonetheless Deputy President Roche found that Mr Collet was not without a remedy because his entitlement to weekly compensation would be revived when he stopped work to undergo surgery in accordance with Section 59A(3).

In interpreting the provisions of the section Deputy President Roche indicated weekly compensation is only "payable" when there is a right or entitlement to recover actual weekly compensation. This entitlement will depend on the application of the legislation to a particular worker's circumstances. Entitlement to weekly compensation can cease with an unfavourable work capacity decision or if a worker fully recovers from the effect of an injury and returns to normal full time duties. In either situation the worker will have no entitlement to compensation under Division 3.

Nevertheless, the right to receive actual weekly compensation can revive at a later time which is the situation dealt with in Section 59A (3). When the right to weekly compensation revives and the worker is again entitled to compensation under Division 3 it is "only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments of compensation are payable to the worker".

Roche DP further indicated the Commission could not order the payment of the costs of the proposed surgery however the insurer would be obliged to meet that cost once the worker's right to receive actual weekly compensation revived when he became incapacitated by undergoing the surgery. The Deputy President further observed that any failure of the insurer to meet the costs of the surgery would be a most serious breach of the insurer's obligations.

Roche DP commented that Section 59A would:

> *"create great uncertainty, unnecessary litigation and potentially, considerable hardship while parties fight about whether compensation was paid or payable and whether, and if so, when, the worker's entitlement to weekly compensation ceased. It is a provision that is in need of urgent reform".*

Whilst Deputy President Roche has clarified the Section 59A adopting a literal approach, consistent with Parliament's intention to restrict entitlement to ongoing medical expenses incurred more than 12 months after payments of weekly compensation cease, it is certain there will be an increase in disputes about prospective medical treatment. We also foresee an increase in "single day" incapacity claims as workers seek to maintain their ongoing entitlement to recover medical expenses notwithstanding an apparent lack of incapacity for pre-injury duties. These "single day" claims may involve a worker seeking minor medical treatment and furnishing a certificate potentially entitling them to a payment of weekly compensation for that brief period off work. Insurers will need to consider making work capacity decisions in all cases where injured workers return to full pre-injury duties in an effort to prevent revival of entitlement weekly compensation and medical expenses where future surgery is found to be reasonably necessary.

Belinda Brown
bjb@gdlaw.com.au

Retirement extinguishes rights to medical expenses

Further to Belinda Brown's article in our current newsletter it is clear the Presidential Unit of the Workers Compensation Commission has been busy dealing with appeals relating to the payment of medical expenses in workers compensation claims. A further example of this is the decision of Deputy President Bill Roche in *Air Electrical Pty Limited t/as DJ Staniforth & Company v Mortimer* (2015) NSWCCPD 18 wherein Deputy President Roche was required to examine the entitlement to medical expenses after a worker had reached retirement age.

Mr Mortimer was a 65 year old electrician who worked for Air Electrical Pty Limited for a number of periods, the most recent period of employment extending from 1989 to November 2013. He had previously injured his right knee whilst working with another employer in approximately 1986 and had surgery for that injury before returning to work on normal duties.

Whilst employed with Air Electrical Mr Mortimer completed a claim form on 13 November 2013 asserting he had been experiencing problems with his right knee and he had been informed by his orthopaedic specialist he needed a knee replacement.

The insurer disputed that Mr Mortimer received an injury, that his employment was a substantial contributing factor to any injury and asserted that the need for proposed knee replacement did not result from any injury with Air Electrical. Noting it was a "prospective medical expenses" claim, Mr Mortimer was referred to an approved medical specialist (AMS). The AMS issued a Medical Assessment Certificate that the proposed right knee replacement surgery was reasonably necessary as a result of the injury sustained during the course of Mr Mortimer's employment up until 12 November 2013.

The employer appealed the decision. Mr Mortimer contended that the appeal was possible given the likely quantum of the appeal was less than $5,000.00 (the threshold for an appeal to the President of the Workers Compensation Commission).

Ultimately this element of the appeal was irrelevant as the Deputy President determined that in any event Mr Mortimer had an inability to receive compensation for the surgery given the operation of Section 59A.

Section 59A provides that a worker to whom weekly compensation has not been paid or payable is only entitled to compensation for any treatment, service or assistance for 12 months from the date on which a claim for compensation in respect of the injury was first made. A worker is not entitled to recover the cost of such treatment given or provided more than 12 months after that date.

Mr Mortimer had not received any weekly compensation and as he had reached 65 years of age, he had no potential right to receive weekly compensation in the future. Section 52 of the *Workers Compensation Act* 1987 provides that for a worker who receives an injury before retiring age, weekly payments of compensation are not to be made in respect of any period of incapacity occurring *after* the date on which that person reaches retirement age.

Subsequently Mr Mortimer could not rely upon Section 59A(3) which allows him to again be entitled to medical expenses during a period in which weekly compensation is payable to him. Section 59A applied from 13 November 2014 and Mr Mortimer failed in his claim. This was despite the arbitrator having made an award in favour of the medical expenses being reasonable and necessary. The effect of Section 59A and the passing of the 12 month period resulted in the award being unable to be enforced.

Although this decision is relatively unusual, it highlights the necessity for workers to demonstrate an entitlement to weekly compensation before enlivening an entitlement to medical expenses after the 12 month limit has expired. It is also a timely reminder for workers to seek their medical treatment in a timely fashion, contemporaneous to their weekly compensation payment and not delay any surgery or treatment until after retirement.

Stephen Hodges
sbh@gdlaw.com.au

CTP ROUNDUP

Trees & blameless accidents

The *Motor Accidents Compensation Act 1999* ("MACA 1999") provides for recovery of damages where there is a blameless accident. A blameless motor accident is defined in the legislation 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."

Judge Norton SC of the District Court of New South Wales in *Connaughton v Pacific Rail Engineering Pty Ltd NSW* was recently called on to consider whether or not there was a blameless accident when a motor vehicle was struck by a falling tree branch.

Garry Connaughton was driving a motor vehicle that was owned by the defendant, Pacific Rail Engineering Pty Limited. Connaughton was driving the vehicle in a northerly direction on Mt Ousley Road at Mt Ousley at approximately 10.30 am when a tree that was on the roadside fell and struck the cabin of the truck. This caused the truck to run out of control. Connaughton contended in the pleadings filed in the District Court that the accident was a blameless motor vehicle accident within the definition in Section 7A of the MACA. This was disputed by the defendant.

The matter proceeded before Her Honour in relation to the issue of liability only, in particular, whether the accident could be classified as a blameless accident.

According to the Police report, at the time the collision occurred there were heavy winds which caused the tree to break away from the root system and come to rest across all three lanes in both directions of the road. The tree, falling on the cabin, crushed the cabin of the truck and trapped the driver. No other vehicles were involved in the collision. The defendant conceded there had been a collision between the motor vehicle and a fallen tree and that following the collision the motor vehicle continued northerly for some distance until it stopped.

The defendant however submitted that the Police evidence was of little weight and the damage to the cabin roof should not suggest a force had fallen on it. In response Connaughton submitted that it must have been so close in time so as to avoid a collision so that there could be no blame on the part of Connaughton. Pacific National submitted that Connaughton was

precluded from recovering any damages as he was the driver and the act of driving the vehicle was in itself sufficient to attract the exclusion in Section 7E of the legislation as according to the defendant, Parliament never intended to cover drivers in single vehicle accidents. The defendant also referred to the decision of Axiak v Ingram in which Tobias AJA stated:

> *"The one exception is that the driver of the motor vehicle in the accident will not be entitled to make a claim under these provisions."*

In her judgment Judge Norton stated:

> *"While I accept the objects of the Act include a desire to restrict claims and keep the costs of insurance down, the intention of the present provisions is to extend the coverage of the Act into areas not previously covered by any CTP Scheme. I also accept the High Court in the past has declared it is appropriately to narrowly construe the definition of motor accident. Those decisions related to earlier versions of the Act, some of which were differently worded and none of which involved any concept of a blameless accident. Special leave was refused in Axiak. ....*
>
> *It seems to me a number of anomalies arise regardless of whether the plaintiff's submissions or the defendant's submissions are accepted. It is clear that the provisions were meant to extend the coverage of the Act and that being the driver of a motor vehicle was not of itself intended to prevent an injured person from recovering damages. The effect of an accident involving a single vehicle has not previously been considered by any higher Court and is not referred to in the Second Reading Speech."*

Her Honour therefore went on to consider the positions posed by the parties; that is, was it a blameless accident and if so, was the plaintiff excluded by Section 7E?

The defendant also submitted that Connaughton had to pass the first hurdle, that is, was Section 3A relevant to the claim? Her Honour accepted the plaintiff's submission that Section 3A was not relevant to claims that potentially come within blameless accident provisions. The trial judge was of the view that Section 3A only applies when there is fault.

The second question was, whether or not there was a motor vehicle accident. The trial judge also determined this question in the plaintiff's favour. The vehicle was in motion and the accident involved the use or operation of the motor vehicle. Connaughton was injured as a consequence of a collision with the vehicle. Her Honour concluded:

"On the facts as I have found them the plaintiff did not cause this accident. His driving on the road was no more than a background fact which explains no more than why he was in a position where he could be struck by a tree. Thus, the driving of the plaintiff was nothing more than "the mere occasion of the injury".

In oral submissions it was emphasised that the section must be read in the context of the Part and that in circumstances such as the present case the plaintiff, as the driver, is deemed to be the person at fault and to have caused the accident.

Looking at the words of the section and bearing in mind the words used in the Second Reading Speech I find that even under the extended definition of causation in Section 7E there was no act or omission on behalf of the plaintiff, either voluntary or involuntary, which can be said to have caused the accident. I do not accept that the words mean that drivers in single vehicle accidents are deemed to have caused that accident."

The decision is an interesting one as for the first time the liability of drivers in a single vehicle collision has been considered.

We anticipate there will be an appeal to the Court of Appeal in relation to the decision.

Amanda Bond
asb@gdlaw.com

Section 81 Notices: If in doubt, don't deny liability

All NSW CTP insurers will be aware of the decision of *Smalley v Motor Accidents Authority [2013] NSWCA 218*, in which the NSW Court of Appeal dealt with the operation of the Claims Assessment and Resolution Service ("CARS") exemption provisions, in the context of denials of liability by CTP insurers.

The Court of Appeal found that where a CTP insurer did not issue a section 81 notice within the 3 month statutory time limit, a denial would be 'deemed' on the part of the CTP insurer by virtue of the operation of section 81(3). This would then have the consequence of triggering a mandatory exemption from CARS.

Following the reasoning of the Court of Appeal in Smalley, there was a wider implication that the only claims which should not be exempted from CARS are those claims where the insurer has wholly accepted liability for the claim, and within the 3 month time limit.

(A more detailed discussion of Smalley is available in the November 2013 edition of the Gillis Delaney newsletter.)

The recent decision of *Aaron Mordue v QBE Insurance (Australia) Limited [2015] NSWSC 98* in February provides a cautionary tale for CTP insurers who have issued Section 81 notices wholly admitting fault on the part of the insured within the 3 month time limit.

Mr Mordue was injured as a front seat passenger during a motorcar rally in the Coopernook State Forest, on 1 December 2012. The driver of the insured vehicle, Mr Mordue's son, had lost control of the vehicle during the rally, which landed in a gravel drain and caused Mr Mordue injury.

A claim for compensation was made under the Act on 27 December 2012. The CTP insurer, QBE, issued a Section 81 notice on 14 February 2013 in the following terms:

"On the basis of our enquiries to date, QBE is prepared to accept that the accident occurred as a result of the fault of our insured driver. Therefore liability is admitted in accordance with section 81(1) of the Motor Accidents Compensation Act 1999. QBE reserves the right to withdraw this admission should further relevant information come into our possession."

Shortly thereafter, on 5 June 2013, a document entitled 'Amended s 81 Notice' was forwarded to Mr Mordue's solicitors as follows:

> *"We have fully reviewed the circumstances of this accident. It is clear that your injury arose during the course of an organised motor sports event and therefore QBE, as CTP insurer, has available to it the defence of voluntary assumption of risk as provided by s 140 of the Motor Accidents Compensation Act 1999.*
>
> *QBE relies on this defence to fully meet any liability it might otherwise have in relation to your claim and liability is therefore denied to the extent of 100%."*

Solicitors acting for QBE then wrote to the insured driver and Mr Mordue's solicitors on 3 March 2014, purporting to deny indemnity for the claim:

"Please note that by operation of s 10 (1)(b) of the Motor Accidents Compensation Act, QBE's third party policy only operates whilst this vehicle is being used or operated on a road, within the meaning of that term set out in the Road Transport Act 2013.

A road is defined to mean "an area that is opened to or used by the public" and we note that this accident occurred during the course of a rally authorised by the Australia Auto Sport Alliance and that the road on which the accident occurred was closed to the public at the time of the accident.

For that reason, we must advise you that QBE's third party policy does not respond to this claim. Accordingly, indemnity is denied for this claim."

QBE applied for and was successful in making an application for exemption from the CARS, on the basis that liability for the claim had been denied. The claimant consequently sought relief by way of judicial review in the Supreme Court of NSW.

When examining whether QBE was entitled under the Act to apply for an exemption from CARS, Adamson J first considered the validity of the further notices issued purporting to deny indemnity. Pursuant to the conclusions of Basten JA in case of *The Nominal Defendant v Gabriel [2007] NSWCA 52,* Adamson J found that CTP insurers could not 'withdraw' admissions of liability which had been made under s81(1). The only exception to this was in cases of fraud under s118.

As QBE had admitted fault on the part of their insured pursuant to s 81(1), the 'Amended s 81 Notice' issued by QBE on 5 June 2013 purporting to deny liability was ineffective.

The secondary issue dealt with by Adamson J was that of the operation of the purported denial of indemnity, issued on 3 March 2014.

Adamson J distinguished the two processes of a claim in relation to liability, as follows:

- The 'liability' of an insurer to make immediate payment of medical and related expenses under s 83; and
- The assessment by either CARS or the Court of the insurer's 'liability' for damages.

Following the initial s 81(1) notice, QBE had made and continued to make payments to Mr Mordue for treatment expenses, pursuant to s83.

QBE rightly conceded that the denial of indemnity subsequent to the initial s 81(1) notice did not affect the liability to make payments to Mr Mordue, pursuant to s 83 of the Act. However, it was argued on behalf of QBE that the notice issued on 3 March 2014 entitled QBE to deny indemnity for the claim.

Ultimately, Adamson J was not prepared to accept that the QBE was entitled to deny liability in an "indirect" and "circuitous" way.

In applying Smalley, Adamson J found that the initial s 81(1) notice satisfied all the criteria for a complete admission of liability. This admission could not be withdrawn. There was no provision in s 81, or the Act generally, which allowed a subsequent denial to be made following an admission within the 3 month time

limit as there was in the reverse (i.e. pursuant to s81(4), where a denial had initially been made and an insurer could then issue a further notice making an admission of liability).

Adamson J concluded indemnity is necessarily implied in an admission of liability by a CTP insurer.

The decision of the Principal Claims Assessor was quashed, and the Motor Accidents Authority was prohibited from issuing a certificate of exemption.

Essentially, the decision in Mordue simply concludes that where a CTP insurer admits fault on the part of the insured, there is also an implicit admission that indemnity will be extended to the insured.

Adamson J, however, did seek to provide some valuable guidance for those CTP insurers in doubt within the 3 month time limit – that there is provision under s 81(4) to first deny liability, with the option of later admitting liability when the facts become clearer, and it is evident that the insured driver is liable.

It would seem that CTP insurers should be conscious of the consequences of an early admission, particularly in circumstances where the facts give rise to doubts as to whether the policy operates to cover the driver.

Rachael Miles
ram@gdlaw.com.au