Gillis Delaney Lawyers

GD NEWS / MAY 2015

IN THIS EDITION

Editors:


David Newey


Amanda Bond

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

What is Accidental Damage for the Purpose of an Insurance Policy?

Insurance policies that cover damage to property often contain a definition of "insured damage" to identify the circumstances covered by the policy and that definition may refer to the need for the damage to be accidental, sudden and unforeseen. However not all incidents are accidental and not all damage is accidental damage. So how is the issue determined?

In *Matton Developments Pty Limited v CGU Insurance Limited,* the Queensland Supreme Court was recently called on to determine whether a claim for damage to a crane which had collapsed came within the definition of insured damage in circumstances where the crane had not been operated appropriately.

Matton Developments owned a telescopic crawler crane. It entered into a contractors and plant insurance policy with CGU in respect of the crane.

Matton provided the crane and crane operators to third parties for reward.

The crane and a crane operator were lent on hire to G&M Panel Constructions Pty Limited to be used to lift and place 25 concrete tilt panels weighing between 36-38 tonnes as part of the construction of a factory in Queensland.

In the course of the second last lift the crane's boom collapsed damaging the crane beyond economic repair.

Matton made a claim on its insurer. The insurer refused the claim primarily because the damage was:

- not "accidental, sudden and unforeseen" within the meaning of the insured damage in the policy; and
- was excluded by the operation of various exclusions in the policy.

CGU asserted the evidence strongly evidenced the machine was being used well outside of its design specifications and operating manuals and that is the reason an exclusion was engaged.

Matton argued that the boom of the crane collapsed because of a failure of a heel weld joint that resulted from a structural pre-existing weakness.

CGU argued the boom collapsed due to structural overload as a consequence of a side load induced by the crane operating on a 7^{o} slope.

Insured damage was defined in the policy to mean:

> *"Accidental sudden and unforeseen physical loss of or damage to a machine which occurs during the period of insurance and requires immediate repair or replacement to allow continuation of use."*

One of the exclusions provided that cover was not provided for insured damage if at the time of an accident the machine being used as a crane or lifting device and was:

(a) *"being operated with your knowledge or the knowledge of any of your agents or employees or by any person in contravention of any applicable statutory requirement; or*

(b) *loaded in excess of the safe working load specified by any relevant statutory authority, manufacturer's specification; or*

(c) *being used in any raising or lowering operation in which a single load is shared between two or more cranes or lifting devices except when covered under optional extension (dual or multiple lifting) and that optional extension is noted on the policy schedule; and*

(d) *not used in compliance with the relevant Australian Standard."*

Another exclusion provided that the policy did not cover insured damage to any machine which is or has been operated contrary to the manufacturer's guidelines.

After hearing a great deal of evidence the Court concluded the crane operator knew the crane had to be operated on level ground and if it was to be operated on more than a 1^{o} gradient, this required a separate assessment. The crane was actually operated on a 7^{o} slope when it collapsed.

Operating the crane on a 7^{o} angle did not comply with the manufacturer's guidelines and when operated in this way there was a real risk of structural overload.

Operating the crane on a 7^{o} slope constituted a breach of the relevant Australian Standards and operating the crane on a 7^{o} slope did not comply with the manufacturer's guidelines.

The Court was called on to consider whether the operation of the crane in this way amounted to "insured damage" as defined in the policy and whether the exclusions applied.

The Court accepted that by virtue of the definition of insured damaged it was necessary for Matton to demonstrate that there was physical loss or damage which was:

- accidental;
- sudden; and
- unforeseen.

The terms, accidental, sudden and unforeseen were not defined in the policy.

Flanagan J concluded that the proper test of whether or not the damage was accidental, sudden or unforeseen was a subjective test with objective qualifications. Flanagan J noted:

> *"The proper test in my view is the subjective test with an objective qualification. There cannot be unlimited indemnification by solely focusing on an insured's subjective beliefs, opinions or expectations. One cannot claim cover by virtue of gross stupidity or ignorance. There must be some qualification to the subjective test, whether it would be unreasonable to say the damage arose from the accident. It is a question of fact as to whether the circumstances of the case fall outside an accident. The Courts appear to be slow in finding an event is other than an accident unless it can be established that there is something more, like a deliberately incurred or courted risk.*
>
> *The cases that apply subjective tests do so in a way that leaves open conduct which, as a matter of common sense, commerciality and public policy, ought not to receive indemnification under an accident policy.*
>
> *....*
>
> *The objective qualifications to the subjective test appear to be:*
>
> *a)* *whether an insured gambles or courts a risk or takes a calculated risk with knowledge of its outcome, that is, a deliberate acceptance of that risk, or*
>
> *b)* *where an insured voluntarily embarks on a foolhardy venture from which the loss or damage that resulted was almost an inevitable consequence."*

The trial judge noted that there were provisions in the policy that provided extended cover where the crane was accidentally overloaded. However, once again it was necessary for the overloading to be an accident.

The trial judge was not convinced that there was anything accidental about the incident. Here, the collapse of the boom was not intended, however it was not established that the collapse was unexpected and unforeseen.

The crane operator fully appreciated the crane had to be operated on level ground. He knew that if it did not operate the crane on level ground there was a risk the boom would fall. The crane operator had been warned that a ramp that the crane was moved onto was too high. The crane operator disregarded this advice and crawled the crane up the ramp to its final position where he operated it on a slope where there was a real risk of the boom collapsing.

At the end of the day the Court found that the way the incident occurred took the circumstances outside the definition of "insured damage" in the policy.

Flanagan J referred to a number of decisions that provide guidance on what the word "accidental" means and referred to the decision in *National & General Insurance Co Limited v Chick* where a man who was pretending to play Russian Roulette discharged a gun into his own head thinking the bullet was in a different chamber. The question was whether the dominant cause was the pressing of the trigger (a deliberate act), or the discharge of the gun. It was held to be the discharge (unexpected). Mahoney JA stated:

> *"An event may be accidental because the happening of it was accidental:- thus the trigger of a gun may be pulled accidentally in the sense that the trigger was moved but the person whose finger moved it if not intend that it be moved. But accidental may also ... be applied to an event to indicate that, viewed as a consequence of a previous event, it was an accidental consequence of it ... the fact that the mechanism struck the loaded chamber and caused the gun to fire was, I think, an unintended consequence of what the deceased did and in this sense this means by which the injury was inflicted on him may properly be described as accidental."*

But in this case there was nothing accidental about the situation.

Flanagan J went on to conclude that even if that finding was not correct, Matton was not entitled to indemnity because of the operation of the relevant exclusions as the crane had not been operated in accordance with the manufacturer's guidelines or the Australian Standards.

At the end of the day CGU were not liable to indemnify Matton for the damage to the crane as the facts established that the damage was not accidental, sudden or unforeseen where the crane was being operated in an inappropriate manner contrary to the manufacturer's guidelines and Australian Standards.

Not every incident is an accident and at the end of the day the words accidental, unforeseen and sudden, when found in an insurance policy do not contemplate deliberately courting a risk or danger.

David Newey
dtn@gdlaw.com.au

Ski Accidents and Causation

Plaintiffs have an evidentiary burden in claims for personal injury to establish a causative link between the negligence alleged on the part of the defendant or defendants and the nature of the injury suffered.
This concept is contained within section 5D of the Civil Liability Act which provides:

> *"(1) A determination that negligence caused particular harm comprises the following elements:*
>
> *(a) That the negligence was a necessary condition of the occurrence of the harm; and*
>
> *(b) That it is appropriate for the scope of the negligent person's liability to extend to the harm so caused."*

What must be established by a plaintiff was recently considered by the NSW Court of Appeal in Perisher Blue Pty Limited v Nair-Smith where the Court of Appeal set aside orders made in the Supreme Court awarding damages to Nair-Smith, on the basis that causation had not been established.

Nair-Smith suffered injury on 18 July 2003 whilst boarding a chairlift at the popular ski resort. She was struck in the groin area from behind by the armrest of the chair and sustained significant injuries. She commenced proceedings in the NSW Supreme Court against Perisher and was successful at trial before his Honour Justice Beech-Jones.

Nair-Smith was a seasoned skier with some 25 years experience. Her evidence at trial was that as the chair approached the waiting skiers from the bullwheel she and another skier noticed that the safety bar was not up and that they both yelled out "the bar" to get the attention of a nearby Perisher attendant, Mr Lofberg.

Lofberg grabbed the back corner of the chair and pulled it towards him, flipping the safety bar up at an angle. Nair-Smith contended that the attendant's actions caused the chair to move out of alignment and

the side handrail struck her in the groin causing immediate and intense pain.

Perisher initially disputed Nair-Smith's version of the accident and contended that Lofberg raised the safety bar in a safe and timely manner. In cross-examination Lofberg conceded that Nair-Smith's account was accurate.

At trial, Beech-Jones J found that Perisher breached its duty of care by failing to take the precaution of having a lift operator near or close to the loading point who could observe, at the very latest moment, the state of the chairs as they exited the bullwheel. His Honour held that this failure was causative of Nair-Smith's injuries because Lofberg's inattention and delayed reaction caused panic and jostling amongst the skiers which caused Nair-Smith to become misaligned with the chair resulting in the accident.

Perisher appealed his Honour's decision on a number of bases including challenges to the finding of breach of duty and causation.

The Court of Appeal comprised of Barrett and Gleeson JJA and Tobias AJA confirmed the trial judge's finding in respect of Perisher's duty of care to Nair-Smith and subsequent breach of that duty.

The Court of Appeal held that there was a foreseeable and not insignificant risk that the skiers would panic and move out of alignment if the lift operator did not react or appear to react in a timely manner to the chair having its safety bar down. Despite Lofberg's eventual reaction the Court of Appeal agreed that his delay gave rise to an apprehension in the skiers that he could not intervene in time. Accordingly, His Honour was correct in finding that the lift operator was in breach of his duty of care.

However Perisher had success with its causation argument. The Court of Appeal found that there was no direct evidence that Nair-Smith or either of her companions panicked because of Lofberg's delayed observation of the condition of the safety bar or of his reaction to it. On that basis:

> *"There could be any number of reasons why the respondent was out of alignment with the chair. Her ski may have slipped to the right at some point during the loading process. Her misalignment may have been caused by a simple inadvertence on her part. Her biomechanics may have meant that her hips shifted to the right as she looked over her left shoulder to observe the approaching chair."*

The Court of Appeal was ultimately not convinced that the plaintiff had discharged her evidentiary burden, finding that:

> *"The course of common experience does not establish why any one of these explanations is the more probable inference that ought to be drawn in the circumstances. The various explanations do no more than suggest competing inferences of equal degrees of probability so that any choice among them is no more than mere speculation. For the primary judge to conclude that the cause of [Nair-Smith's] misalignment was the consequence of jostling in reaction to the chair coming so close with its safety bar down due to Mr Lofberg's reaction after the time reasonable care required him to act was a matter of mere conjecture. The evidence does not allow a finding that the events that in fact happened accorded, as a matter of probability, with this possibility."*

For that reason it was not open to the Trial Judge to conclude that Perisher's negligence was a necessary condition of the occurrence of the harm. Perisher was successful in its appeal and Nair-Smith was denied her damages.

A secondary issue before the Court was the inconsistency between the provisions in Part 2 of the *Civil Liability Act*, restricting in certain circumstances a plaintiff's entitlement to common law damages, and section 74(1) of the then *Trade Practices Act* regarding contractual liability. The Court of Appeal held that the trial judge was correct in finding that the two were directly inconsistent and that the *Civil Liability Act* provisions were invalid in this claim as a result. Changes to the Trade Practices Act in 2004 meant that the restrictive provisions within the Civil Liability Act would apply for claims after 13 July 2004. In any event, the Court's decision did not turn on this issue given its findings on liability.

As we know every case turns on its facts, however the Court of Appeal's decision in this case highlights the importance for all parties to consider each limb of the test for negligence pursuant to the *Civil Liability Act*. In this case Nair-Smith failed to meet that test. A little bit of evidence from Nair-Smith that she panicked which caused her to move out of alignment was all that was required to demonstrate the negligence caused the harm but without that evidence Nair-Smith could not succeed. Once the matter reaches the Court of Appeal no new evidence can be led. No doubt Nair-Smith will be bitterly disappointed with the outcome.

Vince Ripepi
var@gdlaw.com.au

Cyclists Are A Dangerous Risk For Councils

The recent Court of Appeal decision of *Rockdale City Council v Simmons [2015] NSWCA 102*, highlights the significant measures that must be taken by Councils to avoid liability for personal injury claims brought by cyclists that find their way into areas managed by the Council.

Alex Simmons, an experienced cyclist, sustained injury as a consequence of an accident that occurred at about 6.15am on 11 April 2007 whilst he was riding his bicycle through a car park that was adjacent to the St George Sailing Club. Simmons struck a boom gate that had been closed across the entrance to a carpark. The injury led to a below knee amputation of the left leg.

Simmons sued Rockdale City Council and the St George Sailing Club.

The boom gate had been erected by Council in 2004 to prevent access to the car park at night by hooning motorists. The Club had entered into an informal agreement with the Council that allowed it to lock and unlock the gate at its discretion.

Simmons' evidence was that he had ridden the same route hundreds of times and it was regularly used by other cyclists. According to Simmons, the boom gate looked the same closed as when it was open. Simmons did not realise there was an obstruction until he was about to hit it. Of significance, the Council was aware of at least three previous incidents of cyclists colliding with the boom gate.

At first instance, Hall J held that Council owed a duty of care to users of the roadway including cyclists. His Honour found that the Council had been negligent and awarded Simmons damages in the amount of $1,160,000, reduced by 20 per cent for contributory negligence. The Club escaped all liability on the basis of a finding that it did not owe Simmons a duty of care.

The Council appealed the findings of duty of care, breach, causation and contributory negligence. Simmons also appealed against the failure to find the Club owed a duty of care and the finding of contributory negligence.

The Court of Appeal comprising of Justices Beazley P, McColl JA and Barrett JA held that the primary judge was correct in finding the Council owed a duty of care to cyclists including Simmons, and that it had breached its duty of care.

The Court of Appeal found that Council had failed 'to exercise reasonable care to avoid foreseeable injury to cyclists and Council's negligence was a necessary condition for the occurrence of the harm suffered by Simmons'.

The Court of Appeal emphasised that Council was aware that sporting or serious cyclists had often ridden along the roadway in the early mornings. In relation to this issue, the Court of Appeal stated:

> *"the risk, that, if the boom gate was closed across that part of the roadway, a cyclist seeking to exit by the vehicular entrance might be harmed by coming into contact with the closed gate must be taken to have been a not insignificant risk of which the council knew or ought to have known …there was a probability that potentially serious harm of that kind would occur in the absence of precautions to cause the gate to be opened daily in accordance with an established regime."*

The Court of Appeal agreed with the Primary Judge's finding that Council retained overall control over all aspects of the boom gate. Council had failed to take precautions in relation to daily opening of the gate and failed to have in place a proper system that coordinated and regulated the boom gate operation.

The Court of Appeal concluded:

> *"the Council was aware that sporting or serious cyclists such as the respondent often rode in an easterly direction along Riverside Drive in the early morning and exited the carpark by the vehicular entrance at Fraters Avenue. It may be said, paraphrasing language of Gleeson CJ in Roads and Traffic Authority of NSW v Dederer … that the vehicular entrance was not designed to be a bicycle exit and that that was not its intended use, yet it was a use that was regularly made of the particular part of the roadway. The risk that, if the boom gate was closed across that part of the roadway, a cyclist seeking to exit by the vehicular entrance might be harmed by coming into contact with the closed gate must be taken to have been a not insignificant risk of which the Council knew or ought to have known"*

Further, Council had knowledge of prior incidents involving other cyclists and was aware of the visual ambiguity of the boom gate. Council had not taken any steps to rectify this issue.

In relation to the Primary Judge's findings regarding the Club, the Court noted that the Club did not have a formal contractual arrangement for the manning and operation of the boom gate. There was no evidence that the Club had knowledge of the propensity of early morning cyclists to use the car park as a thoroughfare. Therefore it was held that the Club did not know or ought to have known of the risk posed to Simmons and

as such could not be expected to have taken reasonable precautions against the risk. The appeal in this regard was dismissed.

Council sought to invoke a defence under section 43A of the Civil Liability Act. That section provides that any act or omission involving an exercise of, or failure to exercise a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

The Council argued at trial that when it installed the boom gate in 2004, it exercised a "special statutory power" as defined by s 43A(2).

There was no dispute that the Council had power to install the boom gate as it did. The question was whether, in doing so, it exercised, in terms of s 43A(2)(a), a power "conferred by or under a statute".

The Court of Appeal held in this case that defence was not available as:

> *"The primary judge was plainly correct in deciding that the boom gate was not, on either of the bases postulated, within the statutory definition of "traffic control facility" and that, for that reason, s 43A of the Civil Liability Act was not engaged"*

The gate was not a "traffic control facility", as defined in the Roads Act as the gate was "not directed to "promote safe or orderly traffic movement on roads or road related areas". The function of the gate, as the Primary Judge noted was "to prevent any movement after dark".

In relation to the issue of contributory negligence, Council contended at first instance that Simmons collided with the boom gate simply because he was not keeping a proper lookout which rendered him liable for his own injury. The Primary Judge however considered that Council's failure to take reasonable care was the predominant cause of Simmons accident, while Simmons failure to react in time to avoid the force of impact constituted a lower standard of care.

On appeal, Council contended that the degree of responsibility attributable to Simmons was much greater than 20%, while Simmons contended that there should have been a finding that he was not negligent at all.

The Council conceded that, if the finding that the Simmons "could not" see the gate was wrong, the basis for the finding of contributory negligence did not exist.

The Court of Appeal concluded the Primary Judge's finding on contributory negligence was not correct.

The Court of Appeal noted that:

> *"The plaintiff's evidence that he could not, and did not, detect that the boom gate on the day of his accident was in a closed position until it was too late to avoid it is significant if his evidence that he was looking ahead as he approached the boom gate is to be accepted..."*

The Court of Appeal accepted that Simmons failed to see the gate in time despite the fact that he was exercising reasonable care for his own safety and was keeping a proper look out. There was no contributory negligence on the part of Simmons.

In this case the Council was totally liable for the loss and damage suffered by Simmons.

As recreational cycling becomes more popular Councils will be increasingly confronted by risks that cyclists will be injured when they come across facilities under the Council's control.

Kristine Gorgievski
kkg@gdlaw.com.au

The Sting in the Tail When You Appeal and Don't Pay the Judgment - Court Awarded Interest

Interest claims have the potential to substantially increase the damages payable by a defendant in personal injury and property damage claims. In NSW the Uniform Civil Procedure Rules 2005 prescribes a rate for interest.

A Court may include in the amount of a judgment interest calculated at rates specified in the Uniform Civil Procedure Rules 2005 on the whole or any part of the money for the whole or any part of the period from the time the cause of action arose until the time judgment takes effect.

Further, unless the Court otherwise orders, interest is payable on so much of a judgment as is from time to time unpaid at the rate prescribed in the Uniform Civil Procedure Rules 2005.

There are different rates for pre-judgment interest and post judgment interest.

The rate for pre-judgment interest is 4% above the cash rate last published by the Reserve Bank of Australia before the period commenced and for post judgment interest, the rate is 6% above the cash rate last published.

When damages are awarded against a defendant and a defendant appeals, if the judgment is not paid the defendant, if unsuccessful in the appeal, will face a significant increase in the amount payable as a consequence of post judgment interest.

In recent years the post judgment interest rate has ranged from 10.75% in 2011 down to 8.5% in 2015.

So how does post judgment interest play out for a defendant who has attempted to pay the judgment money but a plaintiff has refused to accept the money tendered and proceeds with an appeal?

The NSW Supreme Court was faced with this issue in *Grima v RFI (Aust) Pty Limited*.

On 8 March 2010 Mr Grima was badly injured whilst working for Allied Overnight Express. He was engaged in the unloading of a truck loaded with carpet rolls which had been loaded in Melbourne by RFI. In the claim Grima argued that RFI had been negligent in loading the truck and RFI cross claimed against Allied seeking contribution to any sum it was obliged to pay Grima.

On 2 September 2013, after six days of hearing in July and August 2013, Harrison J awarded Mr Grima damages.

The parties had agreed damages at common law at $5.75 Million. Harrison J held that RFI and Allied should each bear 50% of liability. The parties also agreed that the sum for work injury damages had Mr Grima sued Allied, would have been $330,000. The end result of these findings was a judgment for $3,040,000 as the combination of the employers liability and RFI's liability reduced the overall damages award from the common law assessment.

Substantial amounts of workers compensation payments had been made by Allied and the Court ordered RFI to repay $2,022,803.65 to Allied from the damages awarded to Mr Grima.

The end result was that Mr Grima had an entitlement to a relatively small portion of his $3 Million judgment.

Mr Grima's lawyers took the view that the judgment should not be accepted and any payment of damages tendered by RFI should be refused as this would bring to an end Mr Grima's entitlements to workers compensation which in reality were more valuable than the judgment he had obtained in the proceedings.

Mr Grima's lawyers determined that the best course to adopt was to appeal and not to accept any damages tendered.

RFI's lawyers were anxious to avoid interest accruing on the judgment and embarked on an exchange of correspondence seeking to evidence the fact that RFI was ready, willing and able and wanted to pay the judgment.

Mr Grima's lawyers had advised Mr Grima he should not accept any verdict where the nett value of that judgment to him was less than $2 Million and he should reject the tender of any cheque sent by RFI.

The exchange of correspondence between the lawyers culminated in a letter which confirmed that:

- Mr Grima had lodged an appeal;
- Mr Grima had requested RFI that it refrain from drawing a cheque in favour of him;
- RFI had attended to payment of the workers compensation payback;
- RFI wished to tender payment of the judgment because it did not want to be placed in a position whereby at the conclusion of the appeal process it was faced with an application being made for interest on the balance of the unpaid judgment on the basis the balance had not been paid;
- The parties agreed that in relation to interest, they were in the same position as if the money had been tendered and the payment rejected within 28 days of the judgment;
- RFI remained ready and willing to pay that amount to Mr Grima at any stage on receipt of a request for payment from Mr Grima.
- RFI's lawyers were concerned about a substantial award for interest if the appeal succeeded.

The Court of Appeal ultimately delivered judgment on the appeal on 13 October 2014 and Mr Grima succeeded with the apportionment being adjusted to 75% to RFI and 25% to Allied. The turnaround for Mr Grima resulted in a nett judgment of $2,291,093.38, an increase on the original judgment of more than $1 Million.

On 2 April 2015 Garling J determined a claim for interest on the unpaid judgment.

Interest was sought on the full amount of the nett judgment of $2,291,093.38 from the date of the judgement in 2013 until it was paid. That was a claim for interest from 2 September 2013 to 19 December 2014 when RFI had tendered its cheque which was accepted by Mr Grima.

The Court, in considering the claim for interest, was confronted by an argument from RFI that it was not equitable to award interest on the entire judgment

where RFI had been willing, ready and able to tender the judgment from the beginning.

Garling J noted that an award of interest up to judgment should be included in an award of damages so that a plaintiff is put in a position that he would have been in but for the negligence of the defendant.

In relation to post judgment interest Garling J noted:

> *"It seems to me that when interest is awarded pursuant to Section 101 of the Civil Procedure Act 2005 on a judgment for damages for the period between the time when the judgment was entered and the payment is made, it can properly be regarded as being to compensate for the late payment of damages."*

RFI argued it acted reasonably in attempting to pay the judgment and argued it could do nothing where the plaintiff refused to accept the judgment.

However, Garling J noted in light of the plaintiff's refusal to accept the sum, it was open to the defendant to pay the monies into Court. If it needed directions from the Court, or some form of authority, then it was open to it to make application by Notice of Motion. Alternatively, the defendant could have paid the money into a dedicated account with a financial institution so that the money could be invested pending the resolution of the proceedings by the appeal, and indicated to the plaintiff that if his appeal was successful, he would be entitled to the sum together with any interest earned upon it.

Garling J noted the defendant did not do either of these and it kept the money, slightly over $1 Million. It was apparent that RFI's insurer continued to use that money as part of its general working capital for its business.

Garling J concluded both parties had acted reasonably. The defendant, through its insurer, by offering to pay the money at first instance, and Mr Grima by declining to accept the offer.

As RFI's insurer had retained the money and the use of that money until 19 December 2014 it was appropriate to order interest on the judgment sum.

At the end of the day interest was awarded on the judgment sum as amended by the Court of Appeal from the date of the original judgment at the prescribed rate of 6% above the cash rate for the period from the date of the first judgment until the judgment was paid.

As can be seen here, an attempt by the defendant to pay the judgment money failed to overcome any claim for interest with the end result that interest in the sum of $254,623 was ordered to be paid. Here, RFI needed to have done more if it was to avoid the somewhat inevitable consequence of the delay in payment of a judgment, a significant award of interest.

Grima's case serves to demonstrate that even a defendant who seeks to tender payment of a judgment may find itself facing an interest bill as a result of a successful appeal against a damages award where the payment of a judgment has not been accepted.

David Newey
dtn@gdlaw.com.au

No "Double Jeopardy" in Personal injury Claims

In criminal law double jeopardy is a procedural defence that prevents a defendant from being tried again on the same or similar charges from which they have previously obtained a legitimate acquittal or conviction. But what about civil claims in New South Wales? What if there has been a dismissal of Court proceedings in a civil claim? Does a similar proposition apply?

In *Benton v QBE Workers Compensation (NSW) Limited* the Court of Appeal has recently confirmed that a claimant cannot re-litigate matters that have already been dealt with by the Courts as to do so is an abuse of process.

Kenneth Benton filed proceedings in the District Court as a consequence of injuries sustained in October 2003 when, during the course of his employment he was attempting to alight from the cabin of a prime mover and slipped and fell. In 2005 Benton commenced proceedings in the District Court against Scotts Refrigerated FreightWays Pty Limited ("Scotts"). Scotts cross claimed against Benton's employer, Restaco Pty Limited ("Restaco"). That company was deregistered on 10 May 2006 and that cross claim appeared to be abandoned. The claim brought by Benton against Scotts came to hearing before Judge Truss in the District Court in 2007 and Her Honour entered judgment for Scotts. Benton had attempted to argue unsuccessfully that Scotts were a "quasi employer".

In 2012 Benton commenced subsequent proceedings in the District Court. QBE Workers Compensation (NSW) Limited ("QBE"), the workers compensation insurer of Restaco were named as defendant to the proceedings. Motions were filed by the parties in relation to Section 151D of the Workers Compensation Act 1987 which provides that a party has three years from the date of accident to commence Court proceedings. QBE also argued that the proceedings ought to be dismissed or struck out on the basis that

commencement of the proceedings was an abuse of process.

The motion proceeded to hearing and QBE's submission was accepted by Her Honour Judge Balla and the proceedings were dismissed. Her Honour was satisfied that in fact Benton was seeking to re-litigate matters that had already been conclusively determined after full hearings.

Benton appealed that decision and the matter came before the Court of Appeal.

In the leading judgment of Meagher JA, His Honour was of the view it was open to the trial judge to conclude the proceedings were an abuse of process. Her Honour Justice Adamson who also heard the matter in the Court of Appeal, stated:

"The applicant's proceedings against QBE Workers Compensation (NSW) Limited are an abuse of process because the applicant seeks to re-litigate an issue on which he was unsuccessful in the proceedings he had earlier brought against Scotts Refrigerated Roadways Pty Limited ... the primary judge was correct to dismiss the proceedings to prevent the abuse of process."

Defendants can therefore have some comfort in the fact that an unsuccessful claimant cannot in circumstances such as this case seek to re-agitate the same issue before the Court as this will be an abuse of process.

Amanda Bond
asb@gdlaw.com.au

Head Contractor's Trust Account Scheme

Amendments contained in the *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2014* (the "Regulations") in NSW will commence on 1 May 2015. The Regulations require that head contractors establish and maintain a retention money trust account for the benefit of subcontractors.

The withholding of a portion of money from a subcontractors payment claim (retention money) is a form of security commonly used in construction industry contracts to ensure the performance of a subcontractor. A percentage of the contract sum is deducted from each payment claim up to a percentage specified in the contract. Usually the amount is around 5%. The retention money is returned to the subcontractor by way of 50% at practical completion and the balance at the end of the default liability period after any defective work is rectified.

An inquiry into insolvency in the construction industry commission by the NSW Government in 2012 found that many subcontractors were not receiving their retention money back once their obligations under the contract had been fulfilled. Head contractors were found to be using retention monies as working capital and to pay other debts.

The Regulations are in line with similar requirements now in place in most common law countries.

The Regulations will now require that head contractors deposit the subcontractor's retention money into a trust account. The trust account is to be established with an authorised deposit taking institute and is to be held as:

- a separate trust account for retention money held in respect of a particular subcontractor;
- a separate trust account for retention money held in connection with a particular project of the head contractor; or
- a separate trust account for all retention money held in connection with two or more projects of the head contractor.

Clause 8 of the Regulations provides that retention money cannot be withdrawn by the head contractor except:

- to pay money in accordance with the terms of the contract under which the money was retained;
- as may be agreed in writing between the head contractor and the subcontractor; or
- in accordance with an Order of a Court or Tribunal.

The head contractor will also be required to keep records showing the amounts deposited or withdrawn from a retention money trust account for a period of at least three years after the closure of the account.

Head contractors should be aware that there is an immediate need to implement processes to comply with the new retention money trust account requirements. There will be penalties of up to $22,000 per offence for any breaches of the Regulations.

At present the Regulations will only apply to contracts between the principal and the head contractor valued over $20 Million, however the NSW Government will be considering the broadening of the application of the scheme to commercial subcontracts of $1 Million or more.

The scheme only applies to contracts entered into after 1 May 2015.

There are no compulsory requirements to have security by way of a retainer. Parties can agree to

other methods of security such as bank guarantees or insurance bonds and in those cases the Regulations will not apply.

A head contractor operating a retention money trust account in any financial year must, within one month after the end of the financial year, provide to the Office of Financial Services:

- an account review report given by a registered company auditor in which the auditor certifies that in his/her opinion the retention money trust account operator has complied with all of the requirements under the Regulations during the financial year for which the report is given
- a retention account statement for the account in the prescribed form set out in the Regulation
- a $1,500 fee to accompany the account review report and retention account statement.

Head contractors should:

- review their contracts to ensure they comply with the latest regulations;
- ensure they have the appropriate trust account arrangements in place if required;
- look at alternative security arrangements to see if they are more cost effective; and
- consider how these regulations will impact on cash flow.

Subcontractors should consider seeking to have a retainer clause in their contracts to ensure security of payment.

Money held in trust will not be available to creditors if the head contractor is placed in liquidation and the contractor will be able to access the money to cover legitimate claims.

The NSW government estimates that only 1,000 contracts a year will be impacted by this legislation however this will increase significantly if the criteria for implementation is lowered to contracts over $1 million dollars.

The impact of the Regulations in NSW is uncertain at this stage however based on overseas experience it should be a workable model once the parties apply their minds to implementing the requirements.

Kelvin Keane
kdk@gdlaw.com.au

EMPLOYMENT ROUNDUP

Another Nail in the coffin for implied term of mutual trust and confidence

The theory that an employment contract contains an implied term requiring the employer to act towards the employee with "mutual trust and confidence" has been dealt another blow.

Originally a product of employment tribunals' decisions in the United Kingdom, the theory had gathered growing support in Australia over the last 15 years or so, and had been endorsed as a principle of the common law in a number of first instance decisions of superior courts.

It was struck a mortal blow, however, by the High Court in *Commonwealth Bank of Australia v Barker [2014] HCA 32*, a judgment handed down late last year and discussed in the November 2014 edition of this newsletter. In Barker, the Court held that the proposed term was not necessary in the sense that would justify implying it by law into all employment contracts.

That left the door open for an argument that the circumstances of a particular employment contract might warrant the implication of the term.

In *State of New South Wales v Shaw [2015] NSWCA 97 t*he opportunity arose to run that argument.

In 1999, Mr Shaw and Ms Salt (who were married to each other) were appointed as probationary teachers assigned to the Bourke Public School. The State of New South Wales was deemed to be their employer pursuant to the Teaching Services Act 1980.

On 20 March 2000, pursuant to provisions of the Act, the probationary appointments were annulled, and a determination was made that the plaintiffs cease to be employed in the NSW Education Teaching Service.

The plaintiffs brought proceedings in the District Court against the State, claiming damages for, among other things, breach of their employment contracts. They alleged, and the District Court found, that there had been a serious breach by the State of a term of mutual trust and confidence that was implied into their contracts of employment.

That breach consisted of the act of the school principal in handing to Ms Salt, not in a formal meeting with a support person present but "almost casually in the staffroom or nearby", an envelope containing a bundle

of documents in which there was material "critical of and damaging to" both of the plaintiffs. Included in the material was a copy of a letter, or a petition, signed by other staff expressing concern at their interactions with the plaintiffs. The envelope was given only to Ms Salt but she showed the contents almost immediately to Mr Shaw.

The primary judge found that both plaintiffs were humiliated by the principal's act. The plaintiffs announced to the staff that they were walking out of the school. They did so. They did not return to teaching duties. However, they continued to accept payment of their salaries and complied with at least some directions given to them by Department of Education officers until the annulment of their contracts in March 2000.

The District Court found that that conduct breached the obligation on the parties not to conduct themselves, without reasonable cause, in a manner likely to destroy or seriously damage the relationship of trust and confidence between them. Judgment was entered in the plaintiffs favour but they were awarded no damages.

Pursuant to leave granted by the Court of Appeal, the State appealed from the primary judge's decision.

Notwithstanding that after the District Court judgment was handed down, the High Court decision in Barker was delivered, the plaintiffs nevertheless maintained that a term of mutual trust and confidence was properly found to be implied into their probationary employment contracts and that the primary judge's decision on liability was correct on the basis that there had been a serious breach of an implied term of good faith, the content of which mirrored (and had been subsumed in the pleading of) the term of mutual trust and confidence.

The Court of Appeal allowed the appeal by the State, relevantly holding that:

the probationary nature of the employment did not require, for the efficacy or worth of their employment contracts, that a term of mutual trust and confidence be implied; and

it was not demonstrated that a probationary common law contract of employment would be rendered nugatory or worthless or would be seriously undermined or devalued because of the absence of a term of mutual trust and confidence. The fact that employment was of a probationary character was not a meaningful point of distinction from the conclusion reached in Barker.

So, is this another nail in the coffin for mutual trust and confidence? Undoubtedly, yes. At the moment, employers are getting the better side of the deal, but it still remains open for an employee to argue that for their particular contract such a term should be implied. No doubt further cases will emerge over the next few months.

David Collinge
dec@gdlaw.com.au

A pragmatic approach to procedural deficiencies in dismissing employ

In the matter of *Harvey v Egis Road Operation Australia Pty Ltd [2015] FWC 2306* the Fair Work Commission (FWC) was asked to consider an application for an unfair dismissal remedy pursuant to section 394 of the *Fair Work Act 2009* (Cth).

Harvey was employed as Manager, Environment, Safety and Quality in respect of a tunnel project for about 11 months prior to being terminated. During that short period, a series of complaints concerning his performance and behaviour resulted in a steady deterioration of his relationship with various other employees.

Early in his employment, Harvey claimed to have identified poor organisation within his team and an absence of regard for appropriate process and a lack of interest by others, in his area of responsibility. He quickly made allegations that certain managerial actions responding to complaints about him were undertaken to overrule and undermine him and that other staff were dismissive of his work efforts and reluctant to interact with him.

Some of the primary complaints against Harvey included the perception that he did not spend sufficient time in the workplace, that he responded inappropriately to requests made of him – including for guidance by his subordinates, that he intimidated certain female staff members, and that his behaviour was largely threatening and erratic.

Another significant allegation involved Harvey sending offensive email communications through his LinkedIn profile, which included reference to his role and employer, to someone suspected to be his ex-partner, resulting in a complaint being made by the recipient to the employer.

The employer extended Harvey's probationary period and endeavoured to place him on a performance management plan and offer support.

In response to the allegations, Harvey alleged that he considered there to be fluid arrangements in place in

relation to his working hours and that any perception regarding his behaviour or conduct were not something he considered necessary for him to address. Harvey claimed he was being bullied and that the anxiety arising from the "demeaning" management responses and attitude of others in the workplace necessitated leave on medical grounds.

The employer ultimately engaged an external consultant to investigate the bullying conduct alleged by Harvey. Later, Harvey said he grew concerned that the investigation appeared to be focused upon him rather than his bullying allegations. Ultimately, Harvey was summoned to a meeting and provided an executive summary of the consultant's report and informed that the employer was accepting the consultant's recommendation to terminate Harvey's employment.

Harvey complained that he was never informed in any detail as to what the reason for his dismissal was and therefore was given no opportunity to exercise a right of reply – thereby being denied procedural fairness.

The employer led evidence – that was held to be frank and largely corroborated in documentary form – that:

- the employer did not approve of Harvey working from home or during irregular hours as it lead to a dysfunctional workplace, particularly in circumstances where Harvey was to supervise staff;
- Harvey was defensive and argumentative in response to allegations made by female staff;
- another manager had offered personally and through the assistance of another manager, to attend meetings with staff to assist Harvey in developing tasks and that this proposal was rejected;
- Harvey became irrational, aggressive and offensive at the prospect of a performance management plan;
- Harvey was deliberately unhelpful and obstructive towards staff causing the employer disappointment about the nature of Harvey's leadership and supervision; and
- He responded defensively, uncooperatively and failed to demonstrate remorse when directed not to use an email account essentially "advertising" Harvey's role with the employer for non-work-related purposes.

Section 387 of the Act sets out the criteria for considering whether a dismissal was harsh, unjust or unreasonable. It provides that the FWC must take into account matters including but not limited to:

(a) Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) Whether the person was notified of that;

(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct;

(d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal; and

(e) If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance before the dismissal.

In delivering its reasons addressing the above criteria, the FWC found that Harvey was advised on a number of occasions as to the employer's expectations of him as a senior manager and that he showed no serious intention of responding positively or constructively towards the concerns. He had rejected assistance and support offered to him exhibiting increasing resistance to any course that required reflection on his conduct. He refused to participate at various times in any performance management procedure or coaching, which the FWC considered this to be a refusal to follow a lawful and reasonable direction.

The evidence in the matter compelled the FWC to reach a conclusion that Harvey was unable to conduct himself as a manager professionally, or otherwise deal with issues either of substance or perception that had arisen in a relatively small workplace in a cooperative manner. Much more was reasonably expected of him in his senior role and in the absence of his exhibiting the desired suite of managerial traits, the FWC found the employer had a valid reason for the termination of Harvey's employment.

The FWC found that the steps by which the dismissal was effected were irregular and that Harvey was not expressly informed or notified prior to his dismissal of the reasons the employer relied upon. However, the FWC found that the employer's concerns with his conduct ought hardly have come as a surprise to Harvey given the lengthy and involved interactions about a range of matters. These amounted to ample opportunity to address his employer's concerns.

The FWC found that the circumstances by which the dismissal was communicated and effected did not give rise to Harvey having been refused an opportunity to have a support person present.

Taking all the circumstances into account, including the apparent lapses in the procedural steps taken in relation to Harvey's dismissal, the FWC found that the dismissal was not harsh, unjust or unreasonable.

The decision demonstrates that the FWC is prepared to take a more pragmatic approach to the reasons of the dismissal and will not allow particular irregularities, shortcomings or imperfections procedurally to disturb an employer's dismissal and find it harsh, unjust or unreasonable. The FWC takes a more global and forensic approach to the circumstances leading to dismissal.

Notwithstanding that, it remains the case that caution ought be exercised by an employer when dismissing an employee to ensure that it is not harsh, unjust or unreasonable – for the sake of both the employer and the employee.

Victoria-Jane Otavski
vjo@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Work Christmas Function Shenanigans

There have been a number of decisions in the Workers Compensation Commission in recent years dealing with injuries which occurred at work or purported work Christmas functions. This has certainly added to the concerns that employers already have for such functions, particularly when alcohol is readily available at a Christmas party and too much alcohol can lead to behaviour that puts a worker at a risk of injury.

In *Collins v Signature Blend Pty Limited t/as Alira* (2015), the Workers Compensation Commission was called on to determine whether activities held after an official work Christmas function fall within the scope of employment.

Michael Collins was employed by Signature Blend Pty Limited t/as Alira, a Sydney restaurant. Mr Collins was both the manager of the restaurant and the sole director of Alira. On 19 December 2011 Mr Collins and other employees of the restaurant, together with one ex-employee, attended a Christmas lunch which extended from midday to 4.00 pm.

During lunch Mr Collins consumed alcohol and cocaine. At approximately 4.00 pm Mr Collins and some of the attendees of the lunch returned to Mr Collins' apartment where they consumed further alcohol. Mr Collins also consumed cocaine on at least on three separate occasions. All but two of the lunch attendees went to Mr Collins' apartment.

There were two conflicting versions as to how Mr Collins suffered his injury. Mr Collins submitted he had jumped in the air and clicked his heels together like an "Irish jig" when he lost his balance and fell over the railing, falling approximately 24 metres. The second scenario was that Mr Collins had grabbed the railing of the balcony and flung himself over the rail and attempted to land on the cement ledge but lost his grip on the railing and fell. Ultimately the exact circumstances of injury were of little relevance in Arbitrator Haddock's determination.

Expert evidence adduced by Alira was that the effect of the consumption of alcohol and cocaine were sufficient to impair Mr Collins' judgment and coordination, thereby leading to the injury. Arbitrator Haddock determined the employer had not induced or encouraged Mr Collins in the consumption of cocaine or alcohol. The consumption of cocaine was such to constitute misconduct and took Mr Collins outside the course of his employment.

Arbitrator Haddock rejected the argument by Mr Collins that the attendance at his apartment was a "seamless continuation" of the lunch. Attendance at his apartment was not actively induced, encouraged or expected by the employer.

Even if it was ultimately considered that Mr Collins was still in the course of his employment whilst at the function at his apartment, his acts there took him out of the course of his employment because neither activity, that is either consuming alcohol or cocaine, was induced or encouraged by the employer. Similarly, Alira did not induce or encourage Mr Collins to engage in behaviour that resulted in him falling from the balcony; that is the significant level of intoxication due to alcohol, being under the influence of cocaine and finally jumping on a wet and slippery balcony.

Mr Collins appealed the decision of Arbitrator Haddock but Deputy President Roche rejected the appeal. The mere fact that Mr Collins participated in the activity, did not mean that Alira provided the necessary inducement or encouragement to make the gathering at his home a continuation of the work function.

It was also not accepted that, even though Mr Collins owned the business, he was something other than an employee and that he could not be induced or encouraged to attend a Christmas celebration.

Deputy President Roche examined the inconclusive evidence about who paid for the taxis to get from the restaurant to the apartment and who paid for the alcohol to be consumed at the apartment. Noting the evidence was not conclusive, it was open to Arbitrator Haddock to not to accept the conclusion urged by Mr Collins that Alira had induced or actively encouraged Mr Collins and other employees to attend at his

apartment. Further, Deputy President Roche noted that two employees failed to attend at the apartment and there was attendance at the apartment of an ex-employee. This was evidence that the function at Mr Collins apartment was not a work activity.

Deputy President Roche made the final comment:

> "*It followed that on any view of how Mr Collins came to fall over the railing, the employer did not induce or encourage Mr Collins to engage in the activity or activities that brought about his injury and he was not in the course of his employment at the time he fell.*"

The decision is the first NSW workers compensation determination following the High Court decision of *Comcare v PVYW* (2013) HCA41. The High Court determined in that matter the test as to whether a worker would be in the course of employment was whether the employer induced or encouraged the worker to engage in the activity that brought about the injury. Arbitrator Haddock's determination and that of Deputy President Roche mirrors the determination of *PVYW* and is a sensible and pragmatic victory for employers.

Stephen Hodges
sbh@gdlaw.com.au

Aggregation of Multiple Injuries is not permitted to exceed thresholds

The 2012 amendments to the workers compensation legislation in NSW reduced benefits available to injured workers. Thresholds of 20% and 30% whole person impairment ("WPI") were introduced to ameliorate the impact of the legislative changes on workers with more serious injuries. Lawyers acting for injured workers have resorted to innovative means in attempting to exceed these threshold levels.

In *Merchant v Shoalhaven City Council* [2015] NSWWCCPD 13 President Judge Keating considered whether it was permissible to aggregate impairment assessments that had resulted from injuries to different body parts, in a series of unrelated incidents, to meet the required threshold of more than 30% WPI so Mr Merchant could be characterised as a "seriously injured worker".

Mr Merchant commenced proceedings in 2002 seeking lump sum compensation in respect of impairments of the back and both legs sustained in two specific incidents in 1989 and 1992 and the nature and conditions of his employment. Those proceedings resulted in consent orders reflecting awards under Section 66 in respect of permanent impairment of the back and permanent loss of efficient use of both legs.

Following further claims in respect of a hernia injury and for additional lump sum compensation for the injuries to the back and legs an Approved Medical Specialist ("AMS") issued a Medical Assessment Certificate assessing the permanent impairments arising from the initial injury in 1989.

Mr Merchant's solicitors wrote to the insurer's solicitor referring to all of the differing findings made by the approved medical specialist and the consent awards and submitted that the claimant was a seriously injured worker.

Liability was declined by the employer and Mr Merchant's solicitors then filed a miscellaneous application in the Workers Compensation Commission seeking an assessment of whether Mr Merchant was a seriously injured worker.

Before Arbitrator Wynyard at first instance there was an award for the respondent entered on the basis that the total WPI had not been assessed by an AMS as required.

In proceedings before the Arbitrator Mr Merchant's counsel submitted that the definition of "injury" in Section 32A WCA 1987 did not require the impairment to have resulted from a single injury and therefore applying the *Interpretation Act*, the definition of a seriously injured worker in Section 32A should be read to mean *"a worker whose injury or injuries have resulted in permanent impairment".*

President Keating found Mr Merchant's claim was distinguishable from the decision in *Hogan* because that case involved only one injury, namely a back injury. President Keating found there had been an error on the part of the arbitrator and he conducted a re-determination.

After considering the provisions of the WCA 1987 President Keating referred to the decision in *Edmed* where Deputy President Roche indicated that the term "injury" can have two different meanings. This included where a worker suffers more than one pathology ("injury") as a result of one incident or injurious event, Section 322(3) provided that the impairments were to be assessed together. The WorkCover Guidelines at paragraph 1.18 likewise provided that impairments arising from the same injury were to be assessed together to assess the degree of permanent impairment of the injured worker, with the exception of impairments arising from psychological and psychiatric injuries.

President Keating indicated there was nothing in the legislation consistent with multiple and unrelated

injuries being aggregated so as to meet the threshold for "seriously injured worker". Had the legislature intended that the definition of "seriously injured worker" in Section 32A to have that meaning it would have specified as such.

This conclusion was reinforced by the provisions of the Workers Compensation (Amendment) Existing Claims Regulation 2014 which reduced the threshold for excluding the operation of Section 59A for existing claimants from 30% to 20%. Clause 28 of the Regulation referred to "the injury" and "the worker's injury" resulting in permanent impairment of greater than 20%. It was the use of these words which evidenced an intention by the legislature that existing claimants will only be exempt from the operation of Section 59A when the threshold is reached by an impairment resulting from a single injury. This is consistent with the statutory language in Section 65 and Section 66 where the words "the injury" are consistently applied.

Accordingly, Judge Keating found that Mr Merchant had no entitlement to aggregate his various impairments resulting from various injuries to differing body parts on different dates, for the purposes of reaching the Section 32A impairment threshold for a seriously injured worker.

Belinda Brown
bjb@gdlaw.com.au

CTP ROUNDUP

More credit should be given to credit – a viable argument in personal injury

The District Court of NSW has recently examined the impact of adverse findings as to credit, in the context of personal injury claims under the *Motor Accidents Compensation Act 1999 (NSW)* regime.

The plaintiff, Mr Singler, was driving along Silsoe Street in Mayfield at approximately 7:45am on 7 April 2003. It was alleged that as he approached the intersection with Maitland Road he had a green traffic light, but as he entered and began to drive through the intersection, the lights turned to amber.

The plaintiff's vehicle then 't-boned' the defendant's vehicle, which had travelled into the intersection from Maitland Road.

On 15 May 2009, Judge Sidis delivered a judgement in which Her Honour found in favour of the defendant. That judgment was subsequently set aside by the Court of Appeal in the decision of *Singler v Ferguson [2010] NSWCA 32*5. The proceedings were then remitted back to the District Court for a re-hearing before Judge Mahoney.

Evidence from the first trial before Judge Sidis was tendered at the second trial, by consent. Expert evidence was also tendered by both parties.

At both the first and second trial, the defendant alleged that he had proceeded to drive through the intersection, as the lights had turned green. Mr Lewis, a passenger in the defendant's vehicle, gave evidence consistent with this account in the first trial, but was not called to give evidence at the second trial.

Allegations were raised at both trials by the plaintiff that following the collision, the defendant asked the plaintiff whether he had proceeded through a red light. The plaintiff gave evidence that he had responded "Yeah mate. You went through a red light". The plaintiff then alleged he overheard the defendant say to Mr Lewis, "When the police come we'll tell them we had the green. There's two of us. There's only one of them. No witnesses stopped". It was on the basis of overhearing this conversation the plaintiff alleged he waited at the scene for police to arrive.

By contrast, the defendant gave evidence at both trials that he had stated to the plaintiff "mine wasn't red", and that at some point during the conversation, the plaintiff had commented that the traffic light governing Silsoe Street had been "orange" at the time he was proceeding through the intersection. The defendant denied he had discussed with Mr Lewis whether or not to tell police that the light had been green.

Specifically in relation to findings on credit, there were three issues raised by Judge Mahoney:

- If there was a finding that the defendant had spoken to Mr Lewis about recounting to the police that the light had been green, whether any adverse inference as against the defendant as to liability could be drawn.
- On the basis of evidence led by the defendant, whether any adverse inference could be drawn as to the reliability of the plaintiff generally, both in respect of liability and quantum.
- On the basis of evidence led by the plaintiff, whether any adverse inference as to credit could be drawn against the defendant.

On the first issue, Judge Mahoney noted that the plaintiff did not mention the overheard conversation in his statement to police. The defendant also denied having that conversation with Mr Lewis. Further, as discussed by Court of Appeal the words referred to ("When the police come we'll tell them we had the green. There's two of us. There's only one of them.

No witnesses stopped") were ambiguous and could simply have been a statement that it was important to mention to the police was that the light had been green, as it had in fact been green.

In respect of the plaintiff's credit generally, Judge Mahoney noted inconsistencies in respect of the plaintiff's presentation in Court and to medical practitioners, compared to the surveillance footage taken by the insurer and admitted into evidence. On that basis alone, Judge Mahoney was prepared to accept that the plaintiff's evidence "would have to be treated with careful scrutiny, and only accepted when supported by objective and independent evidence."

The plaintiff had also sworn an affidavit in unrelated Family Court proceedings in 2012 as to his mental state, which contradicted evidence given at trial in the substantive proceedings. Judge Mahoney found that the affidavit had been motivated by his desire to maintain custody of his children, and therefore demonstrated "a capacity to mislead the court to obtain the plaintiff's desired result". Evidence as to the plaintiff's longstanding marijuana use, however, was not found to have an adverse impact on the plaintiff's credit.

Overall, Judge Mahoney noted that the adverse findings "did not assist the plaintiff's case" in making out negligence against the defendant.

Furthermore, in respect of quantum, Judge Mahoney found that the plaintiff had "exaggerated the effects of the injuries". The plaintiff had tendered a schedule of damages amounting to approximately $1.8 million, including an allowance of nearly $400,000.00 in future economic loss (from the age of 30 years to retirement) and $360,000.00 in future treatment expenses, based on alleged impairment predominantly from the psychiatric sequelae.

Judge Mahoney preferred the medico legal evidence tendered by the defendant, which attributed the plaintiff's psychiatric condition to his separation from his wife, and concluded that the plaintiff had been "malingering in terms of his endeavours to maximise his damages in this litigation". No allowance was made for future economic loss or treatment expenses. The total notional assessment of damages by His Honour was in the order of $200,000.00 (for past economic loss and superannuation, past treatment expenses, and Fox v Wood only).

As to primary liability, Judge Mahoney noted after a thorough reading of the expert evidence, that the evidence of the plaintiff and the evidence of the defendant were impossible to reconcile on the traffic light sequences.

Counsel for the plaintiff made submissions as to the credit of the defendant as a witness on two grounds, namely that his evidence at the two trials as to the colour of the plaintiff's car (blue or grey, and white) and the pre-accident speed of his own vehicle (40 kph, or 40-45 kph), had been contradictory. Judge Mahoney concluded that these inconsistencies were merely an example of the unreliability of witness testimony in the context of traumatic events. Nothing turned on the colour of the car, and moreover, the defendant had no onus to discharge in respect of the question of negligence.

The plaintiff had the burden of proving beyond the balance of probabilities that the defendant had deliberately drive his vehicle into the intersection against a red light at a low speed. This burden had not been discharged. The defendant's evidence that he had changed lanes when the lights turned green and proceeded into the intersection was "plausible" and had "the ring of truth", and was supported by Mr Lewis at the first trial.

The plaintiff was again unsuccessful.

This case evidences the importance of ensuring witness reliability at trial. Judge Mahoney's findings on credit were relevant both to quantum, giving credence to the defendant's arguments to limit the allowance for future economic loss and treatment expenses, and to a lesser extent, liability. In the case of liability, Judge Mahoney clearly sought to limit the reliance on the plaintiff's account of the accident in the absence of supporting independent witnesses, owing to the findings that the plaintiff had exaggerated his injuries, and mislead the Court in the Family Court proceedings.

Clearly, it is vital to ensure that witnesses (particularly primary witnesses such as plaintiffs and defendants) will present in a positive light, given the potential ramifications where there is an unreliable witness against whom an adverse inference as to credit can be drawn.

By the same token, it is an area that defendants can potentially exploit, if there is any suggestion that the plaintiff presents as a less than honest character.

Rachael Miles
ram@gdlaw.com.au

The complexities involved in assessing economic loss and mitigation of loss

The New South Wales Court of Appeal has recently examined an award of past and future economic loss and the requirement for a plaintiff to mitigate their loss.

Khaled Aychahawchar arrived in Australia from Lebanon in May 2009 on a 3 month visa. It was Aychahawchar's intention to obtain work as a carpenter and eventually marry an Australian citizen with a view to obtaining permanent residency or citizenship. Unfortunately, after only 2 months in Australia, Aychahawchar was struck by a motorbike while crossing a road in Guildford.

Following the accident Aychahawchar underwent treatment relating to an injury of his right hand in Sydney. In August 2009 Aychahawchar returned to Lebanon to reside with his parents. Aychahawchar also complained of injuries to his cervical spine, lower back and neck as a result of the accident. He received advice from his treating specialist in Tripoli that he should not attempt work which involved lifting weights or walking for long periods.

The motorbike which struck Aychahawchar was unable to be identified. As such proceedings were commenced in March 2011 in the District Court of New South Wales against the Nominal Defendant.

Aychahawchar gave evidence he worked a 66 hour a week in Lebanon to earn $191 per week prior to coming to Australia. He was accepted his wage in Lebanon would have increased to $432.50 gross per week.

The primary challenge relating to economic loss at trial was that Aychahawchar had acted unreasonably by refusing to pursue work that could have produced a lesser income. It was Aychahawchar's evidence that if he could not obtain work in plastering then he would rather be unemployed than take up a role with a lesser remuneration. Aychahawchar's own counsel accepted tht such a position taken by his client was not reasonable.

Norton DCJ did not accept that Aychahawchar had made sufficient attempts to research employment opportunities in Lebanon nor retrain for an alternate role. Her Honour referred to s 136 of the *Motor Accidents Compensation Act* 1999 (MACA) which provides that an injured person is under a duty to mitigate his or her loss.

Notwithstanding the above comments Norton DCJ did not take into consideration Aychahawchar's failure to mitigate his loss in her calculation of economic loss. Her Honour based the calculation of past economic loss on an average nett weekly wage of $410.00. This figure represented an estimate of what Aychahawchar would have earned between May 2009 when he ceased work to come to Australia and the date of judgment had he not been injured. Her Honour did not apply any discount for vicissitudes and she did not account for any earnings Aychahawchar received during May 2009 and the date of judgment.

Similarly, in assessing future economic loss Norton DCJ did not take into consideration Aychahawchar's failure to mitigate his loss as required by s 136 of MACA. The award was calculated for 2 separate periods, the first relating to the 3 years following trial, and the second relating to retirement age. Her Honour's calculation for the first period was based on evidence from a previous employer of what Aychahawchar would have earnt as a plasterer in Lebanon. The assessment was based on Aychahawchar being totally incapacitated for work.

Her Honour's calculation for the second period was based on a more reasonable figure of $416.00 which took into consideration Aychahawchar's ability to regain one third of his pre-accident earning capacity.

The Nominal Defendant appealed. One of the grounds of appeal related to an excessive award of past economic loss. Although the grounds of appeal did not specifically challenge her Honour's calculation of future economic loss, submissions by the parties addressed the assessment of future economic loss. Adamson J in the Court of Appeal was emphatic in noting that legal principles do not allow for the calculation of past economic loss and future economic loss to be independent of each other.

On appeal Counsel for the Nominal Defendant argued that Norton DCJ's calculation of past economic loss failed to take into consideration the medical evidence which established that Aychahawchar had a residual capacity for work and that Norton DCJ failed to appropriately consider s 136 of MACA given the following findings of fact:

- Aychahawchar's visa was valid until July 2009 and therefore he would not have returned to Tripoli to work until at least August 2009;
- Aychahawchar was able to drive within 3 months following the accident;
- Aychahawchar was engaged in work for a 2-week period during July 2010 and he earned $US250.00

Counsel for the Nominal Defendant also relied on the inconsistencies in the Trial Judge's calculation given the findings:

- It was unreasonable for Aychahawchar to refuse work other than plastering on the basis that the remuneration was low;
- There were no attempts by Aychahawchar to apply for jobs in Tripoli and he had not made any attempts to obtain further qualifications or retrain;
- At the date of the trial Aychahawchar was fit for part-time light duties; and
- Aychahawchar's diagnosis of Post-Traumatic Stress Disorder did not result in a further reduced capacity to work.

The Court of Appeal accepted there were inherent inconsistencies in Norton DCJ'S calculation of past economic loss.

Adamson J noted Norton DCJ's failure to discount the award for vicissitudes resulted in the assessment being based on the Aychahawchar working 66 hours per week for 52 weeks of the year without any breaks.

Adamson J concluded that a more appropriate approach was to discount economic loss by 30% taking into consideration some diminution in work capacity, the possibility that Aychahawchar may not have progressed steadily up to the maximum wage over the period of 5 years, and may not have been willing to work.

In the reassessment of future economic loss Adamson J emphasised Norton DCJ'S failure to consider the fact that Aychahawchar made no attempts to retrain and that he was unwilling to embark on employment other than plastering work must have an impact. Although Norton DCJ made these findings of fact she nonetheless found that by 2017 Aychahawchar would have regained one-third of his earning capacity.

Adamson J noted that assessing an injured person's capacity to re-enter the workforce should bear a rational relationship to the evidence presented at trial and found that Norton DCJ failed to identify a rational basis for determining Aychahawchar was totally incapacitated for 8 years and failed to take into account the failure of Aychahawchar to mitigate the consequences of the injury. Future economic loss was consequently reduced from $325,000.00 to $243,600.00, bearing in mind the vicissitudes identified.

A secondary ground of appeal related to an excessive award for non-economic loss. *Moran v McMahon* (1985) 3 NSWLR 700 establishes that the Court must be satisfied that an award falls outside the bounds of sound discretionary judgment in order for it to be reassessed on appeal. Adamson J considered the award was at the higher end of sound discretionary judgment but was not satisfied that it was beyond the bounds.

The decision is important in terms of highlighting the tension between the requirement that a plaintiff prove their diminution of earning capacity and a defendant's onus to prove the plaintiff failed to take reasonable steps in mitigation of that loss. Section 136 of MACA does not assist to resolve this tension. Basten JA noted that in circumstances where a plaintiff resides in another country, a more pragmatic approach should be adopted wherein the defendant's burden should be reduced. A plaintiff must give evidence regarding his attempts to obtain work within his capacities and whether there are jobs available in the area in which he resides.

Elana Chandran
elc@gdlaw.com.au