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Insurer successful in a fraud claim involving damage to property caused by fire

For an insurer to refuse to indemnify its insured under a policy of insurance on the basis of fraud, one of three scenarios must arise:

- Pre-contractual fraud or fraudulent misrepresentation. Where the insured knowingly gives false information to the insurer before entering into the contract of insurance and then seeks to obtain a financial or other benefit by claiming under the policy after the policy has been incepted.
- Fraud in the event. Where the insured was directly or knowingly involved in the occurrence of the loss and then submits a claim under a policy of insurance to obtain a financial or other benefit in respect of the damage.
- Fraud in the claim. Where the insured has intentionally presented a dishonest claim to the insurer to obtain a financial or other benefit in respect of the insured items.

In this article, we consider the second and third scenarios and highlight a recent unreported decision of Judge Lakatos SC of the District Court who upheld a fraud defence and entered judgment in favour of an insurer.

In any claim involving fraud, where the claim is pursued by the insured and litigation results the insurer bears the onus of proof.

Proving fraud is one of the most difficult tasks facing an insurer. In all three of the above scenarios, the common element is an intention by an insured to obtain a financial or material benefit from an insurer by deception.

The remedies available to an insurer who alleges fraud are found in the *Insurance Contracts Act 1984* (Cth) ("ICA").

In the first scenario, an insurer can avoid the contract under Section 28(2) ICA in the case of contracts of general insurance and Section 29(2) ICA for contracts of life insurance.

In the second and third scenarios, the remedy for the insurer is found in Section 56 of the ICA pursuant to which the insurer may not avoid the contract, but may refuse to pay the claim.

In the context of property damage caused by fire, the allegations may involve an insured igniting the fire or being knowingly concerned in its ignition, where the fire causes damage to insured property and the insured makes a claim under a policy of insurance for the damage.

These circumstances give rise to the second and third scenarios, where the insured has committed fraud in the event which then leads to fraud in the claim when the insured submits a claim under a policy of insurance in respect of the insured property which has been damaged by the very fire which the insured ignited or in whose ignition the insured was knowingly concerned.

It would be a very rare fraud case to involve a confession from an insured who, after submitting a claim for insurance, admits to igniting the fire or being knowingly concerned in its ignition. Fraud in the event and fraud in the claim would be inevitable findings if the claim was pursued and the confession was upheld by the Court.

It is almost as rare for an insurer to have evidence from witnesses who directly observed the insured lighting the fire that caused the damage. If that were the case, it is likely that the insured would already be indicted by the Director of Public Prosecutions for serious criminal offences and/or the NSW Coroner would have made findings in a Coronial Inquiry that inculpate the insured in a criminal activity.

Invariably the evidence is circumstantial. This is what makes the insurer's task of proving a fraud defence all the more difficult.

Section 140 *Evidence Act 1995* (NSW) states that in civil proceedings, the Court must find the case of a party proved if it is satisfied on the balance of probabilities.

In *Asim v Penrose* [2010] NSWCA 366, Tobias JA of the NSW Court of Appeal held the following elements are necessary for circumstantial evidence to lead to an inference of fraud:

- The Court must consider the weight which is to be given to the united force of all the circumstances put together.
- The onus of proof is only to be applied at the final stage of the reasoning process. It is erroneous to divide the process into stages and, at each stage, apply some particular standard of proof. To do so destroys the integrity of a circumstantial case.
- The inference drawn from the proved facts must be weighed against a realistic possibility as distinct from possibilities that might be regarded as fanciful.
- Where the competing possibilities are of equal likelihood, or the choice between them can only be resolved by conjecture, the allegation is not proved.

The Courts frequently refer to the oft-cited passage of Justice Dixon of the High Court in the 1938 decision of *Briginshaw v Briginshaw* in which his Honour pointed out that, in a civil case, it is sufficient that a party has made out an allegation to the reasonable satisfaction of the tribunal:

> *"The seriousness of an allegation made, given the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to that question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."*

This is often referred to as the *Briginshaw standard* which suggests something greater than the balance of probabilities is required in cases involving fraud.

However, what is often overlooked in these cases is the subsequent passage of a 1951 High Court judgment in *Bradshaw v McEwan's Proprietary Limited* where the Court emphasised that even though proof may fall short of certainty, accepting that it has risen to the level of balance of probabilities, it is not to be regarded as mere conjecture or surmise.

With these elements in mind, we now turn to the recent decision of his Honour, Judge Lakatos SC, in *Eric Brown v Elders Insurance Limited* (unreported, District Court of NSW, 18 May 2015).

Mr Brown was a man in his 50s who was the registered owner of real property situated in Neville, about 60km outside Orange in NSW. The land had on it a home, which had been gifted to him by his elderly parents on the condition that he look after them in their elderly years.

Brown's parents owned the title for an adjacent parcel of land on which there was a house in which they resided that was about 200m to 300m away from Mr Brown's home. A third parcel of land comprising a

farm was the subject of a third title. All up, the land comprised about 300 hectares.

Mr Brown was divorced and had two girls from the marriage aged 9 and 14 who stayed with him every second weekend and occasionally through the week. His former wife lived about 7 km away. He had been a farmer and grazier all of his life and had been, as at the date of fire, a member of the rural fire service for 25 years and was the Captain of the Neville Rural Fire Service. He was involved in another relationship at the time of the fire although his partner did not live with him.

On 23 December 2009, Brown renewed his contract of insurance with Elders pursuant to which his house and motor vehicle were insured items of property against perils including fire. The insuring clause of the policy extended cover to Brown in respect of the insured property for accidental damage caused by fire.

On 22 February 2010 at about 1.30 am, a fire broke out in Brown's house causing extensive damage to the house and his motor vehicle. Brown submitted a claim under his contract of insurance with Elders. The insurer refused to pay the claim.

Brown commenced proceedings in the District Court at Orange in which he claimed indemnity under the policy or alternatively damages for breach of contract by reason of the insurer's wrongful refusal to indemnify him in respect of the damage to his property.

A defence was filed on behalf of Elders in which the insurer raised fraud in the event and fraud in the claim.

At trial, the parties agreed on the following:

- The total quantum of losses sustained by Brown, if his claim was successful, was $221,135.
- The trial was therefore confined to liability.
- The plaintiff bore the onus of proof in respect of the insuring clause being engaged such that he was required to prove that the fire was "accidental".
- Accidental in the context of the insuring clause meant that the plaintiff was required to prove that if the fire was deliberately lit, the plaintiff was not involved in its ignition.
- The insurer bore the onus of proof in respect of the allegations of fraud in the event and fraud in the claim.

The defence put forward on behalf of the insurer was based entirely on circumstantial evidence which consisted of the following:

- The plaintiff's own evidence which was presented as follows:
  - He came home at 7.00 pm and did not notice or observe any accelerants which might have been poured on the floor or anything unusual at all.
  - He went to bed at about 10.00 pm.
  - He woke up after 1.00 am with the smoke alarms going off.
  - Having checked on the fire he then pushed open a window in his bedroom rather than just walk out the door.
  - He took his passport and stamp albums with him and went to tell his parents up the road about the fire without trying to put it out.
  - He detoured on the way back to put his passport and stamp albums in a shed for no explicable reason.
  - He returned to the scene of the fire and still did not try to put it out.
  - When the rural fire brigade (his own team) arrived, he entered the house wearing only his singlet and shorts (as opposed to his fire fighting protective gear) and armed with a garden hose as if he was trying to put out the fire.
- Evidence from one of the rural fire fighters who stated that, upon her arrival, the first thing Brown said to her was "do you have to put the fire out?". The witness also gave evidence that Brown phoned her within a day or two after the fire and asked her not to repeat to anyone what he had said.
- Evidence from the police officer in charge of the investigation from his interview of Brown's former partner (the relationship had broken down after the fire) in which she told him:
  - She had decided to sell her property and move in with Brown.
  - The house still had remnants of Brown's former wife and he had told her that he wished to renovate.
  - Three weeks before the fire, Brown told her that he had a dream of his house burning down by fire and wondered what the consequences would be if that happened.
- The existence of pour patterns confirming the use of an accelerant as the cause and origin of the fire, in circumstances where Brown had gone to bed at 10.00 pm and the fire started sometime between then and 1.00 am, just three hours later.
- There was no evidence of any break-in to his house suggesting another person may have entered his house to start the fire in circumstances where Brown had a guard dog

whose bark was loud, but which was not heard that night by him or anyone else.

- Although "motive" was not something the insurer is required to prove in a fraud case, it was nevertheless made out by the insurer in this case where Brown:
  - had a $500,000 mortgage taken out over the property and a $100,000 overdraft account in which $87,000 had been drawn down, and
  - intended to renovate the house ready for his partner to move in.

It was argued for the insurer that, when taking all of the above circumstantial evidence into account, as is required pursuant to the principles enunciated by Tobias JA in *Asim v Penrose*, Brown's case was so implausible that it was far-fetched and could not be accepted. As such, either Brown had failed to discharge his onus of proof regarding "accidental" fire, insofar as he had failed in his evidentiary burden to disprove his involvement in its ignition, or that the insurer had successfully discharged its onus regarding fraud in the event.

It followed, as was submitted for the insurer, that if the Court found Brown had committed fraud in the event, that he had also committed fraud in the claim by reason of his insurance claim form and subsequent statements provided to the insurer's investigators, were false in which he had denied any involvement in the ignition of the fire.

Lakatos SC DCJ agreed with the submissions presented on behalf of Elders and entered judgment in favour of the insurer. His Honour found that when considering the united force of all the circumstances put together, Brown ignited the fire at his home or was a party to that event and that several statements he made to the insurer constituted fraud in the claim.

His Honour emphasised that he made the above findings having regard to the serious allegations of impropriety which are involved.

This case presented one of those rare situations for the insurer where there was no direct evidence of the insured being involved or complicit in the ignition of the fire which led to the property damage the subject of his insurance claim.

Nevertheless, the overwhelming conclusion available from the circumstantial evidence, when viewed as a whole, led the Court to correctly find in favour of the insurer on the fraud defences that were raised on behalf of Elders.

Insurers can take comfort in this decision which shows that fraud defences in circumstantial cases can succeed, albeit rarely.

However, the general principles to be applied in a fraud case are universal and often result in a hesitancy by insurers where the evidence is circumstantial because of what is often a misunderstanding of the principle surrounding the *Briginshaw* standard.

It should be remembered that while the evidence may need to rise to a level where the trial judge can be comfortable the evidence suggests the involvement of the insured in the occurrence of the loss, or where the insured has given false statements in support of an insurance claim, the High Court made it abundantly clear in *Bradshaw* that, in a civil case involving fraud, if the evidence rises to the level of balance of probabilities, it is not to be regarded as mere conjecture or surmise, even if it fails to rise to a level of certainty.

Absent a confession by the insured that they ignited the fire or were complicit in its ignition or overwhelming evidence from witnesses who directly observed the insured being involved in the ignition of a fire, a case involving fraud can never rise to a level of certainty especially where the evidence is circumstantial.

It is therefore a timely reminder to observe how the principles involving a fraud defence can work in favour of the insurer where the united circumstances viewed as a whole result in the insurer successfully defending the claim.

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No Liability for Trip on Box

The State of NSW and an employer have successfully defended a claim following a trip and fall at Campbelltown Public School.

Carol Drew was a cleaner employed by Menzies Property Services Pty Limited ("Menzies"). On 14 April 2005 Drew was working at Campbelltown Public School when she tripped and fell and injured her right knee. In 2013 Drew commenced proceedings against the State of NSW on the basis it was the occupier of the school and vicariously liable for the staff at the school and also against Menzies, her employer.

At trial Drew was unsuccessful against both defendants. Drew appealed.

The Court of Appeal noted there were no contemporaneous documents which precisely identified the circumstances of the fall. Drew gave evidence that she fell in a classroom that contained

items that were being stored for a school fete. Drew had given evidence she had walked through the classroom five times that afternoon before the fall. The incident occurred when Drew was trying to walk through the area whilst carrying a mop and bucket. On the way back she tripped. Drew's evidence was to the effect that either her foot or the lip on the bucket caught the box and she fell over on top of the box.

In relation to the liability of Menzies, the employer, the trial judge Delaney DCJ noted that Menzies owed a non delegable duty of care to provide a safe place and safe system of work. In this particular case however the box had not been in the classroom the previous day and Menzies could not have been aware of the existence of the box unless informed by someone. The trial judge was of the view there was nothing that Menzies could have done and in fact Drew could have done what she did earlier and walked around the box and so avoided the accident.

The Court of Appeal in their decision noted that Menzies had a practice of sending a supervisor to visit the school monthly and it was not suggested there was anything deficient about that practice. Accordingly, the findings of the trial judge in relation to Menzies were correct.

In relation to the claim against the school, the Court of Appeal noted that:

> *"In addition to what was said in Phillis v Daly, a series of cases have held that it is not an objectively reasonable precaution that an occupier remove obvious tripping hazards: Jaenke v Hinton (hose left lying on lawn); Sibraa v Brown (wire mesh left on lawn). Section 5B of the Civil Liability Act 2002 required the primary judge to determine the probability that harm would occur if no precautions were taken. It is plain from the reasons of the primary judge that his Honour considered that probability to be low. Moreover, only if a reasonable person in the position of the State would have taken precautions can a breach of duty be made out…*
>
> *The appellant contended that the State should have instructed its servants or agents to stack items in the classroom so as to maintain a clear unobstructed pathway, or alternatively should have placed tape or a chalk mark on the floor with an instruction to store items only on either side of the path, or else lock the classroom to prevent the ad hoc storage of items for the fete. The trial judge found the precautions which the plaintiff had contended would not have avoided the risk of injury. No error has been established in that conclusion. The risk of harm was to be considered prospectively: Sibraa v Brown. Even if the floor had been marked so as to delineate a way through the middle of the room, or if in some other way control had been exercised so as to reduce the clutter, there would always remain the risk of a cleaner stumbling over an obvious obstacle."*

The appeal was therefore dismissed.

The decision is again a reminder that simply because an accident occurs it does not mean that a party will be liable.

A person must take care for their own safety.

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Deregistered company and claims against its insurer - Section 601AG *Corporations Act 2001* (Cth)

Claimants are sometimes faced with a situation where they have a right to bring a claim for damages against a company but discover that the company has been deregistered.

The claim for damages must involve an existing legal entity, in this case, a company registered under the Corporations Act 2001 (Cth) ("CA").

Does the claimant have an available legal remedy in this situation where the company against which a legal entitlement to claim damages has been deregistered?

The answer is yes, in certain circumstances. The available remedy can be found in Section 601AG of the CA which provides:

> *"A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:*
> *(a) the company had a liability to the person; and*
> *(b) the insurance contract covered that liability immediately before deregistration."*

This section has been the subject of judicial interpretation since its inception in 2001 and has produced relatively straightforward principles which govern whether or not a claimant has an entitlement to sue an insurer of a deregistered company directly.

The principles governing the first limb of s601AG are:

- The liability referred to in s601AG(a) must subsist as at the date of the company's deregistration (*Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd [2005] NSWCA 19*).
- A liability for the purpose of s601AG(a) need not be a liability that had been determined prior to deregistration but included a liability which, immediately before deregistration, was contingent

or inchoate (*Tzaidis v Child [2009] NSWSC 465* per McCallum J).

The principles governing the second limb of s601AG are:

- S601AG(b) does not mean that the insurer was obliged to pay the liability of the deregistered company immediately before its deregistration.
- Instead, it need only be shown that the scope of the policy extended to the risk that had manifested in the particular case.

What often eventuates in claims seeking relief under s601AG of the CA is a twofold test where the insurer, sued directly by the claimant, attempts to establish that its insured, the deregistered company, had no liability to the claimant or that the insurance policy does not respond.

On the first issue involving a determination of whether or not the deregistered company was, prior to deregistration, liable to the claimant, the insurer will, in the context of a claim for damages in negligence, invariably mount the standard defences which seek to defeat the claim on grounds such as:

- The deregistered company did not owe the claimant a duty of care or that no duty arose in the circumstances.
- If a duty of care is established, the deregistered company did not breach its duty of care to the claimant.
- If duty and breach are established, the damage suffered by the claimant was not caused by the deregistered company's breach of its duty of care.
- Contributory negligence on the part of the claimant.
- Proportionate liability provisions in an effort to cast the net of liability beyond the scope of liability limited to the deregistered company to include concurrent wrongdoers, whether under the Trade Practices Act 1974 (Cth) ("TPA") or the Australian Consumer Law ("ACL") for alleged negligence occurring after 1 January 2011, or under the Civil Liability Act 2002 (NSW) ("CLA").
- Other statutory defences such as those which might be found in the TPA, ACL or CLA if the claim involves personal injuries and issues arise with respect to "obvious risk", dangerous recreational activities, inherent risks, public authorities, intoxication, criminal activities or volunteers.

As such, this aspect of a claim against an insurer under s601AG of the CA would proceed in the usual fashion by the insurer presenting evidence to refute the proposition that its insured had any liability to the claimant.

The second limb, however, does not operate based on the liability of the deregistered company to the claimant but is contingent on the liability of the insurer itself to indemnify its insured pursuant to the contract of insurance. Put another way, the question for the Court's determination is whether cover would have extended to the insured pursuant to the terms and conditions of the contract of insurance had the company not been deregistered.

On this issue, an insurer will invariably seek to argue that cover was not available due to the operation of an exclusion clause under the policy wording governing the insurance contract.

In a recent single justice decision of the NSW Supreme Court, Justice Beech-Jones in *Smart v AAI Ltd; JRK Realty Pty Ltd v AAI Ltd* dismissed proceedings brought by plaintiffs against AAI Limited t/as Vero who sought to invoke s601AG of the CA.

Both plaintiffs allegedly sustained damage caused by the fraudulent misappropriation of moneys each had provided to a finance broking company having relied upon representations made to them by the company's general manager that their funds would be invested pursuant to lending arrangements with clients of the company.

The claims for damages were brought pursuant to provisions of the TPA regarding misleading and deceptive conduct and for breach of contract under the CLA.

At the time of the alleged conduct by the general manager, the company had entered into a entered into a contract of insurance with Vero, the terms and conditions of which were described in a claims made and notified policy described as a "Professional Indemnity Policy for the Mortgage and Finance Industry".

The company was later deregistered.

Beech-Jones J found in both cases that the plaintiffs had established the deregistered company was liable to each of them.

The ultimate question for the Court's determination was whether or not that liability was covered by the Vero policy immediately prior to the company's deregistration, applying the above principles enunciated by McCallum J in *Tzaides*.

On this limb, the insurer succeeded by invoking an exclusion clause under the policy by which cover was excluded if the liability of the deregistered company was assumed outside the normal course of the "Professional Services" as defined in the policy and that there was no exception to the exclusion clause by

reason of the acts of an employee because it was held by his Honour that the general manager who committed the embezzlement of the plaintiff's funds, was not an employee but a part owner of the business. More significantly, however, the Vero policy could only be invoked in respect of claims first made against the insured and notified to the insurer during the period of insurance.

The definition of "claim" required a demand "for compensation".

Beech-Jones J relied upon the 2013 decision of the Victorian Court of Appeal in *Kyriackou v ACE Insurance* in which it was held that a demand for compensation does not include a claim in debt or restitution, or for a civil penalty. In that decision, the Court stated:

> *"Aggrieved persons may have claims of various kinds – for example, in restitution, or debt, or damages – or some combination of these … But a claim for damages requires a breach of a duty or obligation and would therefore exclude claims for restitution or debt. Thus, in the present case the available evidence suggests that, if any claims were to be made by aggrieved investors, they would likely be for the return of borrowed funds, had and received, or for a debt due or payable under contract – neither of which would constitute payment of compensation or damages. Such claims fall outside the insuring clause…of the professional indemnity policy with which these proceedings are concerned."*

Here, his Honour held that the insuring clause was of a similar nature to that discussed by the Victorian Court of Appeal in Kyriackou.

The plaintiffs had not made a claim for compensation but instead, their demands were for a return of moneys owed.

His Honour concluded that the plaintiffs had not made a claim against the insured during the period of insurance.

Accordingly, they had failed to establish the second limb of s601AG of the CA and thus were not entitled to seek relief against the insurer of the deregistered finance broking company directly.

The proceedings were dismissed with the plaintiffs to pay Vero's costs.

This decision highlights the way in which s601AG of the CA operates to provide relief to an aggrieved claimant when the party against whom liability is alleged is a deregistered company which had entered into a contract of insurance prior to deregistration.
Claims for damages involving the allegedly negligent advice or conduct of professionals for which there is a professional indemnity policy in play are more difficult for plaintiffs due to the more substantial nature of the exclusion clauses available under those policies, a determination of the conduct of the person whether they were an employee or not, or whether such conduct was wilfully dishonest or not, and the fact that such policies are often claims made and notified policies which can result in the second limb of s601AG of the CA not being made out.

Other contracts of general insurance which provide cover to a deregistered company such as a builder against which liability might be alleged due to the personal injuries sustained by a claimant or property damage suffered by a third party arising from construction works are not so confined but operate on the same legal principles examined in this article.

The principles governing claims under s601AG of the CA are relatively straightforward and have a two-limb process where a claimant must essentially establish that the deregistered company who held the policy with the insurer sued was liable and that the policy covered the company at the time of the act giving rise to the liability.

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Homeowners liability for actions of its contractors

When engaging a handyman or tradesperson to conduct work on your premises, you expect the work to be completed to an acceptable standard with reasonable skill and care. But can a landlord escape liability where an act that results in an accident was delegated to a contractor?

Is there a duty to make enquires to establish the contractor is competent?

These are all questions a landlord or occupier must consider when delegating work.

In *Fabre v Lui,* the NSW Court of Appeal was called on to review a decision of the District Court where the trial judge, Flannery SC DCJ, found that the landlord did not breach the duty of care owed to a tenant after it had engaged a handyman/tradesperson to install a rangehood.

In December 2007, Ms Lui, while living in the subject premises, discovered that her stove rangehood was not working. Accordingly, she engaged a handyman/tradesman from the local newspaper to install and replace the rangehood. She paid the contractor $250 in cash for the work.

In early 2008 Ms Lui moved out of the premises and subsequently, entered into a Residential Tenancy agreement with Ms Fabre.

On 18 December 2010, while the rangehood over the cooking stove was being cleaned the hood fell from the wall causing injury to Ms Fabre. The incident occurred approximately three years after the installation of the rangehood.

Ms Fabre initially commenced proceedings in the District Court claiming damages from Ms Lui, the registered owner of the premises, and the managing agent of the property.

Ms Fabre argued that Ms Lui owed her a duty of care because she occupied the premises at the time and had arranged for the rangehood to be installed.

The primary judge referred to the decision in *Bevillesta Pty Ltd v Liberty International Insurance Company* [2009] NSWCA 16 which identified the appropriate principles to apply to occupiers:

> *"There is no doubt also that this occupier's duty of care is 'delegable', in the sense that it may be discharged in whole or in part by the occupier's exercise of reasonable skill and care in engaging someone else to take steps to keep the property safe either generally or in particular respects. Discharge of the duty in this way requires reasonable skill and care in the selection of the other person, in arranging the terms of engagement of that person, and in confirming that the person does take appropriate steps. If it is reasonable for an occupier to seek to discharge or partly discharge the occupier's duty in this way, and the occupier does exercise reasonable skill and care in all these respects, then if a person coming on to the property is injured due to the failure of the other person engaged to exercise reasonable skill and care to keep the property safe, the occupier may escape liability."*

Following the above decision, her Honour rejected Ms Fabre's negligence claim on the following basis:

> *"The first defendant (Ms Lui) had no experience in installing rangehoods, and did what I consider a reasonable landlord would do in those circumstances: she looked in a local newspaper for a tradesman, found an advertisement for a handyman/tradesman, spoke to him about the job and he not only agreed to install it, but purchased one on her behalf and then installed it."*

Further, Flannery SC DCJ observed:

> *"As regards the failure by the first defendant to make any enquiries about the background, skills, or experience of the contractor, I agree … that in finding a handyman/tradesman, who the first defendant believed and who held himself out to be capable of installing a new rangehood, which belief was confirmed when he (1) arrived at the property in possession of a replacement rangehood, and (2) removed the existing rangehood and fitted the new one, which then worked, she had exercised reasonable skill and care in selecting him".*

Ms Fabre filed an appeal arguing that Ms Lui failed to make appropriate enquires of or about the installer sufficient to establish his competence. In failing to make such enquiries, it was contended that Ms Lui was in breach of her duty of care owed towards any person who might in the future occupy the premises, clean them, or otherwise undertake activities near the kitchen stove.

In a unanimous decision of the NSW Court of Appeal comprising of Basten JA, Macfarlan JA and Meagher JA, the Court upheld the primary judge's decision and found that Ms Lui was not negligent.

It was accepted that there was a risk of injury if the rangehood were not properly affixed to the wall. That risk was not insignificant and the harm which might result was likely to be serious if a person were in the immediate vicinity. However, in this case the only issue was what precautions would a reasonable person in the position of Ms Lui have taken to avert or minimise the risk of such harm.

In dealing with the issue and in arriving at its decision, the Court of Appeal noted the following:

> *"(1) Although the work needed to be done carefully in order to avoid injury, the work was of a minor kind. It was in the nature of an "odd job" or "small repair", those being tasks that a "handyman" could, according to the ordinary usage and Macquarie Dictionary definition of that word, be expected to do.*
>
> *(2) The contractor held himself out as a "tradesman" or "handyman/tradesman" in the respondent's local newspaper, that being a source from which one could reasonably expect to identify such a contractor.*
>
> *(3) The respondent (Ms Lui) was not asked by either party about her conversations with the contractor however it can readily be inferred that he indicated to her his readiness and willingness to do the work, including obtaining the relevant replacement rangehood. This clearly carried with it an implicit representation by him of his ability to complete the work, to an acceptable standard.*
>
> *(4) This implicit representation was further supported when the handyman arrived in possession of what was apparently a suitable replacement rangehood; and*

(5) *He removed the existing rangehood and installed the new one, without any difficulty apparent to the respondent."*

It was held that Ms Fabre failed to demonstrate that a reasonable person in the landlord's position would have taken any particular precautions or that, if they had been taken, they would have required the engagement of someone with better qualifications to install the rangehood. Accordingly, the appeal was dismissed.

As can be seen, whilst an occupier owes entrants a duty of care, that duty can be discharged partially or fully when selecting a competent contractor.

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Claims for pure mental harm and the relevance of a sibling relationship

Prior to the enactment of civil liability legislation around Australia, a claim for damages involving a psychiatric illness suffered by a claimant in response to a tortious event caused by a third party which killed or seriously injured a relative, or by a non-relative who was present at the scene and witnessed the tortious event or its aftermath, were referred to as claims for nervous shock.

These claims are now described in legislation as "pure mental harm" claims. That is, the claimant himself or herself does not sustain physical injury but another person is either killed or seriously injured in an event and the claimant develops a recognised psychiatric illness in response to that event.

These legislative criteria were introduced by the enactment of the civil liability laws throughout the states and territories of Australia in response to the developing common law which had culminated in the High Court's decisions of *Tame v NSW* and *Annetts v Australian Stations Pty Limited,* both handed down in 2002.

These cases were heard together and in the separate judgments handed down simultaneously, the High Court reviewed the common law and whether it was necessary for the claimant to establish the following:

- Being present at the scene.
- Having directly witnessed the event which put the deceased or injured person in peril, or if it was sufficient to have witnessed its aftermath.
- A recognised psychiatric illness was suffered by the claimant in response to the tortious event which killed, imperilled or seriously injured the victim.
- A person of normal fortitude may have developed the psychiatric illness of which the claimant complains.
- The relevance of the relationship (if any) between the victim and the claimant in determining foreseeability to establish a duty of care.

On 10 June 2015, the High Court handed down its decision in *King v Philcox* which involved a consideration of the legislative principles involving pure mental harm claims pursuant to the *Civil Liability Act 1936* (SA) ("CLA") including whether a sibling relationship, under the South Australian legislation, was relevant to foreseeability.

On 12 April 2005, between 4.50 pm and 4.55 pm Scott Philcox was a passenger in a motor vehicle driven by George King in Campbelltown, a suburb of Adelaide. As a result of King's negligence, the vehicle collided with another at an intersection which resulted in the death of Philcox ("deceased") about half an hour later, while he was still trapped in the vehicle.

The deceased's brother, Ryan Philcox ("Philcox") heard of the accident a few hours later. He then realised he had driven past the location of the accident earlier that day while the vehicle in which the deceased was trapped and dying was still there. Subsequently, Philcox developed a major depressive disorder.

In the District Court of South Australia, Philcox was unsuccessful in his claim for damages against King.

An appeal by Philcox to the Full Federal Court of the Supreme Court of South Australia was successful and King was ordered to pay damages to Philcox in the amount of $69,212.75.

By special leave, King appealed to the High Court raising two grounds of appeal:

- King did not owe Philcox a duty of care, relying upon Section 33 CLA to argue that a reasonable person in King's position would not have foreseen that a person of normal fortitude in the position of Philcox might have suffered a psychiatric illness.
- Because Philcox was not present at the scene of the accident when it occurred, he did not satisfy the condition imposed by Section 53(1)(a) CLA upon recovery of damages for pure mental harm by someone other than a parent, spouse or child of a person killed, injured or endangered in an accident.

The High Court, in a unanimous decision comprising French CJ, Kiefel, Gageler, Keane and Nettle JJ, upheld the appeal and entered judgment in favour of King.

In three separate judgments, the members of the Court arrived at the same conclusion. All members held that the lower Courts were correct to conclude that a duty of care existed in the circumstances, dispelling the appeal ground that had been reliant on the "normal fortitude" test.

All members of the Court focused on the second ground of appeal which required an interpretation of Section 53 CLA regarding whether or not Philcox was present at the scene when the accident occurred.

Section 53 CLA relevantly provides:

"(1) Damages may only be awarded for mental harm if the injured person-
(a) was physically injured in the accident or was present at the scene of the accident when the accident occurred;
or
(b) is a parent, spouse or child of a person killed, injured or endangered in the accident.
(2) Damages may only be awarded for pure mental harm if the harm consists of a recognised psychiatric illness."

Its form and content is similar to legislative provisions found in civil liability legislation in the other states and territories of Australia.

However, there is a critical difference between the South Australian provision and the same provision in the legislation of other states and territories that distinguish this decision as unique to South Australia, and which would have had a different result had the event causing the death of the deceased occurred, for instance, in New South Wales. We return to this issue later in the article.

The South Australian legislation began in 1936 with the enactment of the *Wrongs Act* at a time when there was no statutory provision which permitted nervous shock claims. These claims were, at that time, determined by reference to the emerging common law of the United Kingdom and Australia which had looked unfavourably upon such claims.

Several amendments were introduced into the legislation which gave rise to nervous shock claims in certain circumstances.

These amendments culminated in 2002 with the introduction of Section 53 by the enactment of the *Wrongs (Liability and Damages for Personal Injury) Amendment Act* (SA).

In 2004, the *Law Reform Act* (SA) renamed the *Wrongs Act 1936* (SA) as the *Civil Liability Act 1936* (SA) which changed name of the legislation, but retained the original year of the *Wrongs Act*.

It was not in dispute that the sibling relationship of Philcox with his deceased brother meant that Philcox could not rely upon sub-section 53(1)(b) CLA as he was not a parent, spouse or child of the deceased.

Accordingly, Philcox was required to satisfy that he came within sub-section 53(1)(a) CLA such that it was necessary for him to establish that he was present at the scene of the accident when the accident occurred.

The evidence on this issue presented by Philcox at the District Court hearing included the following:

- He drove through the intersection at about 5.00 pm on the way to pick up his girlfriend from work. He noticed that an accident had occurred. He did not believe anyone was seriously injured.
- Having collected his girlfriend, he drove back through the intersection a short time after 5.00 pm and observed police officers directing traffic and the presence of emergency vehicles at the scene.
- After returning home with his girlfriend, he then drove her to her parents' home for dinner when he again turned at the intersection where he would have seen the vehicles involved in the accident as he went past, but did not take any notice of them.
- Half an hour later, he had to return home to collect something. Again, he passed through the intersection and observed a blue or grey wagon with severe damage on the passenger side on a flatbed tow-truck. The wagon had been cut open to retrieve someone and he wondered about the injuries sustained by those in the vehicle.
- The intersection had been cleared a short time later when he drove back to the parents home of his girlfriend.
- It was not until 10.30 pm or 11.00 pm that night when his parents came to his girlfriend's house that Philcox was told about his brother's death.

In a joint judgment of French CJ, Kiefel & Gageler JJ, their Honours observed that the wording of sub-section 53(1)(a) was designed to exclude claims for pure mental harm involving siblings who were present at the scene of the event but only during its aftermath, not when the accident occurred.

The sub-section required the sibling of a deceased, as in Philcox's position, to not only be at the scene of the accident, but to also be present when the accident occurred.

Keane J, in a separate judgment, went further to explicitly state that:

"While it is true that the common law has recognised that a plaintiff's presence at the aftermath of an accident may found a claim for damages for mental harm, the plain intention of s53(1)(a) of the Act is to deny the recovery of damages to persons who in those circumstances would have been entitled to recover damages for mental harm."

His Honour later stated that it was to:

"…strain too far against the plain meaning of the language of s53(1)(a) of the Act to say that 'an incident' is 'synonymous' with its aftermath."

Nettle J, in the third judgment of the Court, highlighted that the definition of "accident" in the legislation did not include "aftermath" and concluded, along with his Honour's fellow judges, that the Full Federal Court was in error to award damages to Philcox because he was not at the scene of the accident when the accident occurred.

Accordingly, the appeal by King was upheld and the damages awarded by the Full Court to Philcox overturned.

It is noteworthy that the nature of the relationship between the deceased and claimant is more restricted in the South Australian legislation than counterpart provisions in the civil liability laws of other states and territories of Australia.

In New South Wales, for instance, Section 30 of the Civil Liability Act 2002 (NSW) refers to the plaintiff being a "close family member of the victim" the definition of which includes, not only a parent, spouse or child but extends to include a person with parental responsibility for the victim, a partner, a stepchild or any other person for whom the victim has parental responsibility and a brother, sister, half-brother or half-sister and step-brother or step-sister.

Had this tragic incident occurred in New South Wales, there would have been no issue of Philcox's entitlement to claim damages from King purely by reason of his sibling relationship with the deceased whereby he would not have been required to establish his presence at the scene of the accident.

The position with respect to the other states and territories are summarised below:

- A sibling relationship is sufficient by itself to found a claim in damages for pure mental harm without requiring the claimant to establish that s/he was present at the scene of the accident:

  NSW: ss30(2)(b) & 30(5)(d) *Civil Liability Act 2002* (NSW).

  VIC: s73(2)(b) *Wrongs Act 1958* (Vic) which refers to "close relationship", a term undefined in the Act.

  TAS: ss32(2)(b) & 32(3)(d) *Civil Liability Act 2002* (Tas). Note that these provisions are the same as in NSW but they extend to include "aftermath" making Tasmania the only state or territory with legislation that allows claims purely based on witnessing the aftermath of the accident.

- In Western Australia, Section 5S *Civil Liability Act 2002 (WA)* is silent on this issue and therefore the Court must consider the nature of the relationship between the plaintiff and deceased and whether the plaintiff witnessed at the scene the deceased being killed or put in peril as relevant factors to establish a duty of care. Philcox's claim would have likely been successful.

- Philcox's claim would have succeeded in Queensland and the Northern Territory noting the *Civil Liability Act 2003 (Qld)* and the *Personal Injuries (Civil Claims) Act (NT)* contain no legislative provisions governing claims for pure mental harm. Such claims are therefore governed by the common law of Australia which would uphold the claims by applying the common law principles enunciated by the High Court in Tame & Annetts and confirmed in *Wicks v State Rail Authority of NSW; Sheehan v State Rail Authority of NSW*, the latter being simultaneous decisions of the High Court in 2010 involving claims by police officers who witnessed the aftermath of the Waterfall train disaster in 2003 in which passengers were killed and seriously injured following a train derailment.

- In the ACT, s36 *Civil Law (Wrongs) Act* only gives an automatic entitlement to claim damages for pure mental harm for a parent or domestic partner of the deceased or injured victim. A sibling can only claim damages for pure mental harm if the deceased was killed, injured or put in danger within the sight or hearing of the sibling.

The decision of the High Court provides a fascinating illustration of the way in which the laws of the different states and territories can govern a claim for damages and produce a different result purely depending on the somewhat illusory basis of where the accident occurs.

That there can be such a variance between the states and territories to include or exclude claims brought by the sibling of a deceased or seriously injured person shows the bewildering nature of community differences based on geographical positions within a federal polity.

That a sibling relationship would be compared unfavourably with that of a parent/child or spousal relationship may be considered surprising to some but

the wisdom of the state and territory legislatures in South Australia and the ACT have determined it necessary to impose a control mechanism at that level of a family relationship to exclude such claims as that of Mr Philcox.

A different result would have ensued had the accident occurred anywhere else but South Australia or the ACT!

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EMPLOYMENT ROUNDUP

In NSW employees can accrue Annual Leave whilst receiving weekly compensation payments

In our December 2014 article of GD News, we examined the decision of *NSW Nurses & Midwives Association v Anglican Care* (2014) where her Honour Judge Emmett determined that a worker can accrue annual leave whilst receiving payments of weekly compensation.

Traditionally the approach had been that a NSW worker could not accrue annual leave whilst receiving weekly compensation following the introduction of Section 130 of the *Fair Work Act 2009*. Section 130 provided that an employee is not entitled to take or accrue any leave or absence whilst they are absent from work due to personal illness, a personal injury or receiving workers compensation payments. The difficulty arose in that Section 130(2) of the *Fair Work Act* which provided that the restriction did not prevent an employee from taking or accruing leave during a period of compensation if the taking or accruing of the leave is permitted by a compensation law.

In the NSW legislation, Section 49 of the *Workers Compensation Act 1987* provided that workers compensation was payable in respect of any period of incapacity even though the worker or is entitled to receive in respect of the period of payment an allowance or benefit for annual holidays or long service leave. The difficulty arose in that there was no express provision within Section 49 as to whether leave would continue to accrue during the compensation period. It was argued it simply provided an obligation on a workers compensation insurer to make payments during a period of compensation notwithstanding an employee is also receiving annual leave payments.

Her Honour Judge Emmett in the Federal Court originally considered Section 49 expressly provided for an opportunity for an employee to receive workers compensation and accrue annual leave at the same time. Her Honour was satisfied that Section 49 of the *Workers Compensation Act 1987* did not prevent a worker from receiving both compensation and accruing annual leave.

This decision was appealed to the Full Bench of the Federal Court and Jessup, Bromberg and Katzmann JJ delivered a judgment on 5 June 2015. A key component of the decision was an examination of what was meant by "*permitted*" or more precisely "*permitted by*" by Section 130(2) of the *Fair Work Act*. The Judges determined that permitted should be constructed as a synonym for "*allowed*". They consider it would be odd if it was the Parliament's intention to confine the operation of Section 130(2) to compensation laws which actually created or conferred entitlements to leave.

The Full Bench noted that a worker's entitlement to accrue annual leave was not removed by Section 130 because she was permitted by Section 49 of the *Workers Compensation Act 1987* to accrue annual leave over an entire period she was absent from work and in receipt of compensation.

The Full Bench concluded the purpose of Section 130(2) was to enable employees who were absent from work and in receipt of compensation to retain their entitlements to leave over the same period as long as that course is sanctioned, condoned or countenanced by the relevant compensation laws. In other words, employees in that position were entitled to both compensation and leave benefits provided that permission was given by the compensation law for dual receipt. The Full Bench concluded that Section 49 of the NSW legislation was such a law.

We note this is a fundamental and important determination. Employers should now be aware that the decision of the Full Federal Court means that employees will accrue annual leave whilst they are in receipt of weekly compensation payments.

The decision demonstrates in NSW employers have legislative obligations to maintain the employment of injured workers while attempting to provide suitable duties and rehabilitation and whilst a worker is in receipt of weekly compensation benefits the financial impost of annual leave entitlements continues to accrue.

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The tangled web of workplace affairs

The repercussions of employees engaging in relationships with others in the same workplace are often unforeseen. Regularly, however, cases arise which indicate that work and romance can be uneasy bedfellows.

Mr M was the Branch Manager of a Westpac branch in Wollongong. He had started as a teller and worked his way up over the course of 16 years through various positions within the Bank. His record was largely blemish free.

Mr M's contract of employment included a specific section on conflict of interest which stated:

'During your employment, you must avoid situations which could give rise to a conflict of interest. For example, you must not be involved in activities or decisions which conflict, or appear to conflict, with your work at Westpac or the business of any other member of The Westpac Group.

You must let us know straight away if you think that any activity you are considering might conflict with our core values or business. If you are unsure about whether a situation creates or has the potential to create a conflict of interest, please discuss it with your manager before taking any further action.'

About 2 years after his appointment as Branch Manager, Mr M became involved in a romantic relationship with one of the employees at the Wollongong Branch - Ms A. Ms A reported directly to Mr M. The relationship started in February 2014. Mr M and Ms A moved in together in March 2014 and lived together until the relationship ended.

As part of his duties as Branch Manager, Mr M was involved in conducting performance appraisals, including for Ms A. He also had a role in recommending employees for potential promotion. Based at least in part on favourable recommendations made by Mr M, Ms A was promoted into a new position and provided with a significantly greater salary.

Approximately one month after the discussions about promoting Ms A to a more senior role Westpac's Regional General Manager (RGM) became aware of rumours amongst Westpac staff in the region concerning a romantic relationship between Mr M and Ms A. The RGM asked Mr M whether he was in relationship with Ms A. Mr M denied this and said that he was disappointed that there were rumours circulating about the region about this matter.

Subsequently, there was a breakdown in the relationship between Mr M and Ms A. An interim AVO against Mr M was issued, and he was later charged with breaching the AVO.

Inevitably, Westpac became aware of all these matters, and terminated Mr M's employment on the grounds, essentially, that Mr M:

Was dishonest about his relationship with [Ms A] when questioned about it and did not disclose that there might be a real or perceived conflict of interest;

Breached the AVO and in doing so exposed Westpac to reputational damage;

Inappropriately disclosed details of the relationship with subordinates;

Failed to appreciate the seriousness or extent of the failure of his leadership.

Mr M brought an unfair dismissal application in the Fair Work Commission - *George Mihalopoulos v Westpac Banking Corporation T/A Westpac Retail and Business Banking [2015] FWC 2087*.

The factors FWC must take into account in considering whether a dismissal has been harsh, unjust or unreasonable include whether there was a valid reason for the dismissal related to the applicant's capacity or conduct; whether the applicant was notified of that reason and given an opportunity to respond; and any other matters that the FWC considers relevant.

In evaluating whether there was a valid reason for dismissal, the FWC said:

> *"Employers cannot stop their employees forming romantic relationships. However, in certain circumstances, such relationships have the potential to create conflicts of interest. This is most obviously the case where a manager forms a romantic relationship with a subordinate- specially where the manager directly supervises the subordinate. It is virtually impossible in such circumstances to avoid - at the very least - the perception that the manager will favour the subordinate with whom they are in a romantic relationship when it comes to issues such as performance appraisals, the allocation of work, and promotional opportunities."*

The FWC was of the view that it should have been obvious to any reasonably intelligent person that for a manager in an organisation such as Westpac to form a romantic relationship with a direct subordinate creates the potential for a conflict of interest. Mr G should have disclosed his relationship with Ms A, at least from the time they moved in together.

In relation to Mr M's untrue response when initially questioned about the relationship, the FWC said:

> *"The issue of dishonesty cannot be separated from the conflict of interest. The applicant had a duty to disclose his relationship with Ms A to his manager even before [the RGM] asked him about it. This failure to disclose was greatly compounded when he lied to [the RGM] about the relationship."*

The FWC held that Mr M's failure to disclose his relationship with Ms A, especially when combined with his dishonesty in lying to his manager about the affair on two separate occasions, constituted a valid reason for his dismissal.

In light of that finding it was not necessary to determine whether the fact of being issued with an AVO, and then being charged with breaches of it, constituted a valid reason, in the circumstances, for dismissal. The FWC doubted whether it would.

Mr M argued that dismissal was disproportionate to his misconduct. He pointed out that he had worked for the respondent for 16 years, largely in senior and responsible positions, and that he had made the whole of his career with the respondent. Until the events leading to his dismissal he had a very good employment record, and was regarded as an effective, loyal and trustworthy employee, devoted to his job.

In dismissing those arguments, and the unfair dismissal claim, the FWC said:

> *"It is important to acknowledge that the applicant held a senior position which required a high degree of honesty and personal integrity. His behaviour - in failing to disclose his relationship with Ms A and then (twice) lying about it to his manager - fundamentally undermined the trust and confidence which is at the heart of the employer-employee relationship."*

An important reminder for senior employees that with responsibility comes increased expectations as to behaviour.

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Outsourcing & Transfer of Business Rules – The consequences for a host that employs a previous labour hire worker

The Fair Work Commission (FWC) has delivered a decision that may affect any business employing labour hire workers. The decision relates to whether service as a Temporary worker ("Temp") through a labour hire agency counts when that Temp is subsequently employed directly by the host employer.

In *Burdziejko v ERGT Australia Pty Ltd [2015] FWC 2308 (1 April 2015),* the FWC found that the engagement of a worker from a labour hire agency to provide services to a new client, constituted "outsourcing".

Burdziejko had been engaged by Hays, the labour hire agency, to work at ERGT. After 3 months of work as a Temp, Burdziejko accepted an offer of ongoing employment with ERGT.

A short time after accepting permanent employment, Burdziejko was dismissed. She brought an application seeking a remedy for unfair dismissal (the Application).

ERGT raised a jurisdictional objection to the Application on the ground that Burdziejko had not been employed for the minimum period of employment period of 6 months, as prescribed by section 383 of the Fair Work Act 2009 (FWA) (extended to 12 months if employed by a small business). Minimum period of employment is a factor giving rise to protection from unfair dismissal under section 382 of the FWA.

Burdziejko argued that the labour hire agreement between ERGT and Hays amounted to an outsourcing of the role by ERGT, and that the outsourcing ended when ERGT elected to bring the duties and responsibilities of the role in-house. Against that background, Burdziejko submitted that there had been a transfer of business from Hays to ERGT such that the first 3 months of her engagement were to count towards the employment period.

ERGT submitted that it did not outsource work to Hays as it had not required Hays to perform the work but rather, merely provided an individual to undertake the work for ERGT.

The FWA recognises that transfers of business from one employer to another employer can occur. Section 311 of the FWA sets out the requirements that need to be satisfied for this to occur. A transfer of business occurs if:

- The employment with the old employer is terminated;
- Within 3 months after the termination, the employee becomes employed by the new employer;
- The work the employee performs for the new employer is the same, or substantially the same, as the work performed for the old employer; and
- There is a connection between the old employer and the new employer.

In its determination, the FWC held:

> *"The transfer of business provisions in the Fair Work Act 2009 were intended to have wider application than that provided for in the predecessor acts where the focus was on whether there was a transfer of the*

business between the old employer and the new employer. The application of the predecessor provisions focused on the character of the business in the hands of the old employer and the new employer. The Explanatory Memorandum makes it clear that the new provisions do not focus on whether the new employer had taken over that business or part thereof but whether there has been a transfer of work between the two employers and the reason for the transfer of that work."

One of the primary areas of dispute was whether or not there was a connection between Hays and ERGT. On this question, the FWC found that one only needed to take the words of the FWA and apply it here, finding that

"(a) the transferring work had been performed by one or more transferring employees (Ms Burdziejko), as employees of the old employer (Hays), because the new employer (ERGT), had outsourced the transferring work to the old employer (Hays); and

(b) the transferring work is performed by those transferring employees (Ms Burdziejko), as employees of the new employer (ERGT), because the new employer (ERGT), has ceased to outsource the work to the old employer (Hays)."

On that assessment, the FWC accepted that there was a connection between Hays and ERFT such that there was a transfer of business from Hays to ERGT.

As the period of time Burdziejko was "outsourced" to ERGT by Hays was recognised as employment, Burdziejko was found to have served at least 6 months employment and therefore protected from unfair dismissal.

The decision has very significant ramifications for employers looking to employ Temps engaged through to them by labour hire agencies within 3 months of the termination of the Temp's employment with the agency for similar, or substantially similar work.

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WORKERS COMPENSATION ROUNDUP

Average Weekly Earnings are not an Average

Part of the role of the Workplace Independent Review Office (WIRO) is to review decisions issued by insurers with regards to a workers capacity for employment and payments of weekly compensation. The reviews conducted by WIRO are for procedural errors by the insurer and are not reviews as to the merits of the work capacity decision.

A delegate of the Workplace Independent Review Officer recently reviewed an insurer's work capacity decision of an unnamed worker in WCD 2015/65. The insurer had issued a work capacity decision in November 2014 to the worker after the insurer had assessed that the worker had a current capacity to work for 18 hours per week. As part of the work capacity decision, the insurer informed the worker of suitable alternative employment positions which were considered to be suitable employment. The amount the worker could earn in those alternative employment roles was:

Cashier-	$447.90 per week; or
Sales assistant-	$449.82 per week; or
Kitchen hand-	$387.90 per week.

The worker was then informed by the insurer that it was determined the amount she was able to earn in suitable employment was $428.54. This figure was the average of the identified suitable employment roles.

Prior to the legislative amendments in June 2012, insurers traditionally used the average of the earnings identified in alternative employment roles when conducting an assessment of a worker's ability when a worker was partially incapacitated for employment. These assessments were made pursuant to Section 40 of the Workers Compensation Act 1987. Section 40 was abolished in the legislative amendments on 18 June 2012.

The amendments introduced as part of the work capacity regime dealing with workers with a capacity for employment specify that a work capacity decision is a decision about "an amount an injured worker is able to earn in suitable employment". The WorkCover Independent Review Officer has determined that an average of alternative employment roles is not the amount a worker is able to earn. It is simply a "mythical figure of three different earnings from three separate types of employment combined together".

On that basis there was non compliance with the legislation and the work capacity assessment was set aside. The WorkCover Independent Review Officer noted that had the insurer simply adopted any of the alternative suitable employment options, even the one which resulted in the highest ability to earn, this would have satisfied the Work Capacity Guidelines.

Additional Claims for Lump Sum Compensation – Sections 66(1A) and 66A(3)

The 2012 amendments to the NSW workers compensation scheme purported to restrict a worker to only one claim for permanent impairment compensation that results from an injury: Section 66(1A). However, in practice, application of what appears to be a relatively straight-forward provision has proved complex. Whether a worker is restricted to only one claim for permanent impairment compensation will depend on when he or she made the first claim for compensation, the nature of the injury for which the additional compensation is sought and the means by which the initial claim was resolved.

Following the appeal determinations in *Goudappel*, *Caulfield* and *Cram Fluid Power* it seems clear that workers who made a claim for any form of compensation before the commencement of the legislative amendments on 19 June 2012 are not subject to the one claim restriction introduced by the amendments. Although the employer in *Cram Fluid Power* has lodged an appeal from the decision of President Keating in the NSW Court of Appeal, WorkCover posted a Regulation on 4 June 2015 advising President Keating's decision should be applied until the Court of Appeal determines otherwise.

In *Sukkar v Adonis Electrics* [2014] NSWCA 459 the NSW Court of Appeal determined in circumstances where a worker had been awarded lump sum compensation in 1996 for binaural hearing loss, a further claim for binaural hearing loss made on or after 19 June 2012 was defeated by section 66(1A). However Section 66(1A) would not preclude a claim for a further loss of hearing post-dating the prior claim being a further injury.

The WorkCover Regulation referred to above advised the Court of Appeal's determination in *Sukkar* is to be limited to industrial deafness claims and other disease injury claims, whilst acknowledging the law in this area is not settled.

Claims for additional lump sum compensation made after 19 June 2012 are prima facie caught by the amendments and the provisions of Section 66(1A). However the recent decision of Senior Arbitrator Snell in *Rebecca Robin-True v Stella Maris College* [2015] NSWWCC 179 indicates that in circumstances where the parties resolve the initial claim for permanent impairment compensation by entering into a Complying Agreement pursuant to Section 66A of the 1987 Act, a worker may be able to make a claim for additional compensation under Section 66.

Rebecca Robin-True was employed as a teacher by Stella Maris College. She suffered injury on 17 August 2009 to her right knee. She thereafter underwent a number of surgical procedures and manipulations of her right knee under anaesthetic.

Based on medical evidence Mrs Robin-True suffered 12% whole person impairment resulting from the injury the parties entered into a Complying Agreement pursuant to Section 66A dated 17 January 2013 which provided for payment of compensation in respect of 12% whole person impairment.

Mrs Robin-True subsequently underwent a total right knee replacement on 13 September 2013. She made a claim for further compensation for additional whole person impairment based on Section 66A(3)(a) and (c) of the 1987 Act. This section provides the Commission may award compensation additional to compensation paid pursuant to a Complying Agreement if it is established the agreed degree of permanent impairment was manifestly too low or since the agreement was entered into there has been an increase in the degree of permanent impairment beyond that so agreed.

The College's insurer denied liability for the claim based on Section 66(1A) as the additional compensation sought was a claim for additional compensation under Section 66 and she had already made one claim for that compensation.

Much argument centred on whether it was necessary to formally make a "claim" in respect of the further permanent impairment compensation sought. The Senior Arbitrator determined that it was necessary to make a formal claim in respect of the further permanent impairment compensation claimed.

With respect to the inconsistencies between Section 66(1A) and Section 66A(3) the Senior Arbitrator observed that Section 66(1A) on its face would prevent a worker making a claim for additional compensation under Section 66A(3). After considering the main authorities relating to statutory interpretation the Senior Arbitrator observed that the 2012 Amending Act inserted Section 66(1A) into the 1987 Act and also contained various amendments to Section 66A including to Section 66A(3). He found this was consistent with an intention by the legislature that Section 66A(3) should have continued operation unrestrained by the provisions of Section 66(1A).

Even if this construction could lead to an unjust result in that two potential sets of claimants would be treated differently, the Senior Arbitrator felt there were reasons this may be appropriate. The circumstances contemplated by sub-section 66A(3)(a) and (b) would be unlikely to have application to a group of claimants

whose initial entitlement was awarded after assessment by an AMS.

With regards to Section 66A(3) the Senior Arbitrator noted it dealt not only with circumstances in which there had been an increase in the degree of permanent impairment beyond that previously agreed, it also dealt with circumstances where a worker had entered into a Complying Agreement for a degree of permanent impairment which is "manifestly too low". The section also dealt with circumstances where a worker had entered into a Complying Agreement "as a result of fraud or misrepresentation".

In relation to the circumstances of the particular claim under consideration the Senior Arbitrator noted there was no evidence to suggest the agreed permanent impairment in the initial Complying Agreement was manifestly too low at that time. Mrs Robin-True had thereafter undergone a total right knee replacement and the Senior Arbitrator was satisfied there had been an increase in the degree of whole person impairment within the meaning of Section 66A(3)(c). He therefore remitted the matter to the Registrar for referral to an Approved Medical Specialist to assess whole person impairment of the right lower extremity resulting from the original injury.

It remains to be seen whether the insurer accepts the Senior Arbitrator's determination or seeks to have the matter reviewed at Presidential level on the basis there is an error in the Senior Arbitrator's reasoning.

If the determination of the Senior Arbitrator is not challenged we foresee a rush of claims seeking to revisit compensation agreed to be paid by Complying Agreements particularly in circumstances where there has been further treatment resulting in an increase in the degree of permanent impairment previously agreed in respect of claims made after 19 June 2012.

Careful consideration will be required by insurers as to whether to proceed to resolve claims by way of Complying Agreements as opposed to assessment of permanent impairment by Approved Medical Specialists to secure the benefit of the restriction from further claims provided by Section 66(1A).

The world of lump sum compensation following the 2012 changes to the workers compensation scheme continues to evolve.

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Another nail in the coffin of estoppel by agreement

In contentious proceedings before the Workers Compensation Commission the legal advisors for the parties often reach agreement to resolve a claim on a compromise basis with payment of limited compensation supported by "agreed facts and admissions" which purport to restrict a worker's entitlement to make further claims on the basis they have recovered from the effects of the injury.

In the recent Presidential determination of *Q. v Z. [2015] NSWWCCPD 25.* Acting President O'Grady overturned the arbitrator's original decision upholding an estoppel argument in such circumstances by adopting the line of authority in a number of recent decisions more clearly delineating the matters which an arbitrator can determine and those matters which are for determination by an AMS.

Q (the worker) alleged she sustained a psychological injury as a result of bullying and harassment in the course of her employment as a teacher at a school conducted by Z (the employer). Q made a claim for weekly compensation due to her resultant incapacity.

The claim was declined and in proceedings before the Commission in August 2013 Consent Orders were entered with the employer agreeing to pay a closed period of weekly compensation and medical expenses. The Consent Orders included an Award for the Respondent (employer) in respect of all ongoing claims for weekly compensation and medical expenses.

Consent findings were also noted as follows:

> *"Since 14 August 2013 Q had fully recovered from the effects of any work related psychological injury or condition.*
>
> *Upon receipt of the agreed compensation Q had received all her workers compensation entitlements."*

Subsequently in February 2014 Q made a claim against Z in respect of lump sum compensation pursuant to Sections 66 and Section 67 of the *Workers Compensation Act* 1987. In a Section 74 declinature Notice the insurer relied upon the consent findings in the earlier proceedings asserting that Q was estopped from denying she had not recovered from the effects of the injury by 14 August 2013.

At first instance, the arbitrator upheld the declinature and entered an Award in favour of Z in respect of the claim for lump sum compensation.

The matter proceeded on appeal before Acting President Kevin O'Grady. The Acting President

observed that Z had failed to acknowledge two matters of relevance. The first being the consent finding purported to impliedly determine that there is no whole person impairment and secondly that no medical dispute as to whole person impairment existed.

The statutory scheme establishes that it is for the Commission to determine whether a worker has suffered an injury within the meaning of Section 4 of the *Workers Compensation Act 1987* and whether there were any disentitling provisions such that compensation is not payable in respect of the injury. The Commission's jurisdiction is subject to the restriction contained in Section 65(3) which precludes the Commission from awarding permanent impairment compensation if there is a dispute about the degree of impairment unless the degree of impairment has been assessed by an approved medical specialist.

Consequently, Acting President O'Grady was of the opinion that it was not open for an arbitrator, even by consent, to make a finding which by inference determined that no whole person impairment resulted from the injury suffered by Q. Consequently, the initial arbitrator's finding concerning the force and effect of the original arbitrator's consent finding was made in error. On that basis, the determination that the consent finding created an issue of estoppel was also made in error.

The Acting President also commented that the agreement which purported to provide for the worker's relinquishment of her rights was defeated by the operation of Section 234 of the *Workers Compensation Act* 1987 which prohibits contracting out of the Act.

Accordingly, the matter was remitted to the Registrar for referral to an approved medical specialist for assessment of whole person impairment.

Whilst each case will turn on its facts and the nature and extent of the "agreed facts", the Commission is demonstrating a distinct reluctance to support any extinguishment of a worker's ongoing entitlement to further benefits other than by a binding determination of an arbitrator or an AMS.

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CTP ROUNDUP

Reckless activities and contributory negligence of children

The NSW Court of Appeal was recently required to determine the level of negligence of a 12 year old boy as compared to a parent. Liam Schoupp was a 12 year old boy who suffered a serious brain injury whilst attempting to "skitch" a ride up a hill on his skateboard by holding on the boot of a parent's car.

Alfonse Verryt was driving when his son, who was a good friend of a number of other boys, was sitting in the front seat of his car and noticed a group of his friends riding their skateboards. Mr Verryt stopped and was persuaded by the boys, other than Liam, to "skitch a ride" up the hill. "Skitching" involves holding onto the back of a vehicle whilst standing on a skateboard and being towed. Liam and the other boys held onto the vehicle and Verryt drove off at a speed of no more than 10-15 kph. Liam was not wearing a protective helmet.

After the car had travelled a couple of hundred metres up the hill, Liam started to wobble on his skateboard and he let go of the vehicle. He then fell backwards, striking his head on the bitumen surface of the roadway and suffered serious fractures and contusions to the frontal lobes of his brain.

The trial judge found Verryt 100% liable for Liam's injuries and ordered him to pay damages of $2,204,150. Liam's lack of care was totally eclipsed and overshadowed by the overwhelming negligence of Verryt. On that basis it was just and equitable that Verryt bear 100% of responsibility for the occurrence of the accident.

Verryt appealed the primary judge's findings on two grounds. The first ground was whether the primary judge erred in including an amount of $200,000 in the assessment of damages for future economic loss as a buffer for a loss of chance to earn an income from being self employed as a qualified carpenter and secondly, on the basis there had been no reduction for the contributory negligence of Liam. In particular, Verryt argued that the finding he was overwhelmingly culpable was not justified by the evidence and that the primary judge erred in not finding at the time of the accident Liam appreciated that "skitching" was dangerous.

The Court of Appeal noted Liam had given evidence in the trial at first instance about an earlier occasion when he had been towed on his skateboard. On that basis

Liam had an understanding before the accident that the activity involved danger. Accordingly, the primary judge's finding that there was no evidence as to Liam's understanding of the danger was incorrect and the Court of Appeal determined it should reassess apportionment.

Nevertheless, the Court of Appeal determined that Mr Verryt, as both an adult and driver of the vehicle, appreciated that "skitching" involved significant risks of injury and was in a position to prevent the activity. Mr Verryt simply should not have allowed it to occur. Nevertheless, whilst the Court of Appeal held Mr Verryt should bear the most significant responsibility for the injuries suffered by Liam, the Court of Appeal found it was just and equitable that Liam bear a small proportion of the responsibility by reducing his damages by 10% for contributory negligence.

With regards to the future economic loss buffer, the Court of Appeal determined this was manifestly excessive on the evidence and reduced the allowance from $200,000 to $25,000.

The Court of Appeal made specific comments with regards to the admissibility of the evidence of Professor Quadrio. Professor Quadrio had provided an opinion as to the behaviour of a 12 year old boy. The Court of Appeal found the evidence and views of Professor Quadrio addressed matters of ordinary human experience and were not based on a specialised knowledge for which she was an expert by reason of her training, study or experience. Reliance on such evidence did not satisfy the requirements of expert evidence under the Evidence Act and was likely to incur unnecessary costs and delays in bringing a case to trial. These problems were compounded if an inadmissible report found its way into evidence and generated equally inadmissible reports in reply or extensive cross examination of the witness expressing the opinion. The Court of Appeal noted cases could and should be resolved justly and speedily without reliance on expert evidence of dubious utility.

The decision is a reminder that children of tender years have a different perception of risks to adults. A 12 year old in particular, is optimistic and may be oblivious to the real and ever present prospect of suffering an injury in an accident. On that basis, despite the danger of an activity, a Court is likely to be reluctant to significantly reduce damages recoverable by a child of tender years for the child's contributory negligence.

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Judicial Review of CARS Assessment – lack of adequate reasons

A judicial review involves a consideration of natural justice and procedural fairness. Often judicial reviews involve allegations of denial of procedural fairness and a failure to give adequate reasons for decisions. One such decision is the recent decision of *IAG Limited t/as NRMA Insurance Limited v Zahed*.

Courts when undertaking a judicial review will not venture into an analysis of the merits of the decision that is being reviewed.

The *Motor Accidents Compensation Act 1999* (the "Act") created the Claims Assessment & Resolution Service ("CARS") and provided that a claimant is not entitled to commence Court proceedings in respect of a claim unless a certificate had been issued by CARS pursuant to Section 92 or 94 of the Act. The effect of these provisions is that all claims except those exempt pursuant to Section 92 are assessed at CARS.

The decision of a CARS assessor pursuant to Section 94 of the Act is binding on the CTP insurer if liability has been admitted but the decision is not binding on the claimant, who is entitled to commence Court proceedings after the issue of a CARS certificate. This rehearing is not limited to judicial review grounds.

Effectively the only right of challenge that an insurer has to a CARS assessment is an application for judicial review of a decision of CARS.

His Honour Justice Hulme of the Supreme Court of NSW found the CARS assessor did not comply with the requirements of Section 94(5) of the Act or Guideline 18 and accordingly there was an error of law on the face of the record and the assessment was set aside.

Section 94(5) of the Act provides that the claims assessor is to attach a brief statement to the certificate, setting out the assessor's reasons for the assessment.

Clause 18(4) of the Guidelines issued under the Act provides:

> *"18.4 A certificate under Section 94 is to have attached to it a statement of the reasons for the assessment. The Statement of Reasons is to set out as briefly as the circumstances of the assessment permit:*
>
> *18.4.1 the findings on material questions of fact;*

18.4.2 the assessor's understanding of the applicable law if relevant;

18.4.3 the reasoning processes that lead the assessor to the conclusions made; and

18.4.3 in the case of an Assessment Certificate pursuant to Section 94, the assessor must specify and amount of damages and the manner of determining that amount."

Zahed was involved in a rear end collision on 27 October 2010. Zahed experienced lower back pain, neck pain and other symptoms.

On 14 October Assessor Stern assessed damages in an amount of $114,979.45 as follows:

Past treatment -	$16,699.97
Future treatment -	$12,000.00
Past gratuitous care -	$36,280.38
Future commercial care -	$50,000.00.

NRMA, the CTP insurer of the party at fault, lodged a Summons seeking a judicial review to challenge the findings relating to past and future care.

The findings on past gratuitous care was arrived at in consequence of the assessor concluding that Zahed required 6.76 hours per week of gratuitous care from the date of the accident to the date of assessment. $50,000.00 was awarded thereafter by way of a buffer for future care.

During the course of the matter Zahed had been referred to the Medical Assessment Service where she was assessed by Assessor Davidson who dealt with a number of questions in relation to her requirement for care. Assessor Davidson concluded the care she considered reasonably necessary was:

- 6.76 hours per week from 27 October 2010 to 8 November 2011;
- 3 hours per week from 8 November 2011 to 28 June 2013;
- 3 hours per week from the date of the assessment for two years;
- 1 hour per week for two years from the date following the assessment for a maximum of a further three years.

Even though Assessor Stern was not bound by Assessor Davidson's conclusions, Assessor Stern did not provide any reasoning why he determined that Zahed required 6.76 hours per week both past and future, especially in circumstances where Assessor Stern referred to the fact that he was following Assessor Davidson's conclusions.

Five grounds of appeal were put forward by NRMA. Included in those was the ground that the assessor had failed to give adequate reasons for his decision. Reference was made to the requirement for brief reasons contained in Section 94(5) of the Act and Clause 18.4 of the Guidelines.

As Justice Hulme noted:

"The limits on a Court asked to review a decision of a claims assessor have been considered on a number of occasions… to succeed in setting aside an assessor's decision a party must establish jurisdictional error, a constructive failure to exercise jurisdiction or legal unreasonableness…an assessor (must) provide reasons albeit reasons which are brief (and) a failure to provide reasons constitutes an error"

Justice Hulme found:

"The reasons of an assessor should not be scrutinised over zealously and the reasons required are not those which may be expected of a judge. Nevertheless, the fact remains that Assessor Stern revealed no reasoning process and provided no reasoning why he selected the figure of 6.76 hours per week."

Justice Hulme concluded it could be inferred the Assessor simply adopted Assessor Davidson's figure, however provided no reasons why he did so, why he adopted that figure for the whole of the period of past care and why he rejected Assessor Davidson's view that the figure should be reduced to three hours per week for some of that time.

Accordingly, His Honour Justice Hulme found that Assessor Stern did not comply with the requirements of Section 94(5) or Guideline 18 and therefore was an error on the face of the record and the assessment was set aside.

As was noted by Justice Hulme it is not enough to refer to some or all of the relevant evidence, it has to be taken into account and then the conclusion must be stated.

The matter has now been referred back to CARS before another assessor to again determine damages again.

Judicial reviews are an increasingly relevant area in the personal injury arena. As personal injury law moves into the administrative arena we will see that challenges to administrative decisions by judicial review forms part of the arsenal of weapons available to those that are not satisfied with an administrative determination.

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