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Personal Injury Claims and Road Authority Defences – What is a public road?

The question of what is and isn't a public road is a critical one when it comes to assessing the liability of roads authorities.

When the *Civil Liability Act* 2002 came into effect it introduced a number of statutory defences for public and roads authorities. The defences included a special nonfeasance protection that was introduced in Section 45 of the Act. Section 45 of the Act provides that a roads authority is not liable in proceedings for a failure to carry out roadwork or to consider carrying out roadwork unless at the time of the alleged failure the authority had actual knowledge of the particular risk that resulted in the injury.

In previous decisions such as *North Sydney Council v Roman* (2007) and *Blacktown City Council v Hocking* (2008) and *Angel v Hawkesbury City Council*, the relevant Council was successful in defending the claims relying on the Section 45 defence where the Council did not have actual knowledge of the particular risk. The defence is a powerful one as not only must there be actual knowledge, the knowledge must be that of a person at a decision making level.

However, as a consequence of the operation of section 7 of the *Roads Act* 1993 the defence can only succeed in the case of Local Councils if the road is a public road.

In the recent decision of the New South Wales Court of Appeal in *Cavric v Willoughby City Council*, Willoughby City Council were unsuccessful in their reliance on the section 45 defence as the Council failed in their argument that the accident occurred on a public road.

Despina Cavric was pushing a trolley accompanied by her young child in the Northbridge Plaza car park on 6 June 2011. A front wheel on the trolley hit a pothole which caused the trolley to tilt to one side. Cavric fell heavily as she tried to stop the trolley overturning and injuring her child. Cavric sued the Council and the matter proceeded to hearing in the District Court

before His Honour Judge Elkaim. His Honour Judge Elkaim assessed damages in the sum of $336,337.00 and deducted 15% for contributory negligence. However, the trial judge found that the car park was a public road and as the Council had no actual knowledge of the pothole it could rely on the defence in Section 45 of the *Civil Liability Act 2002*.

Cavric therefore failed to establish liability.

Cavric appealed. In her appeal Cavric contended that the Council was not entitled to rely on Section 45 as the area where she fell was not a public road.

Quantum was not the subject of the appeal. The issue before the Court of Appeal was simply whether or not the car park could be classified as a public road.

The evidence before the Court established that the land had been transferred to the Council in October 1962 for a nominal sum from The Neighbourhood Centres Pty Limited. Although the specific land was not identified, the parties to the proceedings accepted that the land where the accident occurred was part of this land. The land was subject to a covenant that it not be used "for any purpose other than Public Car Parking and a Public Baby Health Centre".

The Court of Appeal noted that there are a number of ways that a road can be "declared to be" a public road. Part 2 of the *Roads Act* 1993 provides that a road can be opened by registration of a plan of subdivision, publication of a notice in the Gazette or by the Governor designating the land as a public road. There was no evidence in this particular case that this had been done. This meant that the only way that the Council could establish that the road was a public road was through reliance on Section 249 of the *Roads Act* 1993 which provides that:

> *"(1) Evidence that a place is or forms part of a thoroughfare in the nature of a road, and is so used by the public, is admissible in any legal proceedings and is evidence that the place is or forms part of a public road.*
> *(2) This section is subject to section 178 of the Conveyancing Act 1919 (No way by user against Crown etc)."*

The leading judgment was that of Justice Basten who referred to the decision of McHugh JA in Newington v Windeyer in which his Honour stated:

> *"At common law the making of a public road required the fulfilment of two conditions: an intention to dedicate the land as a public road and an acceptance by the public of the proffered dedication. The dedication could be made expressly or be inferred from the conduct of the owner. The lodging of a plan of subdivision in a Land Titles Office, showing a road as an open street and giving access to subdivided lots, is evidence from which an inference of dedication as a public road can be drawn ... Dedication to the public may also be presumed from uninterrupted user of the road by the public ... but care must be taken to distinguish evidence of user, from which dedication can probably be inferred, from mere evidence of continual use even for a very long period. At common law, continual trespassing could not create a public road. The evidence must raise the inference that, at some point of time, the owner dedicated the road to the public."*

The Council tried to argue in this case that the area was used by the public and therefore the carpark was a road and was a public one.

His Honour Justice Basten stated:

> *"To the extent the Council relied on public use of the land, the evidence was limited, in effect, to the proposition that the area was part of a thoroughfare which allowed members of the public to pass from one street (Harden Street) to another (Eastern Valley Way). No doubt people did so, both on foot and in vehicles. However, to accept that this might constitute evidence of the area being part of a "public road", without more, would be to give Section 249 an operation which it does not have, namely fixing the criteria by which an area becomes a public road. There being no other evidence supporting the establishment of the place where the accident occurred as a public road, the trial judge should have found that its status was not established, with a result that the Council was not a roads authority with respect to that area and thus not entitled to rely on Section 45 of the Civil Liability Act 2002."*

The Court of Appeal also considered the operation of Section 178 of the *Conveyancing Act 1919* which provides that:

> *"No way by user against Crown etc, no dedication or grant of a wage shall be presumed or allowed to be asserted or established as against:*
> *(a) the Crown; or*
> *(b) persons holding lands in trust for any public purposes, by reason only of user, and this whether in proceedings instituted by or on behalf of the Crown or not, and whether such user commenced before or after the eighteenth day of October, 1861 (being the day of the commencement of the Crown Lands Alienation Act of 1861)."*

The Court of Appeal noted that Council fell within the terms of paragraph (b) of that provision.

In this regard Justice Basten stated:

> *"Accepting that the Council fell within the terms of par (b), as it clearly did with respect to the car park, the appellant contended, that the section "repels any doctrine of presumption of dedication of a public road", adopting language used by this Court in Williams v State Transit Authority of NSW. That provision is not necessarily inconsistent with Section 249 of the Roads Act, as Section 249 itself*

recognises. It is possible that use as a road may, in combination with other evidence, form a basis for an inference that steps have been taken to make the place a public road, as explained by Heydon JA in Ashfield Municipal Council v Roads & Traffic Authority of NSW. On the other hand, such cases are likely to be rare. Further, whilst a dedication and acceptance may have been available to constitute a public road under common law prior to 1906 that would only arise in cases like Newington where the land was not held in trust for public purposes. Section 178 is decisive in the present case, where the only evidence of a place being a public road is use by members of the public."

So what was the end result?

In order for Council to successfully defend the claim they had to establish that the road was a public road. If they did, the section 45 defence would succeed. However, Council did not establish that the car park was a public road and therefore was not entitled to rely on the defence in Section 45 of the legislation.

Cavric was therefore successful.

This particular decision depends very much on its facts. It is unusual for an accident to occur on an area where the legal status of the land, that is, whether or not it is a public road, is subject to debate. However, the case raises concerns for Councils that have benefitted from gifts of land and have created car parks on that land or have used the Council's land as car parks. In the absence of appropriate documents designating the land as a "road" there is a risk the land is not in fact a road and the section 45 defence will not apply to accidents in those car parks.

No doubt this was an expensive outing for the Council who will now be obliged to undertake inspections of the car park and implement a maintenance regime to make sure there are no other potholes waiting for an accident to happen.

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A Bowling Club, an Assault and No Responsibility for the Licensee

A licensee's life is not an easy one however not all skirmishes in a hotel result in a viable claim against the licensee. Whilst operators of licensed premises have a duty of care to their patrons, that duty of care does not extend to ensuring that they patrons are not exposed to the risk of harm from unruly patrons in all situations.

In *Tilden v Gregg* the NSW Court of Appeal was called on to consider a claim brought by Tilden who was injured in a fracas in a Club. Tilden was assaulted at the Ettalong Memorial Bowling and brought proceedings claiming damages against Gregg and the Club.

Gregg was not represented at the trial and a summary judgment was obtained against him. North DCJ, the trial judge, dismissed the claim against the Club finding that it had not breached its duty of care as it was not established that but for the alleged negligence of the Club the injury would not have occurred. An appeal followed.

Gregg was a member of the Club and its darts club. At some point in time in 2001 there was a dispute involving the loss of funds raised by a darts club raffle and as a consequence of that dispute Gregg developed significant animosity towards Tilden and over time had made verbal threats towards him.

One Saturday night when there were approximately 30 patrons in the Club Tilden was assaulted by Gregg.

The staff on duty included a duty manager, a security officer and bar and general duties staff. The configuration of the drinking lounge was such that the staff in the lounge could not see patrons seated at tables in the outside "old smoking area" and there were no CCTV cameras in that area.

The Club had procedures in place for monitoring the behaviour of patrons. In addition to bar attendants there were two general duties staff, one looking after the internal area and the other looking after the external and gaming areas. All staff were required to advise the duty manager of any incidents suggesting intoxication or quarrelsome behaviour.

Tilden argued that the Club owed him a duty to prevent injury to him from violent quarrelsome or disorderly conduct of persons who had been allowed to enter the Club. It was said that this obligation required the duty manager and security officers to keep an eye on Mr Gregg.

The prelude to the assault was unremarkable. Gregg and Tilden were seated at separate tables in the outside area. Each had consumed alcohol. After a period of sporadic verbal abuse Gregg assaulted Tilden.

The Club denied that Gregg had a previous history of violent behaviour, criminal convictions for violent behaviour or had demonstrated violent behaviour at the Club in the past.

The Court of Appeal noted that:

"a plaintiff must establish on the balance of probabilities that but for the defendant's negligence the harm suffered would not have occurred. Tilden argued that factual causation had been made out in two ways. He argued that had the frequency of inspections or walk throughs by staff been increased it was likely that the club staff would have detected Gregg's abusive behaviour before the assault and on

encountering that behaviour it would also have taken steps to eject Gregg. Secondly, with an increased presence of staff and/or presence of a CCT camera there would have been a deterrent making it less likely that Greg would have assaulted Tilden."

That argument had been rejected by the trial judge.

The Court of Appeal noted Tilden had to establish that but for the act of negligence of the Club the risk of harm would not have eventuated.

The Court of Appeal noted:

"If there had been more frequent walk throughs the duty manager or security officer would not have seen or heard any more than was seen or heard by Tilden and Mr Murphy (a friend drinking with Tilden). On their evidence that would not have resulted in either concluding that it was necessary to head off trouble by ejecting Mr Gregg. At its highest Tilden's case was that those inspections might have resulted in one of the staff intervening. That is not sufficient. ... Nor is it likely that the presence of a CCTV camera would have prevented the exchange which occurred or Mr Gregg from assaulting Tilden. Again, at its highest all that can be said is that the camera might have deterred such conduct. However it is more likely that it would not have."

The behaviour of Gregg was not such that it would have alerted the Club that it should eject Gregg and further the behaviour of Gregg may not have been detected with more frequent walk throughs.

At the end of the day Tilden failed to establish that negligence of the Club was the cause of his injuries.

CCTV cameras and additional staff are not an absolute answer for troublesome patrons. In the absence of behaviour that alerts the licensee to intoxicated or quarrelsome behaviour, patrons injured in a fracas will be confronted with evidentiary difficulties as they will need to demonstrate that their injuries would not have occurred but for the negligence of the occupier of the licensed premises. CCTV cameras, additional staff and security personnel may act as deterrents against unruly behaviour but are not a complete answer. The "but for the negligence" is alive and well in claims brought by patrons injured in fracases in licensed premises.

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Residential Building Subcontractors Targeted in Legislative & Policy Changes

Both Queensland and New South Wales have recently moved to strengthen legislation and policy to ensure that subcontractors in the residential building industry are held more responsible for the Home Building Act provides that warranties are implied in every contract of what to undertake residential building work as follows:

- that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract;
- that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- that the work will be done in accordance with, and will comply with, this or any other law;
- that the work will be done with due diligence within the time stipulated in the contract, or if no time is stipulated, within a reasonable time;
- that if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling.

Where building work is defective it is likely building actions will succeed against the builder on the basis that the builder has breached the implied statutory warranties. An owner does not need to pursue the subcontractor as the builder is held responsible for all building work undertaken under the contract. As a result builders felt they were a bit hard done by when the defective building work was work undertaken by a subcontractor and the work was not in the builders control or expertise.

As a result of these circumstances the Home Building Amendment Act 2014 introduced changes to section 18B which provides that all subcontracts also contain the implied statutory warranties. The amendment is as follows:

"18B(2) – The statutory warranties implied by this section are not limited to a contract to do residential building work for an owner of land and are also implied in a contract under which a person (the "principal contractor") who is contracted to do residential building work contracts with another person (a "subcontractor" to the principal contractor) for the subcontractor to do the work (or any part of the work) for the principal contractor."

The changes to the Act will ensure builders have the right to pursue subcontractors for a breach of a statutory warranty where the subcontractor is responsible for the defect.

In June 2015 the Queensland Building and Construction Commission also implemented a policy whereby the Commission could enforce stricter guidelines for ensuring subcontractors rectified any defective work for which they were responsible.

The policy, "Accountability for Subcontractor Defects Policy", notes that while the Commission has always had the power to direct subcontractors to rectify defective work, principal contractors have largely been held responsible for ensuring rectification of defective work performed under their supervision. The policy will ensure all licensees are accountable for their performance and will reduce the burden of responsibility on principal contractors.

From 1 June 2015 a subcontractor responsible for defective work must rectify the defective work or face disciplinary action which could result in the suspension or cancellation of their license. However this policy does not alter or negate a principal contractor's responsibility to properly supervise all building work completed under a contract.

The process by which a defective work directive is now issued by the Commission and is as follows:

- Where a complaint is made by a consumer or a contractor to the Commission about defective building work, the Commission will assess and deal with the complaint in line with the Commission's Rectification of Building Work Policy;
- The Commission will attend a site as part of its processes to establish whether there is in fact defective building work requiring rectification by the principal contractor and/or subcontractor(s). In the event that the subcontractor is found responsible for the defects then the following process occurs:
- Where the subcontractor agrees to rectify the defective work, the Commission will monitor the case to ensure the defective work is satisfactorily rectified;
- Where a principal contractor agrees with the Commission that there is defective building work, and the principal contractor is having difficulty getting the relevant subcontractor(s) back to rectify, then the Commission will issue a Direction to Rectify to the relevant subcontractor(s), as well as the principal contractor, requiring them to return and rectify the defects;
- If the subcontractor(s) and/or principal contractor complies with the Direction to Rectify, the Direction to Rectify will not appear on their public record;
- Should the subcontractor(s) fail to comply with the Direction issued to them, the Commission will undertake disciplinary action against the subcontractor(s) which may lead to suspension or cancellation of their licence;
- Where the subcontractor(s) fails to comply with the Direction issued to them to rectify defects, the principal contractor will be required to either rectify the defect themselves or have another subcontractor do that work at the principal contractor's cost.

While these changes provide some relief for builders the builder is still ultimately responsible for rectification of the defective building work.

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More About Road Authority Defences Under The Civil Liability Act

It is a well established principle that pursuant to Part 5 of the Civil Liability Act 2002 (NSW) ("the Act"), statutory authorities are offered a unique kind of protection from the principles of negligence, distinguishing their culpability from that of standard tortfeasors. In particular, Section 43A(3) of the Act provides the following:

> *"…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 extent of that protection was recently considered by the Court of Appeal in the case of *Roads & Maritime Services v Grant [2015] NSWCA 138.*

On New Years' Day in 2009 at approximately 12:30am, Mr Grant was riding his motorcycle with a friend along Longueville Road, Lane Cove into the city, after having watched a fireworks display. Mr Grant alleged that as he proceeded into a right hand turn onto Epping Road, he collided with a median strip that divided traffic on Epping Road, lost control of his motorcycle, and struck a pedestrian barrier on the side of the road. As a result, Mr Grant suffered a number of serious injuries including the loss of his left leg.

The median strip and pedestrian barrier had been designed and built by or on behalf of Roads & Maritime Services (formerly known as the Roads & Traffic Authority and referred to hereafter as "RMS").

At first instance, Mr Grant brought proceedings before the Supreme Court of NSW against RMS. It was alleged that the placement of the median strip in itself, and also without any appropriate warning sign, was negligent.

RMS denied any liability, relying on Section 43A of the Act.

Justice Rothman acknowledged the joint traffic accident expert report tendered in the proceedings, in which both experts had agreed that there were "features of the intersection and associated lighting

that created a reasonably foreseeable risk" – although they disagreed on the level and significance of that risk.

Mr Schnerring, traffic accident expert qualified by the Mr Grant's solicitors, concluded that on the balance of probabilities Mr Grant had collided with the median strip prior to colliding with the pedestrian barrier. Mr McDonald, qualified by the defendant's solicitors, disagreed. There was no physical evidence at the median strip and no witness testimony to confirm the mechanism of the accident.

Significantly, both experts did conclude that "the subject median nose should have been signed with a 'Keep Left' sign" on the median strip" particularly in circumstances where there was a "median nose… combined with both a horizontal and vertical curve, without visibility".

Justice Rothman considered that the responsibility of RMS to place signs on public roads was no different in substance to the right of members of the public to place signs on their own property. His Honour concluded that RMS was therefore not exercising a "special statutory power" so that there was no entitlement to rely on Section 43A.

His Honour also found that the second hurdle in subsection (3) of Section 43A had not been met so as to activate the Section 43A protection. Applying the test discussed by the NSW Court of Appeal in *Patsalis v State of New South Wales [2012] NSWCA 307*, Justice Rothman considered that the failure of RMS to erect the warning sign to 'Keep Left' was "manifestly unreasonable", so as to meet the test of 'unreasonableness' as referred to in Section 43A, for the following reasons:

- The failure to act concerned a "significant risk" to road users, being that a motorist could collide with the median strip;
- There was a high probability that the risk could cause serious harm, necessitating that the risk be "avoided or ameliorated";
- The risks of a "median nose… combined with both a horizontal and vertical curve, without visibility" were known and documented (in the RMS Guidelines and Traffic Standards);
- The steps that could be taken to avoid or ameliorate the risk were also known and documented (in the RMS Guidelines and Traffic Standards) and the costs of ameliorating the risk were insignificant – being the installation of a 'Keep Left' sign;
- The experts agreed that step should have been taken;
- RMS had no reason to not take the step.

Justice Rothman consequently found for Mr Grant. There was a reduction on the basis of a finding of contributory negligence in the order of 30%, as the evidence suggested Mr Grant had been travelling "at least" 20km/h over the speed limit.

There were 3 main issues on appeal; whether the plaintiff had established negligence, whether the negligence caused the loss and whether the Section 43A defence was available and applied.

Overall, their Honours found that Justice Rothman in the first instance had erred in preferring Mr Schnerring's opinion over Mr McDonald's. Both Basten JA (McColl JA agreeing) and Emmett JA preferred Mr McDonald's conclusions, specifically his comments that the failure by RMS to install a 'Keep Left' sign at the median strip was not in contravention of the RMS Guidelines. It was noted by Basten JA (McColl JA agreeing) that despite his conclusion in the joint expert report, Mr Schnerring had conceded under cross-examination that there were "many instances" where a median strip such as the one located at the accident scene would not be marked with a 'Keep Left' sign.

In circumstances where Mr Grant had been travelling at least 20 km/h over the speed limit, their Honours also found that they could not determine to the standard of proof required, being on the balance of probabilities, whether the absence of a 'Keep Left' sign was in fact the cause of the accident. It also could not be established on the balance of probabilities that Mr Grant had collided with the median strip at all prior to colliding with the pedestrian barrier, in the absence of physical evidence at the scene, and witness testimony.

Most significantly, their Honours noted that the conclusions in the joint expert report were not sufficient to establish that RMS should have installed a 'Keep Left' sign, or that the failure to do so amounted to negligence. As noted by Emmett JA:

> *"The absence of evidence of prior incidents involving the nose of the median strip, and the presence of a median strip all the way along the roadway prior to the intersection, indicates that there can be no real doubt that it would be readily apparent, under normally encountered conditions, that drivers proceeding east from Epping Road through the intersection to Longueville Road should keep left of the median strip and the pedestrian barrier. That is to say, there could be no doubt for any user of the roadway that vehicles should keep left of the median strip and pedestrian barrier."*

The Court of Appeal found that RMS had not been negligent and further that Grant did not establish that any failure on the part of RMS to take reasonable care caused the accident.

Those findings were enough for the Court of Appeal to overturn the primary judgment but that was not the end of the matter.

Justices McColl, Basten and Emmett considered the application of Section 43A of the Act by reference

firstly to whether the installation of a 'Keep Left' sign was a "special statutory power", pursuant to Section 43A. Basten JA (McColl agreeing) noted that "designing, constructing and maintaining the intersection" at the accident site was an exercise of a special statutory power, pursuant to the recent decision of *Curtis v Harden Shire Council [2014] NSWCA 314*.

It was therefore necessary to consider the defence available under section 43A of the Act. Basten JA in his judgment provided an instructive summary of elements to the test noting:

> *"There are, three separate elements to the test which need to be identified. First, the requisite assessment of unreasonableness is to be made by an hypothetical reasonable public authority: while the court must make the assessment, it must do so by reference to the approach properly taken by such an authority. The significance of that element is that the exercise must be undertaken having regard to the limits beyond which a person (such as an authority) having necessary expertise in traffic engineering would not step.*
>
> *Secondly, the test is formulated in the negative. By contrast with s 5B(1)(c) of the Civil Liability Act, it is not satisfied by evidence of what a reasonable traffic engineer would have done as a precaution against an identified risk. Rather, it is only satisfied by proof that no traffic engineer acting reasonably would have failed to take the precaution identified by the plaintiff. That is, accepting that there will be a range of views amongst reasonable traffic engineers, the omission must be such that no person with the requisite expertise could properly consider the omission to be reasonable. The fact that a high threshold is being prescribed is revealed by the double negative, "so unreasonable that no authority ...".*
>
> *Thirdly, the section reformulates the standard by which a breach of duty is to be judged. Once the section is engaged, the plaintiff will have to establish negligence beyond the statutory threshold in order to succeed."*

Applying those tests the Court of Appeal concluded the relevant evidence demonstrated that Grant failed on any view to establish that no traffic engineer acting reasonably would have failed to take the precaution identified by the Grant.

Accordingly, RMS was entitled to the protection of section 43A.

Clearly, whilst expert traffic reconstruction reports are useful "in aspects of the case" they are not admissible as conclusive statements of whether a statutory authority, or indeed any tortfeasor, has failed to take reasonable care. In particular, it must be remembered that the protection offered to statutory authorities by Section 43A means that establishing negligence is a high hurdle to meet, where the standard is that of "manifestly unreasonable".

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Building Licence Applications - Tribunal Upsets Fair Trading's Apple Cart

The *Home Building Act 1989* (the "Act") provides the legislative regime for the provision of endorsed contractor licences to individuals seeking to obtain a builders licence for work in the residential building industry in New South Wales. The Act is supported by the *Home Building Regulation 2014* (the "Regulation") and provision is also made in the Act and Regulation for the Commissioner of Fair Trading to makes rules ("Rules") in relation to the particulars required in an application for a builders licence. The Rules are gazetted by the Commissioner in legislative Instruments. The Rules provide a list of the qualifications and experience that applicants require before a builders licence will be granted.

The Rules for qualifications are self evident in that you must have a particular qualification or you cannot get a licence. The qualifications range from a Certificate IV in Building & Construction upwards including relevant building diplomas or degrees. It became mandatory for applicants to hold a relevant qualification in 2006. Prior to 2006 an applicant could obtain a builders licence if they could show that they had 20 years relevant experience in the building industry.

While the requirements for qualifications are fairly straightforward there has been some confusion for applicants as to the definition of experience. The Act and the Regulation are largely silent on the type or range of experience required other than providing minimum age limits, capacity and financial viability criteria. Applicants must therefore rely on what the Commissioner determines is the experience required and/or the general information regarding experience contained in documents Fair Trading has produced for licence applications and which are available from Fair Trading and on their website. Fair Trading is the statutory authority charged with determining licence applications.

Several Instruments have defined experience. In April 2012 the Commissioner determined that an applicant must have been for a period of two years a:

> *"bona fide employee who has been paid during the relevant period of employment in accordance with an award or enterprise agreement.."*

The Instrument in force from 12 July 2013 to 9 January 2015 provided a broad definition for experience as:

> "*Experience" means experience gained by the applicant as:*

(a) An employee of: or

(b) A person otherwise lawfully engaged by the holder of a contractor licence authorising the holder to do a class of residential building work in which the experience was gained ("the Work"), where during the relevant period, the applicant was:

(c) Supervised and directed in the doing of the Work by the holder of an endorsed contractor licence or supervisor certificate authorising its holder to supervise the Work; and

(d) Financially remunerated for the Work."

The limited definition of experience as provided in the Instruments meant that Fair Trading determined the finer details of what they considered relevant experience should be. The fact that an applicant must gain experience under the supervision of an endorsed contractor licence is clearly evident and this point has not been largely challenged. However based on the definition in the above Instruments Fair Trading appeared to maintain the position that experience could only be obtained if the applicant had been employed by the endorsed licence holder while gaining their experience.

For a more in depth definition of experience, applicants are referred by Fair Trading to a 'Note To Applicants' on the Fair Trading website where experience is defined as:

"Requirements for practical experience in a wide range of building construction work may include but is not limited to:

Experience that demonstrates the ability or capacity to competently project manage residential building work onsite in accordance with the Building Code of Australia, including dealing effectively with subcontractors, consumers and other parties. ... Experience predominantly in singular trade work will not meet the experience requirements. Applicants should demonstrate experience across all stages of construction to satisfy that they have capacity to do, coordinate and supervise general building work in the construction of a residential dwelling."

Applicants are required to submit with their application a Referee's Statement, which the supervising endorsed contractor is required to complete in support of the applicants experience. The Referee's Statement contains further definitions as to the type of experience required. This includes but is not limited to:

- applying building codes and standards to the construction process in accordance with the Building Code of Australia;
- dealing effectively with subcontractors, consumers and other parties;
- reading and interpreting plans and specifications;
- planning building or construction projects and the work;
- organising site surveys and set out procedures to building and construction projects;
- applying structural principles to residential constructions; conducting onsite supervision of building and construction projects;
- applying legal requirements to building and construction projects; and
- managing occupational health and safety in a building and construction workplace.

Based on the above definitions of experience, other clues scattered throughout the Fair Trading website and general observations from review of appeal matters and letters of refusal, there are several reasons why Fair Trading assessors are refusing licence applications. They include:

- the experience was gained while working for a builder who was contracting to an owner builder;
- the applicant was not employed but was a subcontractor;
- the applicant was not financially remunerated properly;
- the applicant was not licensed in any other category of building and was working on a subcontract basis, therefore they were contracting while unlicensed;
- the applicant did not have enough of a wide range of experience of different types of trades, for example they must have been experienced in construction from start to finish of a project;
- their experience was on commercial work;
- the site at which the applicant gained their experience must have had a development application granted;
- experience undertaken at a site where there was a development application could only be counted when construction started after the development application was approved;
- demolition did not count towards experience; and
- the endorsed licence holder was not on site supervising enough.

Appeals against Fair Trading decisions on licence applications go to the Administrative Appeal division of the New South Wales Civil and Administrative Tribunal (the "Tribunal"). The issue as to whether experience can be gained while a subcontractor came to a head in the matter of *Tange v NSW Fair Trading [2013] NSW ADT 201* ("Tange"). Judicial Member Montgomery was satisfied that experience could be gained while working as a subcontractor and adjourned an initial hearing to send Fair Trading away to determine their position as

to whether experience could be gained as a subcontractor. Fair Trading returned stating that it could.

It appears that as a result of this and similar determinations the Commissioner created another Instrument effective from 5 January 2015 which includes a provision that the holder of an endorsed licence can gain experience contracting to the holder of an endorsed builder's licence. Fair Trading licence application forms were also amended to state that experience gained while subcontracting was valid experience, primarily however as a carpenter or bricklayer. Arguably this was a commonsense approach due to the fact that the residential building industry in New South Wales is a predominantly contractor based industry.

Fair Trading licence application assessors however still appear to be reluctant to consider work as a subcontractor as valid experience. This is evident in *Hale v Commissioner of Fair Trading [2015] NSWCATOD 1* ("Hale"). While the decision in this matter was handed down in February 2015 the hearings took place in 2014 and the application for review fell under the Rules contained in the 12 July 2013 Instrument.

In *Hale*, Senior Member Isenberg determined that while section 4 and 12 of the Act provide that a person must not contract for residential building work without an endorsed contractor licence, an unlicensed and unqualified person could gain relevant experience under the provisions of section 13 (1) of the Act which states:

> *"(1) an individual must not do any residential building work, except:*
>
> *(a) as the holder of an endorsed contractor licence, a supervisor or tradesperson certificate or an owner builder permit authorising its holder to supervise that work, or*
>
> *(b) under the supervision, and subject to the direction, of the holder of an endorsed contractor licence or supervisor certificate authorising its holder to supervise that work."*

The Member considered that section 13 stood alone and was not confined by section 4 and 12. The primary consideration therefore was that supervision of the applicant was being undertaken by an appropriately licensed supervisor.

Fair Trading have continued to maintain the position that unqualified, unlicensed individuals should not be granted licences however the *Hale* decision has been supported in the subsequent cases of *Sollazzo v Commissioner of Fair Trading* [2015] NSWCATOD 20 ("Sollazzo") and *Shoobridge v Commissioner of Fair Trading* [2015] NSWCATOD 42 ("Shoobridge") and could reasonably be considered the current law on this issue.

The *Hale, Sollazzo* and *Shoobridge* decisions have also upset Fair Trading's apple cart in that the Members have disagreed with Fair Trading determinations on other issues and found that:

- experience can be gained while working with an endorsed contractor who is working for an owner builder;
- experience is not limited to that under an approved development application;
- a wide range of experience does not mean that the applicant has to have had experience in all types of building work;
- the definition of financial remuneration can provide for various types of financial arrangements including fee for work type; and
- commercial work experience can be included if it is similar to that undertaken in residential work.

It remains to be seen how Fair Trading approaches licence applications following these recent decisions however it is arguable that if the decisions are followed determinations on licence applications would be more in line with the realities of the nature of the residential building industry and how participants gain experience.

Potentially the Tribunal's more inclusive approach would see more residential building industry participants seeking to properly organise their business and licensing arrangements to comply with the Act.

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Life insurer defeats claim due to fraudulent misrepresentation and fraudulent non disclosure

Full and frank disclosure of pre-existing injuries and disabilities is a fundamental requirement when arranging life insurance and a failure to disclose information can result in an insurer refusing to pay a claim and avoiding liability under the policy.

The recent decision of the Supreme Court of NSW in *Andrew Hitchens v, Zurich Australia Limited* confirms that an insurer may avoid a policy of life insurance where an intending insured makes fraudulent misrepresentations or a fraudulent non disclosure of material facts prior to entering into the contract of life insurance.

Anthony Hitchens and Zurich entered into two life insurance policies.

One was an Income Replacement Policy under which Zurich agreed to provide income protection cover up to $7,500 per month in the event of sickness or injury.

The other was called “Term Life Insurance Plus” which provided Hitchens and his then partner a lump sum benefit of $1,050,000 in the event of his suffering Total and Permanent Disablement in the event of Total and Permanent Disablement or death of Hitchen.

Hitchens suffered an accident at his home when using a power saw. He severed the second, third and fourth fingers of his right hand and a small section of his right thumb which required partial amputations.

Hitchens claimed that he was totally and permanently disabled as a result of the injury and psychological problems caused by the injury and he was unlikely to ever be able to work in a occupation similar to the one in which he was employed prior to the accident or engage in any other occupation for which he was suited by reference to his education, training and experience.

Hitchens also claimed that he was prevented from earning his pre-disability income from personal exertion in his usual occupation and was required to be under the regular care of a medical practitioner with regard to treatment for the Sickness or Injury arising from the accident.

Zurich commenced paying Hitchens fortnightly payments but ultimately stopped payments and purportedly avoided both policies on the ground of misrepresentation and non-disclosure.

Hitchens then commenced proceedings against Zurich claiming damages. The quantum of damages sought was $2,934,468 for the loss of benefits under the Income Replacement Policy and $1,276,281 and interest for Total and Permanent Disablement.

Hitchens had completed a proposal form called the “life insurance statement” before arranging the policies and was also examined by a nurse employed by Lifescreen Australia. Hitchens provided medical information to the nurse at the time of the examination.

Following a 14 day trial before White J at the Supreme Court Sydney, his Honour delivered a lengthy judgment which sets out numerous pre-accident injuries and disabilities suffered by Hitchens that were not disclosed in full or at all to Zurich.

These included the following:

- An operation to remove a melanoma from his left calf when he was 14.
- An operation for a groin dissection when he was 19 or 20 to remove lymph nodes because the above cancer had metastasised.
- Ongoing suffering by Hitchens of lymphedema and cellulitis in the left leg.
- A motor vehicle accident on 10 April 1996 when Hitchens was deliberately run over by a work colleague, suffering injuries to his right knee and to his neck and both elbows as well as an impact to the back of his skull. He was diagnosed as also suffering from reactive depression with one psychologist diagnosing acute stress disorder under DSM-IV.
- On 3 May 1996, due to his right knee injury, Hitchens underwent an arthroscopy.
- On 26 June 1996 he was admitted to Mt Wilga Private Hospital for two weeks rehabilitation in respect of his physical injuries.
- In November 1996, Dr Mervyn Cross performed a right knee reconstruction.
- In October 1997, his psychologist reported that he had developed an addiction to his medication including endone and codeine.
- In February/March 1998 he attended the ADAPT pain management program at the Royal North Shore Hospital.
- Following his discharge, the medical evidence revealed that Hitchens was being prescribed endone by numerous medical practices and pharmacies. This included a period of 19 days during November 2000 when he attended five medical clinics, four of which prescribed him endone, two of which with a repeat prescription.

The proposal form was completed by a financial planner who assisted Hitchens and his partner to obtain insurance and who gave evidence that he recalled Hitchens telling him about the MVA in 1996 but that he was given no information regarding Hitchens’ apparent stress and medication needs arising from that incident.

Hitchens signed the form after reviewing all the answers recorded therein. Nothing about the long lasting effects of the MVA was recorded. The financial planner gave evidence that had been told of those effects, he would have recorded them in the proposal form.

The proposal form contained partial answers to some questions which revealed some of the pre-accident medical conditions but not the full extent of them.

Hitchens argued that:

- Zurich was put on notice about pre-existing conditions and his answers were sufficient to alert Zurich to matters which could be investigated by Zurich where deemed necessary; and.
- Zurich had waived compliance with the duty of disclosure in respect of the information provided by Hitchens.

White J spent some time in his judgment considering the case law from Australia, the United Kingdom and New Zealand regarding waiver in the context of a life insurance policy. His Honour concluded that:

> *"…the question of waiver of the duty of disclosure does not arise unless the insurer has been informed of facts which fairly indicate to a prudent insurer that there are other facts that may materially affect its decision to underwrite the risk or the terms on which it might do so, that have not been disclosed."*

Hitchens had failed to provide Zurich with a *"fair presentation of the risk".* Zurich was not put on notice that there were material matters relevant to its decision whether or not to accept the risk relating to Hitchens' use of pain medication. Accordingly, there was no waiver by Zurich.

White J found that Hitchens had made misrepresentations within the meaning of Section 26(2) *Insurance Contracts Act 1984* (Cth) and that some of the representations made by Hitchens in the proposal were fraudulent and were made with the specific intent to induce Zurich to provide cover.

His Honour concluded that Zurich was entitled to avoid the policies on the grounds of fraudulent misrepresentation and fraudulent non-disclosure.

This case is illustrative of the importance for insureds to provide full disclosure when there is a litany of pre-existing medical conditions which are especially relevant to a life insurer.

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EMPLOYMENT ROUNDUP

What is "reasonably practicable" under the WHS legislation in NSW

The *Work Health and Safety Act 2011* (WHS Act)in New South Wales provides that a person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

The duty imposed by the WHS Act is a duty conditioned by the words "so far as is reasonably practicable".

The High Court in *Baiada Poultry Pty Ltd v The Queen [2012] HCA 14* considered sections 20 and 21 of the Occupational Health and Safety Act 2004 (Vic) which imposed a duty upon an employer to ensure, so far as is reasonably practicable the health and safety of his employees and the Court determined:

> *"All elements of the statutory description of the duty were important. The words "so far as is reasonably practicable" direct attention to the extent of the duty. The words "reasonably practicable" indicate that the duty does not require an employer to take every possible step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the duty imposed by s 21(1). The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment."*

Curtis J in *WorkCover Authority of NSW v Eastern Basin Pty Ltd ("Eastern Basin") [2015] NSWDC 92* was recently called on to consider how the burden of proof of establishing what is reasonably practicable applies in a prosecution under the WHS Act in NSW .

In this case a stevedore employed by Newcastle Stevedores Pty Limited ("Newcastle Stevedores") was killed when he was crushed by a collapsing stack of aluminium ingots inside the hold of a ship being loaded while docked in Newcastle Harbour. The aluminium ingots were packed in what is known as Gauchi packs which were then delivered from the assembly area to the wharf for loading by Newcastle Stevedores.

Due to the uneven nature of the top surface of the individual ingots it was recognised that there were difficulties with loading and packing the ingots effectively and therefore a comprehensive packing and loading system had been developed. The packing system involved the use of a number of straps strategically placed around the Gauchi pack ("belly straps") to prevent the individual ingots moving. In addition there were numerous lifting points.

The Gauchi packs were stowed in the holds up to five tiers high consisting of three rows of 15 packs. The bottom tier was laid directly upon the flat floor of the hold where there were no problems with stability. After each tier was completed the stevedores laid planks of wood known as dunnage on top of the packs in that tier. Members of the ships crew inserted inflatable rubber airbags in any voids between the packs to prevent movement at sea. The dunnage was laid to increase stability as it formed a level floor on top of the completed tier. The dunnage was also used to cause

the packs to lean backwards either against the side of the hull or another pack on the same level to counter the possibility that the packs may topple into the unfilled spaces in the tier when they were released by the crane.

On occasion the packs became splayed if they inadvertently hit against another pack, or the hold, and occasionally the splayed ingots were adjusted by the crane driver swinging the packs with some force against the vertical side of the hull to drive the separated ingot packs back together. On occasion the crane driver also swung the packs against the already loaded packs to force them to move closer together and be packed more tightly to prevent movement during the journey. These actions were known as "hitting up". Infrequently the hitting up process caused the belly straps to break.

On 23 September 2012 while in the process of loading a ship the stevedores instructed the crane driver to hit up the third last pack of a tier which had already been stowed. After the process of hitting up Mr Fitzgibbon, the supervisor on the day, observed that the dunnage laid beneath the intended site of the pack still on the crane was out of position. In order to rectify the dunnage Fitzgibbon directed that the suspended pack be moved and he climbed down the open face of the third pack using the straps and ingots as hand holds and foot holds. As he placed his foot on the surface of the tier below, the pack on which he descended fell towards him and he was crushed by the weight of ingots.

The prosecutor claimed that Eastern Basin contravened Section 19(2) of the WHS Act in that Eastern Basin failed to ensure, so far as was reasonably practicable, the health and safety of Mr Fitzgibbon and failed to discharge its duty in the following respects:

"The defendant failed to develop and implement a safe configuration for the utilising of ingot packs for loading onto vessels. In particular, the defendant failed to ensure that:

- *It undertook an assessment and review of the configuration for the unitized ingot packs for loading on to vessels;*
- *The configuration of the ingot packs had a low height to width ratio so as to ensure the ingot lifts were stable;*
- *An adequate strapping arrangement was applied to the ingot packs such as an arrangement that included the application of additional straps at intervals vertically around the circumference of the ingot packs to reduce the risk that aluminium ingot packs could be displaced or unstable and fall during the process of loading in the holds of the vessel."*

In his judgment, Curtis J noted that there was a long history of the loading of Gauchi packs without incident. Newcastle Stevedores commenced loading Gauchi packs in 2000 and since then between 300 and 400 packs were loaded each month. This equated to approximately 42,000 packs having been loaded without mishap before an incident which took place on 22 June 2010 where one of the packs fell over. As a result of that incident a revised risk assessment form was created and a safety alert was issued which highlighted:

- Always be aware of the potential for a pack to topple even if initially it looked secure;
- Do not stand at a position where you can be crushed by a toppling pack especially with your back to it;
- Do not unhook the pack until you are confident that the lift is stable.

In his judgment, Curtis J noted changes in the work health and safety legislation in 2011 brought NSW legislation in line with other jurisdictions and while the duty under the WHS Act remains one of strict liability, the "reasonably practicable" defence is now incorporated in the duty, for example:

"A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:…(s19)"

The standard of proof is now based on the usual criminal standard of proof as provided in section 141 of the *Evidence Act* 1995 which is:

"In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt".

The burden of proof is now on the prosecution to prove what reasonably practicable steps could have been taken to eliminate or reduce the risk and to prove that those steps would have eliminated or reduced the risk.

As stated by Curtis J:

"In a prosecution for breach of section 19(2) of the Act the prosecutor must prove beyond reasonable doubt that:

(a) A risk arose from work carried out as part of the business or undertaking.

(b) The measure particularised in the summons would have caused that risk to be eliminated or minimised.

(c) In all circumstances, including, but not limited o, the matters listed in section 18, it was reasonably practicable for the defendants top adopt that measure".

What is reasonably practicable is defined in section 18 of the Act as:

"… means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

(a) The likelihood of the hazard or the risk concerned occurring; and

(b) The degree of harm that might result from the hazard or the risk, and

(c) What the person concerned knows, or ought reasonably to know, about:

(i) the hazard or risk, and

(ii) ways of eliminating or minimising the risk, and

(d) The availability and suitability of ways to eliminate or minimise the risk, and

(e) After assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with the available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk".

Curtis J determined that in order for the prosecutor to prove the breach beyond reasonable doubt they must prove that:

- A risk arose from work carried out as part of the business or undertaking;
- The measure particularised in the Summons would cause that risk to be eliminated or minimised;
- In all circumstances, including, but not limited to, the matters listed in Section 18 it was reasonably practicable for the defendant to adopt that measure.

Curtis J found in this case that the prosecutor had not satisfied the burden of proof. The evidence did not support the claim that if Eastern Basin had undertaken any more assessments, or configured the packs differently, the outcome would have been different and the cause of the injuries was primarily due to the fact that Fitzgibbon did not follow the recommended procedures.

As can be seen as a consequence of the changes to the WHS Act in 2011 employers that implement appropriate systems can successfully defend a prosecution where they have done everything reasonably practicable

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WORKERS COMPENSATION ROUNDUP

Reasonableness of a worker's failure to continue employment in suitable duties

The NSW Court of Appeal has recently considered the reasonableness of a worker's failure to continue employment in suitable duties and whether this would affect their entitlement to weekly compensation (*Fairfield City Council v Arduca*).

On 16 October 2008, Guiseppe Arduca injured his back and groin whilst lifting heavy storm water grates onto the back of a truck during the course of his employment with Fairfield City Council. Investigations revealed that he had suffered bilateral inguinal hernias.

Following an injury management plan, Arduca returned to work performing 'light duties'. However on 19 April 2010, Arduca resigned as he could no longer perform the 'light duties' provided to him without further aggravating his condition. This was supported by his treating doctor, Dr Sanki.

On 22 April 2010, the Council denied Arduca was entitled to claim weekly compensation alleging that he had unreasonably elected to retire rather than comply with his injury management plan as is required by Section 47 of the Workplace Injury Management and Rehabilitation Act 1998.

Arduca made a claim for compensation on the Council and by notice dated 13 October 2011 Council disputed Arduca's entitlements to weekly compensation, medical expenses in addition to lump sum compensation.

Arduca filed a dispute in the Workers Compensation Commission where an Arbitrator found in his favour. . The Arbitrator's decisions were affirmed by Deputy President O'Grady on appeal.

Council sought leave to appeal against the Deputy President's decision.

The first question the Court of Appeal considered was whether Mr Arduca's failure to continue in his employment with Council was unreasonable. In determining this question the Court considered:

whether Council provided Mr Arduca with suitable duties; and

whether Mr Arduca unreasonably refused to co-operate with the plans.

Whilst no copies of the injury management and return to work plans were in evidence, it was ultimately found that suitable duties were devised by Council and

Arduca was transferred from cleaning duties to nursery duties on reduced hours.

Critically however, the evidence adduced by Arduca was that the duties provided by Council aggravated his lower back and groin pain. His supervisor was informed of his difficulties in performing these duties and no action was taken.

The Court of Appeal stated in a joint judgment:

> *"Counsel for the applicant accepted that the respondent's capacity to comply with the injury management and return to work plan without injuring himself was in issue and that the Arbitrator was entitled to make the findings he made... Those findings were that the worker was unable to perform the duties which had been assigned to him safely so as not to aggravate his existing conditions or cause further injury. The applicant maintained, however, that it had nevertheless been denied procedural fairness because there was never an issue flagged as to whether it had provided "suitable" work.*
>
> *The Arbitrator may have confused matters by referring to "suitable employment", as defined, until its repeal in 2012, by s 43A of the* Workers Compensation Act 1987 *(NSW), and by framing his findings in those terms. However, his conclusion that he was not satisfied that the applicant had provided the respondent with "suitable duties" was another way of stating that the duties which the respondent was required to perform under the injury management plan aggravated his existing injuries, thereby rendering the respondent's failure to continue in that employment not unreasonable in the terms of s 57".*

The second question the Court of Appeal considered was whether Council sufficiently complied with Section 74 of the *Workplace Injury Management and Workers Compensation Act 1998 (NSW)* (hereafter 'WIM Act'). That section provides that if liability is disputed then written notice must be given of that dispute.

The Deputy President had found that Council had issued a "catch all" paragraph which stated:

> *"The issues relevant to this dispute are those identified above and the sections of the legislation on which our client relies in declining liability include Sections 4, 9, 9A, 33, 36, 37, 38, 38A, 40, 60 and 67 of the Workers' Compensation Act 1987 and also Sections 57, 74, 254, 260, 261 and 323 of the Workplace Injury Management and Workers' Compensation Act 1998."*

The Court of Appeal was critical of the form of the notice and it was held that the notice did not sufficiently raise the issue of the worker's alleged failure to comply with his return to work obligations.

In any event however there was no such failure. The end result was that Arduca maintained his entitlement to weekly compensation.

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Apportionment of Injuries for Section 66 Purposes

In Trustees of *The Roman Catholic Church for the Diocese of Parramatta v Barnes* [2015] NSWWCCPD 35, Deputy President Roche considered whether the phrase "an injury" in Section 66(1) of the 1987 Act was restricted to a single injury or whether it could include more than one injury.

Trudi Barnes worked for the Church as a teacher's aide. She injured her low back in the course of her employment on three separate occasions. The insurer accepted liability for each incident. Ultimately Ms Barnes underwent extensive surgery to her lumbar spine following which her solicitors made a claim for permanent impairment under Section 66 for 26% whole person impairment as a result of the three incidents. The IME who provided the assessment apportioned the impairment between the three separate injuries. The IME subsequently confirmed the symptoms were similar on each occasion and consistent with pathology at the L4/5 levels.

The insurer argued that the effect of Section 66(1) of the 1987 Act was that each claim for an injury must exceed the threshold of 10% WPI. That is where there are multiple injuries before a worker can recover permanent impairment compensation each injury must result in a permanent impairment of greater than 10%. As the IME's assessment of the permanent impairment from the first and second injuries was 5% Ms Barnes could not meet the threshold in respect of those injuries and could not be referred to an AMS for assessment of whole person impairment flowing from the first and second injuries.

The arbitrator accepted the submissions of Ms Barnes' Counsel that she had really only made a claim for one impairment and there was only one claim albeit it involved the injurious events.

The employer appealed from the arbitrator's determination on the basis that the arbitrator erred in the interpretation of the words "an injury" in Section 66(1).

Deputy President Roche indicated the word "injury" as used in the 1987 Act can have two, possibly three, meanings: the injurious event; the pathology; and possibly, injury meaning "condition". The sense in which the term "injury" is used will depend on its context. In a claim for lump sum compensation the context is a claim for the whole person impairment that

has resulted from the relevant pathology that has resulted from a particular work incident upon which the worker has sued. He stated the authorities are clear the relevant "injury" in Section 66 is the pathology.

Based on legal authority he indicated the description of how the injury was received, for example due to a frank injury or due to repetitive activities are descriptions of mechanisms for suffering an injury. In other words an "incident" (injurious event) is only a mechanism for suffering an injury and is not itself a Section 4 injury.

Thus it followed, if one assumed Ms Barnes suffered the same pathology in each incident, it was open to the arbitrator to make the remittal to the Registrar for assessment of the whole person impairment of the applicant's lumbar spine.

Deputy President Roche observed that different considerations would apply if Ms Barnes had separately claimed permanent impairment compensation for either her 2006 injury or her 2008 injury but this was not the situation in the present case.

In the course of his determination the Deputy President referred to the principles appropriate for the same issue in claims for common law damages where there was a requirement that "the injury" results in a degree of permanent impairment of at least 15% before a claim can be made.

In *Leppington Pastoral Company Pty Limited v Juweinat* [2002] NSWCA 228 the worker had injured his back in three separate lifting incidents. The Court of Appeal rejected the employer's argument that there were three causes of action and damages had to be assessed separately in respect of each one. It was held the worker "was entitled to claim as the injury for which he sought compensation the condition which resulted from the three incidents". This approach was challenged in *Strasburger Enterprises Pty Limited v Serna* [2008] NSWCA 354 where it was held that "impairment" was "also a state or condition that may result from more than one injury or may itself contain multiple forms". It was observed the statutory scheme was consistent with both an injury and an impairment having multiple causes and an injury being the result of a course of conduct where it was necessary to apportion liability or responsibility for a particular injury that would be done according to general law principle. There was no principle that would suggest a certificate identifying an injury resulting from more than one event or incident was for that reason invalid.

The Deputy President held that these principles were applicable in the matter he was considering for Ms Barnes as in each matter the worker experienced more than one injurious event or "injury".

The Deputy President agreed that apportioning liability for a single impairment is not the same as determining the degree of impairment that has resulted from each event or incident. Apportionment attributes liability for the loss or liability to one or more employers according to the contribution of each employer which only occurs after an initial determination of liability. Where there are a number of work incidents or injuries and apportionment is sought an arbitrator must apply the principles of Section 22.

The Deputy President suggested however in some instances the legislation prevents the accumulation of consequences of separate incidents to satisfy particular thresholds. By way of example he referred to the decision in *Merchant* where it was held the whole person impairment caused by multiple unrelated incidents to different body parts involving different pathology could not be aggregated to meet the seriously injured worker threshold of 30% in Section 32A.

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Are Working Directors Entitled to Workers Compensation Benefits?

The recent decision of Deputy President Bill Roche in *Sarac v Itexcel Pty Limited* (2015) NSWCCPD 32 serves as a reminder that the deemed worker provisions in the workers compensation legislation do not apply to a working director of a company that claims they are a deemed worker of a principal that contracts with that company, However the director may be entitled to workers compensation benefits if

- he/she can demonstrate they are an employee of the principal; or
- the director makes a claim under section 20 of the *Workers Compensation Act* 1987 against the principal who is liable to pay compensation to a worker employed by a contractor where the contactor has no workers compensation insurance,

Mr Sarac was a carpenter and had worked in the construction industry for most of his working life. Until his retirement on 21 November 2013 he was exposed to loud noise from drills and jackhammers and other construction equipment and as a result of his exposure to loud noise he suffered a loss of hearing.

Mr Sarac lodged a claim against Itexcel on the basis it was his last employer where he was exposed to noisy employment. Itexcel's workers compensation insurer disputed liability on the grounds that at all relevant times Mr Sarac was a working director employed by his own company, K & B Ceilings Pty Limited and with respect to Itexcel he was neither a worker nor a deemed worker within the terms of the legislation.

It was not disputed that Mr Sarac was a working director and the appeal centred solely on whether Mr Sarac was a deemed worker pursuant to Clause 2

of Schedule 1 of the *Workplace Injury Management and Workers Compensation Act 1998*. Clause 2 of the Schedule provides:

"Where a contract:

(a) to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name) ... is made with a contractor, who neither sublets the contract nor employs any worker the contractor is for the purposes of this Act taken to be a worker employed by the person who made the contract with the contractor."

Senior Arbitrator Debra Moore concluded in the circumstances that because of the legal situation that Mr Sarac was in, he was a working director of his own company and on that basis was not a deemed worker employed by Itexcel.

On appeal, the Deputy President noted that Mr Sarac's company "existed as a vehicle to get an ABN". This was however irrelevant to the determination. It was to Mr Sarac's advantage to form a company. In those circumstances unless the company was a sham, it was a valid legal entity required to contract on its own behalf and employ its own workers such as Mr Sarac. On that basis that he had done so, Mr Sarac was a working director of that company. Unfortunately for Mr Sarac, his company did not have any workers compensation insurance.

It was also unfortunate for Mr Sarac that he failed to advance an argument at the original hearing that he may in fact be an employee of Itexcel rather than just a deemed employee. A number of indicia including that Mr Sarac was subject to Itexcel's direction, worked exclusively for them on a full time basis and could not delegate work highlighted the possibility he was actually an employee of Itexcel. Deputy President Roche noted however that these indicia of employment were only relevant to establish whether Mr Sarac was a worker, not that he was a deemed worker. By Mr Sarac arguing that he was a deemed worker (i.e. an independent contractor), his legal representatives had effectively conceded he was not a worker and only the deemed worker provisions could apply. In order for Mr Sarac to be considered to be a deemed worker he would need to demonstrate that he was a party to a contract with Itexcel. Because his own company employed him and because that company contracted with Itexcel, Mr Sarac was unable to establish that he was a party to the contract.

To further add insult to injury, Mr Sarac did not rely upon at the arbitration Section 20 of the *Workers Compensation Act* 1987. Section 20 allows for, in certain circumstances, a principal to pay compensation to workers employed by contractors who are not insured. As it was not relied upon in the initial proceedings, the Deputy President considered it was not necessary to consider that provision.

The decision makes it clear the deemed worker provisions of the workers compensation legislation do not apply to working directors. It is essential for a working director to arrange workers compensation insurance for the company they are working for. Once a company has contracted with another purported employer in order to undertake work, a working director loses the protection of the deemed worker provisions. Nevertheless, each case turns on its own facts and alternative arguments to claim workers compensation may be available which include a claim under Section 20 which in certain circumstances requires a principal to pay compensation to "workers" employed by the uninsured contractor or to argue or a claim that the director is really an employee of the principal.

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Permanent Impairment Assessments for Psychiatric Injury

In order for a worker to succeed in a claim for whole person impairment (WPI) in relation to a psychiatric injury, the NSW workers compensation legislation prescribes that a worker must demonstrate an assessment of at least 15% WPI. This compares to the 11% WPI threshold for a physical injury.

The process of assessment in a disputed claim for WPI is that an Approved Medical Specialist (AMS) appointed by the Workers Compensation Commission address the behavioural consequences of a psychiatric disorder with reference to six items, each of which evaluates an area of functional impairment. Those areas of functional impairment are:

- Self care and personal hygiene;
- Social and recreational activities;
- Travel;
- Social functioning (relationships);
- Concentration;
- Employability.

Once an assessment has been conducted, an appeal of the findings of the AMS can be lodged if the assessment contains a demonstrable error or the AMS has used incorrect criteria when conducting the assessment. The appeal is determined by a Medical Appeal Panel and may be subject to further judicial review by way of Summons filed in the Supreme Court.

In *Jenkins v Ambulance Service of NSW* [2015] NSWSC 633 His Honour Justice Garling was required to determine a Summons filed by Ms Jenkins seeking

a judicial review of a Medical Appeal Panel decision. Ms Jenkins was a paramedic for the Ambulance Service of NSW for 22 years and she ceased work on 14 March 2012 due to an alleged depression and anxiety condition. Injury was admitted by the Ambulance Service and Ms Jenkins was examined by an AMS appointed by the Workers Compensation Commission. She was assessed at 6% WPI and the Medical Appeal Panel affirmed that assessment.

Ms Jenkins submitted in her summons that the Medical Appeal Panel wrongly applied and interpreted the psychiatric impairment rating scales (PIRS) and this resulted in an invalid decision.

A cornerstone of the claimant's submissions was that it was erroneous for the Appeal Panel not to "slavishly apply" the criteria in Tables accompanying the PIRS. The Tables require an assessment from Class 1 (no deficit or minor deficit) to Class 5 (totally impaired for that functional area). Different examples relevant to each functional area are provided within the Guides.

His Honour determined that when conducting an assessment, it required a combination of the AMS exercising their clinical judgment and to determine from all the material at their disposal, whether in respect of each functional area, the degree of impairment fitted into one of the 5 classes. On that basis an AMS is not restricted to the examples of activities listed in the Tables or alternatively to those activities as a minimum. Clinical assessment and judgment were both required when formulating an opinion.

In support of this determination his Honour commented that the WorkCover Guidelines record that there is an expectation that the psychiatrist would provide a rationale for the rating which was assigned. Noting that the impairment rating was "based on an injured worker's psychiatric symptoms", a clinical assessment and judgment is required. It was not accepted that an AMS was restricted only to the examples of the activities listed in the tables.

His Honour noted that an AMS was required to take into account a person's cultural background and to consider whether the individual's activities were usual for the person's age, sex and cultural norms. If the AMS was solely restricted to the examples listed in the tables, these would fail to take into account age differences. His Honour highlighted that the example in the tables whereby that "looking unkempt" would indicate a degree of impairment. In that situation the AMS could not solely rely on that appearance and would also need to consider the variation in the activities and behaviour of a person of similar age. A normal person in their late teenage years may appear unkempt generally when say compared to a person who was much older.

The claimant also submitted that the Medical Appeal Panel wrongly determined that it was open to the AMS to find that Ms Jenkins had a capacity for employment on the basis that she undertook some gardening and household activities and looked after her dogs and chickens.

His Honour commented it was open to the AMS to conclude that the physical capacity could be utilised in undertaking remunerative employment such as paid housekeeping. Caring for pets indicated Ms Jenkins may be able to engage in some remunerative employment caring for pets owned by others. This could include paid dog walking for owners of dogs in her neighbourhood. The AMS was not called upon to decide an impairment level having regard to whether employment was in fact available, only impairment of "capacity for work". Ultimately it was open to the AMS to reach the conclusion that he did with respect to impairment and as such the Appeal Panel was not in error.

His Honour noted that in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to a judicial review. This was more akin to a merit review and there was no basis for a judicial review of the kind sought by Ms Jenkins.

This decision makes it clear that when evaluating impairment for the purposes of psychiatric injury, a number of factors are to be taken into account including the presentation of the claimant, the findings on clinical assessment and consideration of the example of activities listed in the assessment tables. Unlike a physical injury, there is no objective method by which the extent of a psychiatric impairment can be measured however clinical assessment remains a vital part of the assessment of WPI.

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CTP ROUNDUP

Section 62 Further assessment and the meaning of "additional information" – Should Singh #2 be revisited?

In the recent decision of *Mullin v CIC Allianz Australia Ltd and Anor [2015] NSWSC 831* Justice Beech-Jones has again considered the meaning of the term "additional information" in the context of an application for further medical assessment under Section 62 of the *Motor Accidents Compensation Act*. In doing so, his Honour has expressed some misgivings as to the decision of Justice Rothman in *Singh v Motor Accidents Authority of NSW (No2) [2010] NSWSC 1443.*

Section 62 (1) of the MAC Act provides:

(1) A matter referred for assessment under this Part may be referred again on one or more further occasions in accordance with this Part:

(a) by any party to the medical dispute, but only on the grounds of the deterioration of the injury or additional relevant information about the injury, or

(b) by a court or claims assessor.

(1A) A matter may not be referred again for assessment by a party to the medical dispute on the grounds of deterioration of the injury or additional relevant information about the injury unless the deterioration or additional information is such as to be capable of having a material effect on the outcome of the previous assessment.

(1B) Referral of a matter under this section is to be by referral to the member of staff of the Authority who is designated by the Authority for the purpose (in this Part referred to as the proper officer of the Authority).

Justice Rothman determined in Singh that "additional information" meant additional to the party seeking the further assessment. The rationale was that to do otherwise would allow a party to keep information to itself, not use it in the initial application, but use it for the basis for a second assessment if it was not happy with the outcome of the initial assessment. This outcome would be inconsistent with bringing about the most quick and efficient determination of matters.

The case before Beech-Jones J required consideration of whether the meaning of "additional information" decided in *Singh* should be further refined to mean information not available to a party by taking reasonable steps to obtain the information. Whilst noting Justice Beech-Jones had not been specifically asked by the parties to decide whether *Singh* should be followed, his Honour dropped some broad hints that the decision should be re-visited.

In the case before Beech-Jones J, the claimant had been assessed at MAS as having a combined Whole Person Impairment (WPI) of 22%. This included an assessment of the soft tissue injury to the neck and shoulder of 20% WPI by Assessor Knoll, who had asked to be provided with claimant's general practitioner and treating specialist clinical notes. The insurer had been provided with authorities by the claimant to obtain the notes but the notes were not received by the insurer until after Assessor Knoll had made his determination.

When the insurer eventually obtained these clinical notes they showed that the claimant had a pre-existing shoulder condition. As Assessor Knoll's assessment made no reduction for pre-existing injuries due to the absence of evidence, the insurer applied for a further assessment under Section 62 (1) (a) of MACA on the basis the clinical notes contained additional relevant material about the claimant's injuries.

The claimant's response was that the clinical notes were not "additional information". The claimant had provided to the insurer authorisations to obtain that material from the relevant doctors prior to the MAS assessment and argued that information which was not in possession of the insurer but which could have been obtained by reasonable steps was not "additional" information for the purposes of Section 62.

The insurer 's application was successful as a result of the proper officer's determination that the notes can be considered additional relevant information, as they have not been considered by an MAS assessor and were not in the possession of the insurer at the time of the MAS assessment.

The claimant subsequently sought judicial review of the proper officer's determination. The claimant's application for judicial review was dismissed but the judgment raises some issues about what can and should constitute "additional" information.

Central to Justice Beech-Jones' analysis was a comparison of the approach taken by Justice Rothman in *Singh* and the approach later taken by Justice Hoeben in *Miles v Motor Accidents Authority of NSW [2013] NSWSC 927*. Justice Hoeben had approached the same problem of what constituted additional information by concentrating not on the most expedient way to dispose of the matter but the importance of allowing an accurate medical assessment to be made. Hoeben J pointed out that the same term "additional information" is used in the wording of both Section 62 (1) (a) and Section 62 (1A). Since the wording of Section 62 (1A) "unless…the additional information is such as to be capable of having a meaningful effect on the outcome of the previous assessment" must mean information available to a medical assessor when the first assessment took place, then that is the same meaning that must be given to the term in Section 62 (1) (a).

In balancing the decision in *Singh*, which concentrated on the availability of the material to the parties, against the decision in *Miles,* concentrated on the availability of the material to the medical assessor who determined the initial dispute, clearly, Justice Beech-Jones thought the availability of the material to the medical assessor was the more relevant test.

His Honour felt the concerns of Justice Rothman that a party may hold back information as a result of the meaning of additional information arrived at in *Miles* could be overcome by the exercise of the discretion of

the proper officer given by Section 62(1). If the proper officer had a concern that a party deliberately held back information in their possession to the medical assessor with a view to using it later if needs be as a basis for a further application, then it would be open to the proper officer to exercise the discretion given under Section 62(1) and refuse the application for further assessment, even if Section 62 was satisfied. Justice Beech-Jones suggests that the decision in *Singh* fails to take into account this discretionary power.

As it stands, the decision of Beech-Jones J concerns whether or not there was an error in the exercise of the discretion of the proper officer, and it remains for a party to challenge the correctness of Rothman J's decision in *Singh* in some future proceedings. There is certainly an attraction to the approach to the issue of "additional information" adopted by Justice Beech-Jones as it would allow for both the proper medical assessment envisaged by Hoeben J as well as address the concerns over potential abuse of the assessment process raised by Rothman J.

It is important to note that in the event that a successful challenge is made to the correctness of the judgment in *Singh* in the future in line with the rationale of Hoeben J in *Mullin*, Justice Beech-Jones would not allow the tender of evidence showing the efforts of the insurer to obtain the clinical notes in the judicial review proceedings. This is because that information was not before the proper officer and was therefore not relevant to the consideration of whether or not the proper officer had erred in her determination. This suggests that it would be prudent for a party to include such information in the submissions to the proper officer if it is thought the issue of the reasonable steps taken or the reason for the withholding of the information from the initial assessor may become relevant in the context of the application to the proper officer.

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The importance of adequate reasons and considering relevant evidence

The NSW Supreme Court has recently considered the circumstances in which the decision of a CARS assessor may be set aside for failure to provide adequate reasons and failure to take into account relevant considerations.

The judgment of Justice Hulme in *QBE Insurance (Australia) Limited v Thomson* [2015] NSWSC 650 concerned a decision of CARS Assessor White made on 27 October 2014.

The certificate of Assessor White related to a motor vehicle accident which occurred on 16 March 2011 in which the claimant, Ms Thomson, was a passenger in a stationary vehicle which was hit from behind. Ms Thomson had worked as a dental hygienist at the time of the accident, however despite some unsuccessful attempts to do so, she had not returned to work. Importantly, on Ms Thomson's own admission in her affidavits and reports to doctors, at the time of the accident she had planned to cease her employment, and seek a new position which was more of an administrative role and which required her to work fewer hours.

By the time the matter reached CARS, it had been the subject of several applications before MAS, and Ms Thomson had seen numerous medical practitioners. A number of reports from those doctors and assessors were before Assessor White. Also in evidence before the Assessor was a surveillance video-recording of Ms Thomson.

The Assessor concluded Ms Thomson suffered injuries to her neck and back by way of aggravation of pre-existing medical conditions as a result of the accident on 16 March 2011 and awarded her damages in the sum of $973,460.18.

The insurer, QBE, applied for judicial review of the Assessor's decision, on a number of grounds, not all of which His Honour ultimately found necessary to address.

The first ground on which QBE relied was the Assessor failed to make a determination on Ms Thomson's credit which amounted to a denial of procedural fairness to QBE, The reasons did not disclose any detailed finding as to Ms Thomson's credit.

This ground was rejected by His Honour, who considered that the Assessor had made a brief comment in relation to the Ms Thomson's credit with reference to the observations of MAS Assessor Dr Harvey-Sutton, who had found Ms Thomson presented in a "genuine and straightforward manner". The Assessor had also remarked that there was nothing in the surveillance footage that would lead her to conclude Ms Thomson was exaggerating her symptoms.

His Honour also noted QBE had taken the opportunity of making written submissions in relation to Ms Thompson's credit. His Honour observed there is no obligation on a judge or tribunal, minded to reject certain submissions, to warn the party that made them of this inclination.

The second ground argued by QBE on which the His Honour found it necessary to make a finding, was that Assessor White had failed to take into account the findings of two doctors who had examined Ms Thompson, namely Dr Breslin, urologist, and Dr Fitzsimons, neurologist.

His Honour did not find anything in the report of Dr Breslin of relevance to the reasons of the Assessor. However problems arose when His Honour considered the report of Dr Fitzsimmons. In his report, Dr Fitzsimmons concluded Ms Thomson "very probably" had non-organic manifestations which made the assessing of the underlying pathology very difficult. In the doctor's opinion it was far from clear whether there was in fact an underlying organic disorder to justify the high level of care Ms Thomson was receiving.

Considering the report of Dr Fitzsimmons raised questions as to whether Ms Thomson had been honest with the doctor, and the fact that the Assessor had chosen to rely on a different assessment (that of Assessor Harvey-Sutton) in relation to Ms Thomson's credibility, it was incumbent on her to explain why apparently credible evidence which tended in the other direction was rejected or discounted.

In this regard His Honour also took into account the requirement in the Motor Accident Authority Claims Assessment Guidelines that the Assessor's reasons should be set out as briefly as the circumstances permit. His Honour found that even taking this consideration into account, the Assessor had said nothing about the reasoning process that led her to ignore Dr Fitzsimons' observations. Thus, His Honour found the Assessor had failed to give adequate weight to an important factor, rendering her decision legally unreasonable.

The final ground argued by QBE related to the failure of Assessor White to give proper reasons in relation to various aspects of her finding in regards to damages for past economic loss.

QBE argued the Assessor fell into error by failing to give reasons for her finding that Ms Thompson had suffered lost wages at the rate of $1,596.75 per week (a figure representing her earnings at the date of the accident) despite the fact that the evidence suggested she had planned to resign from her role prior to the accident. QBE also argued the Assessor failed to give reasons for her determination that it took three and a half years for Ms Thomson's economic loss to decrease.

His Honour found it was difficult to reconcile the Assessor's finding that Ms Thomson was actively looking for alternate work at the date of the accident, which would probably have resulted in a decrease in her earnings with the Assessor's conclusion that Ms Thomson's wages would have remained the same for three and a half years. The Assessor did not provide any reasons for concluding a decrease in earnings would not have occurred during that period.

His Honour concluded that the Assessor failed to state why, despite the available evidence in relation to alternate job seeking, the Assessor calculated Ms Thomson's damages on the basis of pre-accident income. The Assessor had not complied with the provisions of Section 94(5) of the *Motor Accidents Compensation Act 1999* and the Guidelines. Section 94(5) requires a claims assessor to set out reasons for an assessment, while Clause 18.4 of the Guidelines requires that an assessor set out "the reasoning process that lead the assessor to the conclusions made".

Based on the above errors, His Honour set aside the decision of Assessor White, and remitted the matter back to CARS for determination by a different claims assessor according to law.

The decision of Justice Hulme demonstrates that a CARS assessor must provide adequate reasons for their conclusions and the reasoning process which led to those conclusions. Assessors need to engage with the evidence and provide reasons to support their findings, particularly where there is conflicting evidence. Without adequate reasons the CARS assessment is prone to attack on the grounds that the Assessor has failed to take into account important evidence, such as medical reports which have a bearing on the issues in dispute in a matter. Inadequate reasons and a failure to set out why competing evidence has not been accepted can result in a successful judicial challenge to the CARS assessment and a return of the claim to CARS for redetermination by a new assessor.

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