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## IN THIS EDITION



## Consolidation of the Management of Statutory Insurances in NSW

On 21 August 2015 the NSW government effected an overhaul of the governance of State insurance and care schemes and the way those schemes are serviced in New South Wales with the introduction of the State Insurance and Care Governance Act 2015.The date the changes will come into effect as not been announced

The Government has created three new organisations to operate and regulate the State's insurance schemes and regulate workplace safety which will replace the organisations that are currently responsible for the schemes.

The new organisations are:

- Insurance and Care NSW a single provider of services for New South Wales insurance and care schemes;
- The State Insurance Regulatory Authority (SIRA) which will be an independent regulator of New South Wales Government insurance schemes; and
- SafeWork NSW, which will be the work, health and safety regulator.

WorkCover NSW recognised its conflicts of interest in running the workers compensation scheme in NSW as well as regulating work health and safety and an operational separation of its regulatory and insurance activities will be effected.

The new consolidated service provider, Insurance and Care NSW will be an independent statutory corporation with its primary function to provide services for the Workers Compensation Nominal Insurer, Lifetime Care and Support Authority and the NSW Self-Insurance Corporation. Insurance and Care NSW will also provide services to the new Dust Diseases Authority, which is to replace the existing Workers Compensation (Dust Diseases) Board and the Sporting Injuries


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Compensation Authority, which will take over administration of the Sporting Injuries Scheme.

The new State Insurance Regulatory Authority or SIRA, which will also be a statutory corporation and will assume the regulatory functions of WorkCover in relation to workers compensation insurance and related activities, the Motor Accidents Authority in relation to Compulsory Third Party insurance and of NSW Fair Trading in relation to home building insurance.

The Government believes that consolidating regulatory responsibility for State insurance into one regulator will enable a consistent and robust approach to the monitoring and enforcement of insurance and compensation legislation.

No doubt synergies between the workers compensation and CTP schemes will be explored and there will be consolidation of functions. We wonder whether this is the first step in harmonising some of the features in the 2 schemes such as the medical assessment of injured persons.

The role of WorkCover in enforcing work health and safety legislation will be transferred to SafeWork NSW.

With the creation of the new organisations the following organisations are abolished:

- WorkCover NSW
- The Motor Accidents Authority
- Safety, Return to Work and Support Board.

Guidelines and licences issued by WorkCover and the MAA are taken to be issued/granted by SIRA.

An interesting development on the workers compensation front is the introduction of provisions that permit SIRA to issue guidelines with respect to policies of insurance (the Workers Compensation Market Practice and Premiums Guidelines). The guidelines will replace Insurance Premium Orders which were published to set workers compensation premiums. Importantly the Workers Compensation Market Practice and Premiums Guidelines may require insurers to file with the Authority premiums for classes of employers in such manner, and at such times, as may be specified in the Guidelines, and require licensed insurers to specify how they have determined premiums, and require licensed insurers to provide additional information with the premiums they file or to justify the premiums they have filed.

This sounds very much like privatisation is on the way for NSW workers compensation insurance. There are now mechanisms which will permit SIRA to require insurers to submit premium models and SIRA may reject an insurance premium filed with it if it is of the opinion that the premium does not conform with the Guidelines. If a premium is rejected there can be a request for reconsideration, and where the reconsideration is not satisfactory an arbitration of the matter by IPART or an arbitrator nominated by IPART.

Further a licensed insurer must prepare and deliver to SIRA a business plan for its workers compensation insurance business as soon as practicable after it is requested to do so by SIRA.

The Government can also pass regulations that may make provision with respect to prudential standards and the application of such standards to insurers.

We therefore have the framework in place for private underwriting of workers compensation insurance in NSW and it will be a simple matter for the Government to make regulations to introduce that change. The only question seems to be how long will it take for that change.

We can all look forward to significant changes to the statutory insurance compensation schemes in NSW with the creation of the new statutory corporations SIRA and Insurance and Care NSW.

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## Fair Work v Common Law - Is There an Issue Estoppel

The High Court of Australia has recently considered the issue of whether or not a finding made by the Federal Court in a claim pursuant to the Fair Work Provisions creates an estoppel in any subsequent common law proceedings for a personal injury claim.

An estoppel is a legal principle that prevents a party either denying or alleging a certain fact owing to that party's previous conduct, or a determination involving the same parties.

Ramsey Food Processing Pty Limited ("Ramsey") were the operators of an abattoir in South Grafton between 2005 and 2009. Grant Tomlinson commenced work at the abattoir in 2005. In October 2006 Tomlinson, in addition to other workers at the abattoir, were advised that their previous employment ceased and they would now be employed by Tempus Holdings Pty Limited ("Tempus"). In November 2008 Tomlinson and other workers at the abattoir were then told Tempus had ceased "providing labour" to Ramsey and therefore Tempus was unable to offer ongoing employment. Tomlinson subsequently complained to the Fair Work

Ombudsman in relation to non payment of his entitlements when he was made redundant.

As a consequence of that complaint, the Fair Work Ombudsman commenced proceedings against Ramsey in the Federal Court of Australia. The Fair Work Ombudsman was entitled to do so as its statutory functions include a right to commence proceedings in Court "to enforce" the *Workplace Relations Act 1996* and any awards under that Act.

In the proceedings in the Federal Court the Fair Work Ombudsman alleged that Ramsey rather than Tempus had been the employer of Tomlinson and 10 other people at the abattoir. It was also alleged by the Fair Work Ombudsman that Ramsey as the employer was bound by both the applicable award in the meat industry and the Australia Fair Pay and Conditions Standard. A Civil Penalty was sought for the breaches of the Award and the Conditions. Tomlinson and the 10 other people were not a party to those proceedings.

The main issue in the proceedings before the Federal Court was the question of whether Ramsey or Tempus had been the employer. Tomlinson provided evidence in the Federal Court proceedings.

The Federal Court determined that despite the corporate structure Ramsey was in fact the true employer and Tempus was in fact a "sham". Justice Buchanan of the Federal Court imposed a civil penalty on Ramsey and also made orders that Ramsey was to pay to Tomlinson and to the other 10 employees specified amounts.

Tomlinson subsequently commenced proceedings in the District Court of New South Wales against Ramsey making a claim for damages for personal injury he had sustained during the course of his employment at the abattoir in June 2008. Tomlinson argued that although Tempus was his employer, Ramsey was in control of the workplace and owed a duty of care akin to that of the employer.

Ramsey argued that as a consequence of the Declarations and Orders made in the Federal Court Tomlinson could not argue that Ramsey was not his employer. Ramsey relied on the provisions in the NSW legislation relating to compensation claims and contended that if Ramsey was Tomlinson's employer then he could not recover damages as he had not complied with the relevant provisions of the NSW compensation legislation. Those provisions required that in order for a claim to be made against an employer an injured person must have at least a 15% whole person impairment, must have received lump sum compensation, served what is described as a Section 281/282 Notice putting an employer on notice of a claim for work injury damages and served a Pre Filing Statement. The matter must also have proceeded to mediation, or if the employer declined to participate, a Certificate of Mediation Outcome must have been issued. None of those actions had been taken by Tomlinson.

The matter proceeded to hearing in the District Court and the trial judge determined that Tempus was the relevant employer and therefore Tomlinson was entitled to proceed with the claim. Judgment was therefore entered against Ramsey.

Ramsey appealed and the Court of Appeal in NSW unanimously allowed the appeal. The Court of Appeal in their joint judgment determined that the Declarations and Orders that had been made in the Federal Court proceedings created an estoppel as to who Tomlinson's employer was between October 2006 and November 2008. The Court of Appeal determined that although Tomlinson had not been a party to the Federal Court proceedings he had been a "privy" in interest with the Fair Work Ombudsman in the Federal Court proceedings.

Tomlinson sought and was granted special leave to appeal ot the High Court.

A joint judgment was handed down by French CJ, Bell, Gageler and Keane JJ.

In their judgment the High Court discussed the law of estoppel and noted:

*"Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding. The first is sometimes referred to as "cause of action estoppel". Estoppel in that form operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment. It is largely redundant where the final judgment was rendered in the exercise of judicial power, and where res judicata in the strict sense therefore applies to result in the merger of the right or obligation in the judgment. The second form of estoppel is almost always now referred to as "issue estoppel". Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a "judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies". The third form of estoppel is now most often referred to as "Anshun estoppel", although it is still sometimes referred to as the "extended principle" in Henderson v Henderson. That third form of estoppel is an extension of the first and of the second. Estoppel in*

*that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a "true estoppel" and not as a form of res judicata in the strict sense".*

The High Court was of the view that the Court of Appeal erred in concluding the Fair Work Ombudsman was Tomlinson's privy. The High Court noted that in fact the Fair Work Ombudsman was acting pursuant to the statutory power to commence proceedings in Court to enforce the *Workplace Relations Act*. The Fair Work Ombudsman was not acting so as to represent employees. Therefore, the Fair Work Ombudsman was not representing the legal interests of Tomlinson.

The High Court stated:

*"Performing that function and invoking those procedures, the Fair Work Ombudsman did not represent the legal interests of Mr Tomlinson, in the sense that gives rise to an estoppel, by seeking in the Federal Court Orders that Ramsey pay Mr Tomlinson and others amounts which Ramsey had failed to pay in breach of applicable terms. The fact that Mr Tomlinson had complained to the Fair Work Ombudsman and the fact that he had provided evidence in the proceeding make no difference to that conclusion. Counsel for Ramsey disavowed any suggestion that Mr Tomlinson in fact gave to the Fair Work Ombudsman some additional non statutory authority to act as his agent. The Fair Work Ombudsman acted in the discharge of its own statutory responsibility.*

*It follows that the Declarations and Orders made by the Federal Court in the proceeding commenced by the Fair Work Ombudsman created no estoppel binding on Mr Tomlinson in the subsequent District Court proceeding or in any other subsequent proceeding between Mr Tomlinson and Ramsey. If Mr Tomlinson was paid the amount that the Federal Court determined Ramsey to have underpaid and that it ordered Ramsey to pay to him, Mr Tomlinson would be prevented from personally pursuing Ramsey for the same amount. That would not be because of the operation of an estoppel arising from the Order made by the Federal Court. It would be the result of the operation of the distinct rule against double recovery."*

The appeal was therefore allowed and Tomlinson was entitled to proceed with the claim against Ramsey.

When considering whether or not an estoppel arises it is necessary to consider the particular facts and circumstances. In this case Tomlinson did not have his legal interests represented by the Fair Work Ombudsman and so no estoppel arose.

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## School avoids liability for teacher's injury – for now

Public schools, like any other employer, have a non-delegable duty to their employees to take reasonable care to avoid exposing them to unnecessary risk of injury. But what are schools to do when the potential risk is a student? In *State of New South Wales v Sticker* the New South Wales Court of Appeal was asked to consider the actions of a public primary school in dealing with a known troubled student who went on to cause serious injuries to an employed teacher.

Jeanette Sticker suffered serious injury on 18 March 2009 when she was leading a student by hand through a door. The child, known as "X", braced himself and pulled her back causing Sticker to land awkwardly and pushing her right hip out.

Sticker was employed as an Assistant Principal teaching a computer class and providing other learning support at Bert Oldfield Public School, a small school with some 250 pupils spread across several composite classes. X was a seven year old of Liberian background who had formerly lived in a refugee camp and had been granted a protection visa to live in Australia. X had a history of disruptive behaviour at the school and had been suspended on 27 February 2009, three weeks prior to the incident.

As a result of the incident Sticker suffered injury to her right hip, leg and ankle. She commenced proceedings in the District Court against the State of New South Wales and the matter was heard at first instance by his Honour Judge Levy SC.

At trial there was no dispute that Sticker was seriously injured. By the time the matter came to trial Sticker had moved to the private sector as an educational trainer working reduced hours because of her injuries. It was common ground that there was an adverse impact on her earning capacity.

The primary question in the case at trial was whether the State was negligent in failing to remove X from the school or alternatively seek available funding for an additional teacher to attend the school to provide assistance.

Sticker argued that X should have been assessed as unsuitable to attend the school either at the time of his enrolment or by June 2008 when additional funding was sought to assist with the management of his behaviour. Sticker argued that funding should have been made available in the second half of 2008 when it was sought. The evidence was that the funding was not made available until early 2009.

His Honour was critical of the school's response to X and found that he should have been either suspended or removed from the school. His Honour considered that these measures were reasonable and practical and had they occurred Sticker would not have been injured. Damages were ordered in excess of $600,000.00.

The State appealed his Honour's decision in relation to breach of duty and causation. There was also a challenge on the basis that his Honour failed to provide proper reasons in his decision and failed to consider all of the evidence.

The Court of Appeal allowed the State's appeal and set aside the trial judge's orders.

Leeming JA, with whom McColl and Gleeson JJA agreed, found that the trial judge had failed to consider evidence that documented an improvement in X's behaviour in the second half of 2008. This was recorded in a second semester report and supported by oral evidence at trial.

Leeming JA found that whilst his Honour concluded that the problem of X's behaviour was allowed to continue unchecked and to worsen, there was no evidence at all that his behaviour worsened in the second half of 2008. To the contrary there was evidence available that his behaviour had in fact improved.

Leeming JA noted:

> *"I would be unable to conclude that X should have been suspended in the second half of 2008. Still less can I conclude that X should have been permanently removed in the second half of 2008. So far as may be seen, viewing the matter prospectively, the steps put in place by the school were achieving their intended goals."*

The State owed a non-delegable duty to Sticker, as her employee, to take reasonable care to avoid exposing her to unnecessary risks of injury. The trial judge found that the risk could have been addressed by suspending X or finding alternative arrangements for his schooling (which took place after Sticker was injured). The Court of Appeal disagreed noting that the trial judge did not address the school's policy on suspensions and expulsions at all. That policy provided that the school had to attempt to speak with X's mother before any further action was to be taken after his March suspension. The school also had to take into account the impact of a further suspension on X's living arrangements. The evidence at trial was that during his March suspension X had to leave the family home to stay with a relative as his mother worked shift work and couldn't supervise him during the day. The trial judge had erred in failing to consider that evidence.

On balance the Court of Appeal considered that the evidence at trial did not support a finding that it was reasonable for X to have been removed from the school, or that failing to do so was a breach of the school's non-delegable duty. Leeming JA noted:

> *"there is force in the submission advanced by the State that the risk of significant injury to an experienced teacher such as [Sticker] at the hands of a seven year old student X must be considered to have been slight and not one which required his urgent removal from the primary school."*

Turning to causation, the Court of Appeal considered the subsequent history of X in 2009 which included six further suspensions totalling 41 days. X was diagnosed with attention deficit disorder in April and in November was approved for placement in a support class at Rouse Hill Public School for the 2010 school year.

Having regard to that history Leeming JA was not satisfied that causation had been established. His Honour noted:

> *"I am not persuaded that the judgment can be sustained by a finding that, but for a breach of duty X should have been suspended for sooner and longer in 2009 with the result that he would not have been present at school on 18 March."*

The Court set aside the trial judge's orders but did not enter a judgment for the State. Rather, the parties have been sent to mediate, failing which there will be a retrial.

In this case the failure of the trial judge to consider large portions of evidence has meant that the State has so far avoided liability for Sticker's injury. It will be interesting to see how a new judge deals with this matter if there is a retrial, which seems likely.

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## Negligence and contributory negligence – slip and fall claims

In the recent decision of *Stenning v Sannig* [2015] NSWCA 214, the NSW Court of Appeal considered the application of the contributory negligence provisions under the *Civil Liability Act* 2002 (NSW).

The standard of contributory negligence is formulated in Section 5R as follows:

> *(1) "The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.*
> *(2) For that purpose:*
> *(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and*
> *(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time."*

Section 5R contemplates that people are expected to take reasonable care for their own safety, even in circumstances where they bear no responsibility for the risk. What *Stenning v Sannig* makes clear is that a person's actions or inaction may be found to be unreasonable in cases where they have inadvertently failed to take care for their own safety.

The Stennings were an elderly couple in their 90s who resided in a house situated roughly 500 metres from the home of Ms Sannig, the plaintiff. Owing to their age and ill health, Ms Sannig used to frequently visit the Stennings to provide them with assistance and care. Ms Sannig had in fact visited the Stennings on about 50 to 60 occasions prior to the accident.

On most visits Ms Sannig would use an entrance at the side of the house to enter the premises. She had only used the front entrance on about 6 occasions.

Sometime in 2007 or 2008, the Stennings installed Caeserstone steps at the front of their property, which lead from the street to the front door. There was a metal hand rail on the right side of the steps which extended part of the way down the steps from the path leading to the front door.

Caeserstone steps are notoriously slippery when wet.

It was only a few months after they were installed that Mr Stenning slipped and fell on them during a bout of wet weather.

In an attempt to remedy the situation, Mr Stenning installed carpet squares on the steps. It was not in evidence as to what kind of fabric the squares were made of, and to what extent they were slip resistant. In any case, they did not completely cover the steps as on each step there was an area around the carpet square of approximately the width of a brick.

On the 6 or so occasions when Ms Sannig had accessed the property via the front entrance, she had never used the Caeserstone steps. She gave evidence that she regarded the steps generally as unsafe. It was in evidence that she had also been told by one of the Stennings about Mr Stenning's fall on the stairs and the reason for the installation of the squares.

One day in October 2010, it had been raining and Ms Sannig was unable to gain access to the Stenning's property from the side entrance, as Mr Stenning had stacked some timber there and she used the front entrance. When she was leaving the property, Ms Sannig placed her left foot on an uncovered section of the Caesarstone steps and slipped suffering injuries.

About 10 days after Ms Sannig's fall, employees from the Department of Veteran Affairs attended the property on the Stennings' instructions and installed an additional railing next to the steps, together with non slip strips around the edge of the carpet squares.

In the substantive proceedings in the District Court of NSW, Ms Sannig gave evidence that she had intended to leave the path and walk on the grass (thereby avoiding the steps entirely) and in the process of doing so had inadvertently placed her left foot on one of the steps.

At trial Judge Finnane of the District Court observed generally that Caesarstone was not a suitable material for outdoor steps as it was too slippery, particularly in rainy conditions. He noted that the Stennings were aware of this very fact as they had installed carpet squares after Mr Stenning's fall.

His Honour rejected the argument by the Stennings that Ms Sannig would have safely alighted down the steps if she had stepped on the carpet squares and used the railing. He observed that there was no evidence as to the composition of the carpet squares, and they may have become sodden and similarly dangerous when wet.

Judge Finnane considered that Ms Sannig was entirely justified in avoiding the steps, which she rightly considered dangerous, and in using the grass track she had walked on during the previous 6 or so occasions.

The appropriate response by the Stennings after Mr Stenning's fall would have been to remove the

Caeserstone steps entirely and replace them with a concrete ramp, or to have placed some adequate non-slip material around the carpet squares.

Accordingly, there was a verdict for the plaintiff with no reduction for contributory negligence.

On appeal, the Stennings took issue with a number of Judge Finnane's findings, not in the least his conclusion that there was no contributory negligence on the part of Ms Sannig.

In the substantive proceedings, Judge Finnane had considered the application of Section 5R, and concluded that Ms Sannig was exercising care for her own safety in choosing not to walk on the path let alone the steps. The fact that her foot "struck" the Caeserstone tile was "mere inadvertence", particularly as at the time of the accident the conditions were becoming dark, it was raining, and she was holding an umbrella. In essence, Ms Sannig had taken reasonable care to avoid injury by merely attempting to avoid the steps, even if she ultimately had been unsuccessful in doing so.

The Court of Appeal differed in its interpretation of how Section 5R was to apply in the circumstances.

Although Ms Sannig was attempting to take care for her own safety by not stepping on the Caesarstone steps, the Court found that the fact that she had inadvertently made contact with the side of one of the steps fell short of what was to be considered "reasonable" under Section 5R.

In cross examination as to the precise mechanism of the accident, Ms Sannig had described how she took "one step too many", and made an "inadvertent overstep" as she was making her way to the grass.

Justice Hoeben (with Justices McFarlan and Gleeson agreeing) found that the "strong inference" to be drawn from those admissions under cross examination was that Ms Sannig was "not paying adequate attention to where she was placing her feet" which went beyond mere inattention.
Regardless of whether visibility was reduced in the rain and darkened conditions, she should have been paying more attention to where she was stepping.

That said, the Court of Appeal did not factor in Ms Sannig's failure to use the hand rail at the side of the steps. There was a finding that she had intended to walk to the left of the path, and had been holding her umbrella in her right hand. It was to be expected that she would move to the left of the path and away from the rail. Even in circumstances where she had held onto the handrail, she would have let go of it prior to her fall in any case.

Ultimately, the Court of Appeal apportioned 85% responsibility to the Stennings primarily as Mr Stenning had actual knowledge of the risk that a person could slip on the steps and yet still did not adequately respond to it, which meant that his "moral culpability was high".

Ms Sannig's contribution of 15% responsibility was due to the fact that she was "careless as to where she placed her foot in circumstances where she was aware of the danger". One could wonder whether the outcome may have indeed been different if Ms Sannig had slipped on the wet grass.

The Court of Appeal has made it apparent that simple inadvertence is not an answer to a contributory negligence claim where a plaintiff is aware there is a risk of being injured.

The duty to take care for one's own safety anticipates that a plaintiff will take specific and appropriate steps to protect themselves in risky situations.

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## EMPLOYMENT ROUNDUP

### Failure to make reasonable adjustments amounts to discrimination

In a recent Federal Circuit Court of Australia decision, the Court found that the employer discriminated against its employee by failing to make reasonable adjustments to the position of the employee to accommodate her disability. The employer claimed that it did not have to make reasonable adjustments as the employee was not fit for the inherent requirements of her position and/or any reasonable adjustments would not have allowed the employee to perform the inherent duties.

Huntley was employed by the Department of Police and Justice - Corrective Services NSW (CSNSW) as a probation and parole officer. Huntley had commenced employment with CSNSW as a trainee probation and parole officer in January 2005.

Huntley was diagnosed in June 2009 with Crohn's Disease. As a result of her Crohn's disability, Huntley was required to have frequent bathroom access which restricted her ability to travel without "immediate" access to a bathroom. Huntley's access requirements could not be anticipated and were often "urgent".

After Huntley's diagnosis she returned to her work but was unable to perform the "field work" component of the PPO position as a result of her physical needs due to the Crohn's disability.

On her return to work some adjustments to her position were made. She did not have to perform home visits and her caseload was reduced to no more than 80 hours per month. Huntley was permanently placed on intake duties and undertook further report writing and administrative tasks. This was an informal arrangement put in place by CSNSW.

However, the evidence disclosed there was no appropriate workplace assessment after Huntley returned to work and there was no plan for reasonable adjustments put in place.

At a meeting in March 2010 Huntley was advised that the informal arrangement could not continue due to the constraints placed on the operations of the workplace. At the meeting no constraints were identified and no workplace assessment was conducted. Further, CSNSW was not able to identify any complaints from co-workers to justify the termination of the informal arrangements.

Huntley was referred to Dr L Crowle as a result of the cessation of the informal arrangement and as a result of her inability to perform field duties. Huntley was advised by her supervisor that the purpose of the medical assessment was to determine what other roles Huntley cold be more suited to as a result of the restrictions on her ability to perform the field duties.

Following the medical assessment by Dr Crowle, Huntley was deemed permanently unfit for her substantive position as a probation and parole officer. However, the evidence revealed that Dr Crowle was not informed of the "inherent requirements" of the relevant occupational "role" or requested to identify any reasonable adjustments that CSNSW could make to the role.

In July 2010 Huntley applied for and was successful in obtaining a position with the Corrective Intelligence Group. The CIG position was extended twice. In late 2010 and throughout 2011 Huntley began to experience extreme fatigue and was diagnosed with IH disability in July 2011. During the diagnostic period Huntley took varying amounts of sick leave.

Huntley was called to a meeting on 10 May 2011 and advised the CIG position would not be further extended due to her illness and extended sick leave record. Huntley was nominally returned to her PPO position. At the meeting Huntley was advised that she could either agree to medical retirement or undertake a further medical assessment.

A further medical assessment was undertaken with Dr Crowle who determined that Huntley was permanently unfit for her substantive position as a probation and parole officer. CSNSW informed Huntley they were reviewing all available vacancies to locate a suitable alternative position. In June 2012 CSNSW advised Huntley that it was not required to secure an alternate position or provide any adjustments to Huntley's position. Huntley lodged a complaint with the Australian Human Rights Commission alleging contraventions of the *Disability Discrimination Act, 1992*.

Section 15 of the *Disability Discrimination Act 1992* provides that it is unlawful for an employer to discriminate against a person on the grounds of the person's disability. An employer discriminates against a person on the grounds of their disability pursuant to Section 5 of the *Disability Discrimination Act 1992* if the employer treats the person or proposes to treat the person less favourably than the employer would treat a person without the disability. An employer also discriminates against an employee on the ground of a disability if the employer does not make or proposes not to make, reasonable adjustment for the person and those reasonable adjustments have or would have the effect that the employee is treated less favourably than a person without the disability.

However Section 21A of the *Disability Discrimination Act 1992* provides that it is not unlawful for an employer to discriminate against an employee on the ground of disability if the employee is unable to carry out the inherent requirements of the particular work required of the employee even if the employer made reasonable adjustments for the employee.

In considering whether an employee is able to carry out the inherent duties of their work, the following factors are to be taken into account:

- the employee's past training, qualifications and experience relevant to the particular work;and
- the employee's performance in working for the employer; and
- any other factor that is reasonable to take into account.

The report of Dr Crowle stated that Huntley was suitable to perform full time office work where there was unrestricted access to toilet facilities. Travel and associated work should ideally be limited to less than 30 minutes or planned such that Huntley can have reasonable access to toilet facilities. CSNSW sent to Huntley an email stating that as a result of the amount of sick leave taken and her inability to travel more than 30 minutes, her secondment at CIG would no longer be supported.

The Court found that CSNSW proceeded on the factually incorrect basis that Huntley could not work in

a situation which required car trips of more than 30 minutes. The Court found this was not consistent with Dr Crowle's evidence who stated that Huntley was, with some restriction, able to ultimately return to full time office work and could work in situations where she was required to travel for more than 30 minutes if it was planned.

CSNSW's defence was that it was not obliged to put reasonable adjustments in place as Huntley could not meet the inherent requirements of the position.

The Court found Huntley was not given the opportunity to provide any input into the drafting of the return to work plan.

CSNSW was unable to satisfactorily explain to the Court that the informal arrangement for the Huntley's Probation and parole position was only a short or temporary arrangement.

The Court referred to the decision of Watts v Australian Postal Corporation and noted the reasonable adjustments were made "for" the person with a disability and not made "to" the position that the person occupied. It gave the example that the adjustments were not made "to" the equipment the person uses but was made "for" the person who operated the equipment.

The Court noted the onus rested with CSNSW to establish Huntley could not have performed the inherent requirements of the probation and parole position even if and were the reasonable adjustments made.

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## Leave loading payable on termination of employment?

If asked, most people would say that, when an employee's employment comes to an end, the employer is required to pay out any accrued but untaken annual leave entitlement.

Most would also say, however, that any leave loading on an accrued entitlement is not payable on termination. Leave loading, traditionally, is only payable as and when the leave is taken.

That may well be wrong according to a recent unanimous decision of the Full Bench of the Federal Court of Australia - *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union [2015] FCAFC 100*.

The source of the problem lies in one of the National Employment Standards (NES) laid down by the *Fair Work Act 2009 (the FW Act)*.

The NES relate to a range of matters, including hours of work, notice of termination, payment on redundancy, public holidays and various types of leave, among them annual leave.

The NES are "minimum standards" of employment, providing a safety net for employees. Although they may be supplemented or enhanced in a modern award or enterprise agreement, they cannot be displaced to the detriment of an employee, even by an enterprise agreement containing terms substantially to the same effect. An enterprise agreement must not exclude any provision of the NES and, to the extent that it does, that term of an enterprise agreement has no effect.

The relevant NES for annual leave is found in section 90 of the FW Act. It says:

*"90 Payment for annual leave*

*(1) If … an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.*

*(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.*

Centennial Mining had an enterprise agreement with some of its employees. The enterprise agreement provided for employees taking annual leave to be paid their base rate of pay plus components for rostered overtime, shift allowances, penalty rates and bonus they would normally be paid were they not on leave, or leave loading (which in this case was 20%), whichever was the greater.

Another clause of the enterprise agreement said that on termination, accrued leave was to be paid out only at the employee's base rate plus average bonus.

Centennial made a number of employee's redundant. On termination, the employees were paid their accrued leave only at the base rate plus average bonus. This was significantly less, it can be imagined, than their base rate of pay plus components for rostered overtime, shift allowances, penalty rates and bonus. The employees union commenced proceedings seeking, in effect, a declaration that the clause of the enterprise agreement which Centennial relied on was of no effect.

The decision of the Federal Court confirmed that the proper approach to interpreting words of a statute like the FW Act is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole".

The context for construction includes the pre-existing state of the law. The precursor to section 90 of the FW Act was section 235 of the *Workplace Relations Act 1996,* which was part of the Australian Fair Pay and Conditions Standard. It read as follows:

*"235 Annual leave – payment rules*

*(1) If an employee takes annual leave during a period, the employee must be paid a rate for … annual leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay …*

*(2) If the employment of an employee who has not taken an amount of accrued annual leave ends at a particular time, the employee must be paid a rate for … the employee's untaken accrued annual leave that is no less than the rate that, immediately before that time is the employee's basic periodic rate of pay...*

The Court could not ignore the fact that the references to "basic periodic rate of pay" appearing in both subsections of the old section 235 have re-emerged as "base rate of pay" only in s 90(1) of the FW Act. That manifests a legislative intention not to confine "the amount that would have been payable..." to the base rate of pay. If the intention were otherwise, one would expect to see "base rate of pay" in both subsections of s 90 or, at least a reference in s 90(2) to the rate prescribed by s 90(1).

Additionally, the Court had regard to the Explanatory Memorandum to the Fair Work Bill 2008, which states:

*"372. Subclause 90(2) provides that, on termination of employment, an employee is entitled to receive a payment in respect of any untaken paid annual leave. The payment will be equivalent to the amount that the employee would have been paid if the employee had taken the annual leave."*

In all, the Full Court accepted the union's argument. It held that section 90(1) creates the minimum standard: payment at the base rate for ordinary hours worked. The effect of s 90(2) is that if that is the rate at which the employee is paid when he or she takes annual leave, then that is the minimum amount that must be paid for any accrued untaken annual leave. If, on the other hand, there is a modern award or enterprise agreement which provides for payment at a higher rate for annual leave that is taken, then s 90(2) stipulates that that is the rate which is payable where annual leave has accrued but has not been taken.

The decision has enormous potential consequences. Employers should review their agreements with employees and their provisioning for termination entitlements.

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## WORKERS COMPENSATION ROUNDUP

### NSW Workers Compensation Reform

On 21 August 2015 legislation was enacted by the NSW Government instituting a wide range of reforms to the NSW Workers Compensation scheme. The reforms address a number of criticisms directed at the sweeping changes introduced in June 2012. The reforms comprise three main elements:

- Increase in benefits for injured workers;
- premium reductions for employers with good safety and return to work records; and
- a restructure of the organisations to provide workers compensation insurance and care services.

A key aspect of returning some of the benefits payable to workers by the June 2012 amendments is the increased use of whole person impairment (WPI) in determining entitlements. An example of this is the entitlement to medical expenses. One of key criticisms of the reforms introduced in 2012 was the limitation of the payment of medical expenses. The recent reforms have introduced a sliding scale of medical expense entitlements linked to a workers assessment of WPI.

For workers with 10% WPI or less, they will now be entitled to medical expenses for two years after the last date of payment of weekly compensation. A worker with more than 10% but no more than 20% is entitled to medical expenses for a period of five years. A worker with high needs (more than 20% WPI) will be entitled to lifetime medical expenses.

The reforms have also removed the restrictions on the necessity for secondary surgery. Secondary surgery will be payable if the subsequent surgery was directly consequential on earlier surgery and it affects a part of the body affected by the earlier surgery. However there is a 2 year time limit running from the date of the initial surgery that applies to secondary surgery. It has been identified that approximately 1,700 workers will

immediately benefit from the relaxation of the secondary surgery provisions.

There is no further limitation in respect to compensation for crutches, artificial aids, home or vehicle modification, hearing aids or batteries irrespective of the level of WPI for a worker.

Weekly compensation entitlements have been extended in a number of areas. Workers will now be able to receive payments of weekly compensation (although still subject to eligibility depending on their level of WPI) for a period of 12 months after reaching retirement age.

An injured worker with a work capacity of more than 20% WPI will also no longer be required to work a minimum of 15 hours in order to be eligible for weekly payments of compensation after a period of 130 weeks.

The minimum amount of weekly compensation for workers with more than 30% WPI will be $788.00 which will be indexed twice per year. This is irrespective of the worker's pre-injury average weekly earnings.

To ensure that workers continue to receive benefits whilst a review of a work capacity decisions takes place, a stay will operate if a request for review is made by the worker within 30 days after the worker is notified of the work capacity decision. Previously, the weekly compensation payments would cease, after the requisite notice periods, whilst a review took place.

Legal practitioners will now be able to be paid for the costs of a review in connection with a work capacity decision, although the finer details are yet to be finalised through the introduction of regulations.

An injured worker who is unable to return to work in their pre-injury employment will be eligible for compensation for the cost of services and assistance of between $1,000.00 and $8,000.00 depending on their level of WPI to assist the worker in returning to work with a new employer. Work assistance means the provision of educational training, transport, childcare, clothing, equipment or any other similar service or assistance.

There has been an increase in the amount of compensation available for workers with permanent impairment. A worker who is currently assessed at 31% WPI will be entitled to $60,500.00 however under the benefit reforms his lump sum payments would be $83,040.00. This represents a 38% increase. Even workers at the lowest end of the threshold, for example 11% WPI, have received an increase in lump benefits in the vicinity of 25%.

There has been a significant increase in death benefits from $524,000.00 to $750,000.00 and the amount payable for funeral expenses has increased from $9,000.00 to $15,000.00.

Interestingly, despite calls for the reintroduction of workers compensation benefits for "journey claims" there has been no change.

With regards to premiums, there is a commitment that one third of every dollar above the minimum surplus will be returned to business. It is indicated that around $170 to $200 Million will be returned to high performing employers this year via a performance discount. About 70% of employers perform better than the Scheme average and will receive a performance discount of between 5-20%. These are employers with low workers compensation claims costs through good safety systems and who proactively support injured workers in a return to work safely.

An example of this is if an employer returns a worker to work within 13 weeks, they will receive a 15% discount on the cost of that claim. A 10% discount is available if a worker returns to employment within 13 to 26 weeks and a 5% discount if the worker returns within 26 to 52 weeks. Premiums generally for medium and large employers are now linked to good claims performance when compared to the industry average. Employers that have performed well, either by improving safety or proactively helping injured workers return to suitable work safely will pay lower premiums than poorly performing employers.

The reforms highlight the government's desire to ensure worker's with serious injuries, that is workers with "high" or "highest needs" to use the new naming practice, are able to receive higher benefits for longer periods. The threshold to the increased benefits is very much tied to the assessment of permanent impairment. We foresee a significant increase in disputes with regards to a worker's level of permanent impairment, particularly for workers in excess of 20% WPI. Reach the 20% threshold and a worker will be entitled to significant lump sum entitlements, less restricted weekly compensation benefits and lifetime medical expenses.

Work injury damage claims remain a feature of the scheme and the threshold of 15% WPI remains unchanged.

So we have 3 gateways to attract beneficial entitlements, 15%, 20% and 30% WPI. However we note that once a worker reaches 15% WPI and they can establish negligence on the part of the employer they can bring a work injury damages claim which for many is the most attractive option as claims for economic loss are not restricted by the fixed periods specified for weekly benefits.

The legislation requires a mandatory review of the scheme within two years. We wonder whether that review will be the trigger point for privatisation of the Scheme or whether privatisation is on the immediate radar of SIRA the new organisation responsible for workers compensation insurance in NSW.

## One claim only for permanent impairment

The Court of Appeal delivered the much anticipated judgment of *Cram Fluid Power Pty Limited v Green* (2015) NSWCA 250 on 27 August 2015. The appeal specifically dealt with question as to whether there can be only one claim for permanent impairment as a result of the amendments to the workers compensation legislation on 19 June 2012.

Mr Green was an employee of Cram Fluid Power Pty Limited and suffered a back injury at work on 24 May 2015. In December 2010 he made a claim for lump sum compensation for permanent impairment under Section 66. He was paid 7% whole person impairment pursuant to a Complying Agreement.

Mr Green's condition deteriorated and he required surgery in September 2012. On 29 October 2013 Mr Green made a further claim for Section 66 for 22% whole person impairment less the amount previously paid.

Ultimately President Keating of the Workers Compensation Commission determined that the one claim limitation introduced by the 2012 amendments did not apply to Mr Green's 2013 claim. President Keating determined Section 66(1A) only applied prospectively to claims for lump sum compensation made on or after 19 June 2012.

Cram Fluid Power Pty Ltd pursued an appeal. In the Court of Appeal Gleeson JA delivered the leading judgment with Beazley ACJ and Emmett JA in agreement.

There were two issues determined in the appeal. Firstly, whether the one claim limitation applied to Mr Green's 2013 claim and secondly whether the words "*one claim*" in Section 66(1A) is to be interpreted as meaning one "further" claim could be made on or after 19 June 2012.

The provisions relating to lump sum compensation pursuant to Section 66 were amended on 19 June 2012. Those amendments included a new provision under Section 66(1A) which provided that only "one claim" could be made for permanent impairment compensation.

A transitional provision (Clause 15) was also introduced that extended the amendments to Section 66 to include a claim made on or after 19 June 2012 but not to such a claim made before that date. This provision was however subject to regulation.

The Court of Appeal determined that clause 11 of Schedule 8 to the 2010 Regulations varied the operation of clause 15 of the transitional provisions. Clause 11 extended the operation of the 2012 amendments to claims made for compensation made before 19 June 2012 subject to one exception. The exception was limited to those claims made before 19 June 2012 that *specifically sought compensation under Section 66 or Section 67 of the 1987 Act*.

The exemption provided by clause 11 was directed to *claims for compensation* which answer the relevant description and not *the claimant* or *worker* nor the *injury.* Mr Green's 2013 claim answered the description of a *claim for compensation* and it was made after 19 June 2012.

Gleeson JA commented that the clear object of clause 11 was to extend the 2012 amendments to claims made before 19 June 2012 but noted that the clause went no further. The fact that Mr Green's 2010 claim may have *specifically* sought compensation under Section 66 prior to 19 June 2012 was not the point. The subsequent 2013 claim, although arising out of the same *injury*, was a different *claim* to the 2010 claim. In essence, the 2013 claim was subject to the operation of the amending provisions including the one claim limitation in Section 66(1A).

With regards to the second question posed to the Court of Appeal in relation to "one further claim", Gleeson JA made specific reference to the material which accompanied the 2012 amendments including the explanatory notes, the second reading speeches and the joint select committee report on the compensation scheme. Gleeson JA commented this material has made it clear that Parliament had limited the entitlement to benefits provided under the 1987 Act by imposing the one claim limitation and the 10% threshold for permanent impairment. The 2012 amendments marked a legislative policy favouring cost savings and administrative reforms to the existing scheme for lump sum compensation.

The construction favoured by President Keating in *Green* that the new Section 66 provisions were to mean that "*only one further claim*" could be made was not accepted. Gleeson JA highlighted that:

- Firstly, that is not what the words of the provision provide.
- In view of the plain language and the purpose of the 2012 amendments there was no reason to add an additional word such as further into Section 66 (1A).

- Contrary to the view of President Keating, the amendments to Section 66 do not turn on the injustice suffered by Mr Green as a result of the 2012 amendments. To reason in this way was to ignore that the amendments plainly operated to the detriment of injured workers in the position of Mr Green.

Gleeson JA commented that the opinion of Beech-Jones J in *Sukkar v Adonis Electrics Pty Limited* summed up the correct position in that the amendments:

> *"mandate that there shall be only one claim for permanent impairment compensation in respect of the permanent impairment that results from an injury … this may operate on facts antecedent to it coming into force including the existence of an earlier claim".*

This decision has significant ramifications for a large number of claims made by workers for additional permanent impairment. Quite simply, there appears to be no circumstances now wherein a worker will be entitled to make additional lump sum claims, irrespective of the date of injury or when they first brought a specific claim for lump sum compensation.

Insurers should immediately review any further claims for permanent impairment wherein workers have specifically made a claim for permanent impairment prior to 19 June 2012.

The consequence of the decision is that injured workers who had made a claim for permanent impairment before 19 June 2012 which was resolved have no further entitlement to lump sum compensation.

On publication of the judgment WIRO immediately withdrew legal funding for workers who have brought claims caught by the judgment.

The Commission has asked Practitioners to review dispute applications proposed to be lodged with the Commission, to ensure that an entitlement to permanent impairment compensation exists and noted the dispute application should clearly identify that any claim for further permanent impairment compensation was specifically sought before 19 June 2012 or that the worker is exempt from the 2012 amendments.

In relation to proceedings for further permanent impairment compensation that are currently before the Commission the following procedures will be implemented:

- In matters not currently listed before Arbitrators, notices will be sent to the parties inviting submissions as to why the matter should proceed.
- All matters listed before Arbitrators will be dealt with at the respective listing.

The Commission has also asked practitioners to review all current dispute applications before the Commission to ensure that the proceedings are not affected by the 2012 amendments. In cases where there is no entitlement to further permanent impairment compensation, practitioners are advised they should discontinue the proceedings at the earliest opportunity.

This decision is not a surprise and we note that in July 2015 the Law Society provided submissions to the Government proposing amendments to the legislation to remove the one claim restriction, irrespective of the date of injury. It was further proposed that workers should be permitted to bring second and subsequent claims for permanent impairment where there is a deterioration (increase) in their impairment of at least 5% whole person impairment.

Although the judgment of the Court of Appeal is sound we would not be surprised if, given the impact of the decision, leave is sought to appeal the matter to the High Court.

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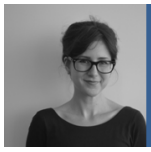

## When is a claim a "claim"? – can an unresolved claim for lump sum compensation be amended without being caught by Section 66(1A)?

Since the introduction of Section 66(1A) of the *Workers Compensation Act 1987* in the 2012 amending legislation workers are limited to making only one claim in respect of permanent impairment that results from an injury that is compensable under the Act. Insurers have since been utilising this provision to decline further claims for lump sum compensation.

The Workers Compensation Commission recently considered when a "claim" for compensation has been made and whether an unresolved claim can be amended without being caught by the Section. Deputy President Roche's decision in *Woolworths Ltd v Stafford* confirms that for a claim to be made it must be capable of payment under the Act and the decision also suggests that the "one claim" should be interpreted as "one determined claim".

Therefore, claims cannot be disputed by invoking Section 66(1A) where the worker has not already had a claim for lump sum compensation in respect of the claimed injury determined by the Commission.

Steven Stafford suffered a serious head injury at work on 14 June 2010. Liability was accepted for the injury and on 7 April 2014 Mr Stafford's solicitors made a claim for 7% whole person impairment relying on a report of Dr Davies, Neurosurgeon. Although his claim

was below the 10 per cent threshold in the amended Section 66(1), when Mr Stafford made his claim he was entitled to recover compensation based on the Court of Appeal's decision in *Goudappel v ADCO Construction*. The High Court then overturned the decision in *Goudappel* and as a result, because Mr Stafford had not specifically sought permanent impairment compensation prior to 19 June 2012, Section 66(1) applied and his claim was not payable.

On 26 September 2014 Mr Stafford's solicitors wrote to Woolworths seeking to amend the claim of 7 April 2014 as Dr Davies had modified his previous assessment to 12% whole person impairment. Woolworths declined the claim relying on Section 66(1A) on the basis that Mr Stafford had made already made a claim on 7 April 2014. The worker lodged an Application to Resolve a Dispute in the Workers Compensation Commission.

Arbitrator Dalley found that the letter of 7 April 2014 was not a "claim" and determined that:

*"(a) the word "claim" in s 66(1A) imports more than "a mere demand for payment but rather is to be read as referring to a claim made in accordance with the 1987 and the 1998 Acts" ([34]);*

*(b) a demand for compensation in respect of whole person impairment of 10 per cent or less cannot be a claim within s 66 and it followed that a demand for a lump sum payment in respect of whole person impairment of 10 per cent or less could not be a claim within s 4 of the Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act) ([36]);*

*(c) a "claim for compensation" in the statutory definition of "claim" means a claim for compensation which is capable of payment in accordance with the 1987 Act ([37]), and*

*(d) the compensation initially sought was "not available under [the Workers Compensation Acts]" ([47])."*

The arbitrator went on to say that even if the letter of 7 April 2014 constituted a claim for the purposes of Section 66(1A), then the claim was unresolved and there was no provision in the legislation which prevented Mr Stafford from amending the claim to enable in order for him to receive compensation.

Woolworths Limited appealed the arbitrator's decision and after an extensive review of the legislation, guidelines and the basic principles of statutory interpretation, Deputy President Roche confirmed the arbitrator's decision. The Deputy President considered the two primary issues on appeal:

- Did the letter of 7 April 2014 constitute a "claim" under section 66?
- Did the letter of 7 April 2014 constitute an unresolved claim?

The Deputy President concluded that read in its proper context, "one claim" in Section 66 (1A) means one valid claim.

The Deputy President considered any other result would lead to a situation where a worker who makes any demand for permanent impairment compensation no matter how defective, is permanently prevented from recovering such compensation. Deputy President Roche determined: *"There is no justification, either in the text or in the context of the legislation, for such an illogical and arbitrary result."* Because Mr Stafford's letter dated 7 April 2014 sought compensation for in respect of less than ten per cent whole person impairment it was not a valid claim under s 4 of the Workplace Injury Management and Workers Compensation Act 1998.

Further, the Deputy President confirmed letters of demand for permanent impairment compensation or permanent impairment claim forms are preliminary documents prepared prior to the commencement of proceedings in the Commission and may be amended prior to the resolution of the claim. Such an amendment does not amount to a second claim and the amendment dates from the date of the original claim. Deputy President Roche noted that the rules of court in most jurisdictions in Australia allow a party to amend his or her pleadings once without leave; therefore the amendment in Mr Stafford's case effected by the letter of 26 September 2014 took effect from the date of the first claim on 7 April 2014.

The decision brings clarity following the amendments as to the status of unresolved claims for permanent impairment. As workers may now only make "one claim" for permanent impairment compensation in respect of the permanent impairment that results from an injury and only one assessment may be made of the degree of permanent impairment of an injured worker by an approved medical specialist, it is not surprising that the Commission will be careful to not deprive a worker of that entitlement. The decision gives a clear message to insurers that a claim for permanent impairment cannot be disputed pursuant to Section 66(1A) where the injured worker has not already had a claim for lump sum compensation in respect of the claimed injury determined by the Commission.

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## Farewell parties – arising out of the course of employment, or not?

In our December 2012 newsletter we commented on the NSW Court of Appeal decision of *Pioneer Studios Pty Ltd v Hills* [2012] NSW CA 324 which examined the liability of an employer for an injury which occurred on an employer' s premises during a party. The Court of Appeal remitted the matter back to the Workers Compensation Commission to determine the matter in accordance with the law. Deputy President O'Grady delivered his judgment on 10 July 2015.

Pioneer Studios conducted a business providing studio space and rental of photographic equipment to the public. Hills was employed as the manager of the equipment rental department and worked between 10:00am and 7:00pm and did not work overtime. A fellow Pioneer Studios employee, Mr Buchanan and two of Mr Buchanan's friends planned to jointly celebrate their birthdays at a party to be held in March 2004. The two friends were not employed by Pioneer Studios.

Mr Buchanan approached Pioneer Studios' sole director, Mr Ludbrook and asked if he and his friends could use one of the studios at the premises as a venue for the party. Ludbrook was content for the party to occur provided Buchanan and his friends provided security on the night. Buchanan subsequently paid for a security guard and a disc jockey to provide entertainment. The party was attended by 100 to 130 people. Amongst them was Hills. Ludbrook was also present.

At about 2:00am Hills began to descend some stairs and fell over the balustrade striking her head and shoulder upon the landing of Level 4.

Hills pursued a claim for workers compensation benefits from Pioneer Studios contending she was induced by Ludbrook to attend the party as it was a farewell party for Buchanan who was departing overseas. Hills was advised that most of the people working at Pioneer Studios would be at the function and there would be a lot of clients attending and the function provided a good chance to meet clients she would do business with. Hills felt it was important for her to be at the party to meet clients face to face and get on with them. She always thought the party was a work function.

Ludbrook claimed he had no involvement in the organisation of the party. The invitations and arrangements were done by Buchanan and his friends and Pioneer Studios had no involvement in who was being invited. The premises were used solely for the purposes of Buchanan's party and Pioneer Studios were not involved in any other way apart from workers and Ludbrook being invited as guests. Ludbrook did not know about two-thirds of the people at the party and the majority were friends of Buchanan. This was confirmed by a number of employees of Pioneer Studios.

Pioneer Studios argued that the function was no more than a birthday party for young people, two of which had a connection with Pioneer Studios. Pioneer Studios did no more than give permission to use the premises and insist that security be provided. The provision of the premises was of no significance. Guests brought their own alcohol and it was not a client function and Pioneer Studios had no control over who was invited.

The injury received by Hills occurred during an interval between two discreet periods of work. At the time of the incident Hills was not performing employment duties. This however did not preclude Hills from receiving compensation if she could show that Pioneer Studios expressly or impliedly induced or encouraged Hills to spend that interval at a particular place or in a particular way. Deputy President O'Grady highlighted the following salient facts:

- that the injury occurred during an interval between periods of employment;
- Pioneer Studios had encouraged or induced Hills to be present during that interval at a particular place, namely the business premises;
- the purpose of Hills attendance was employment related, a farewell party for a fellow employee;
- the factual association or connection with her employment concerned Pioneer Studios' inducement or encouragement to be at the function;
- the injury was received at the place of the Hill's employment.

The Deputy President found the injury was received in the course of Hills' employment. Where an injury occurs in the course of employment, it will almost invariably be found to have arisen out of that employment.

The employment was found to cause or to some material extent contribute to Hills injury and accordingly the injury provisions in Section 4 were satisfied. Further, Section 9A was satisfied on the basis there was a real and substantial connection between the injury and employment and employment was a substantial contributing factor to the injury.

The boundaries between employment and leisure activities can be easily blurred.

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## CTP ROUNDUP

### Applications to commence late proceedings in a motor vehicle accident

In the recent decision of *Dijakovic v Perez* [2015] NSWCA 174, the Court of Appeal has considered the approach to be taken in determining an application for leave to commence proceedings more than three years after an accident pursuant to Section 109 of the *Motor Accidents Compensation Act 1999* (NSW).

Mr Dijakovic was injured in a motor vehicle accident at Croydon on 21 October 2009. Although able to walk, Mr Dijakovic did attend hospital, however when x-rays revealed no fractures, he was sent home. Mr Perez was the driver of the other car involved in the accident and liability was subsequently admitted by his insurers.

It was not until 20 July 2012 that Mr Dijakovic's solicitors lodged a MAS application, and an application for a CARS general assessment was lodged on 19 October 2012. This application was dismissed for procedural reasons, and a fresh CARS application was lodged on 8 February 2013.

It appears some of the delay in the process was caused by the failure of Mr Dijakovic's solicitors to expedite the matter, while delay was also caused by Mr Dijakovic not responding to communication from his legal representatives for extended periods of time, in particular between March 2010 and June 2011.

A CARS assessment hearing was held on 21 October 2013, however Mr Dijakovic rejected the decision of the Assessor and sought to commence proceedings in the District Court of NSW on 13 December 2013.

Under section 109(3) of the Act, the leave of the Court to commence proceedings must not be granted unless the claimant (a) provides a full and satisfactory explanation for the delay, and (b) the total damages likely to be awarded to the claimant are not less that 25% of the statutory amount that may be awarded for non-economic as at the date of the accident in question. Here the applicable monetary threshold was $97,500.00.

The matter was heard at first instance before Judge Olsson of the District Court, who refused the application for leave on both the above grounds.

Mr Dijakovic successfully appealed that decision to the Court of Appeal.

It is important to note the two temporal elements which require consideration under section 109(3)(a). In this case the court clarified that on the one hand, the 'delay' requiring explanation is the period from three years from the date of the accident until proceedings are commenced. In contrast, in providing a 'full and satisfactory explanation' for that delay, the claimant is required to address the period from the date of the accident until the time of providing the explanation.

Mr Dijakovic's appeal was successful on two grounds, the first being that Her Honour erred in her assessment of the evidence of the explanation for the delay.

In this regard, Justice Gleeson referred to a long list of material errors of fact and matters not taken in to account by the primary judge.

Of particular interest, Justice Gleeson found the primary judge erred in concluding a reasonable person in Mr Dijakovic's position would not have acted the way he did. He pointed to the claimant's evidence in cross-examination that he failed to respond to correspondence from his solicitors due to his mental state at the time, and his resultant propensity for avoidant behaviour. Here it should be noted that the claimant relied on medico-legal reports of a psychiatrist, who had diagnosed him with a variety of mental health conditions.

The Court of Appeal clarified that the test to be applied is whether a reasonable person in the position of the claimant would have been justified in experiencing the delay which occurred. A claimant is not required to show they were not the cause of any delay.

The Court also found the primary judge erred in failing to take into account that the insurer did not act quickly in making its section 82 offer 6 weeks after receipt of the section 85A particulars (despite this being within the two month timeframe required under the Act).

In relation to the requirement under section 109(3)(b), Justice Gleeson found that when notionally assessing damages, the primary judge had erroneously approached the task on the basis that a finding should be made with respect to the considerable conflicting medical evidence in the case. It was largely on this basis that the primary judge found the claimant had no cogent claim for either past or future economic loss in the amount suggested by the claimant's counsel.

The problem with Her Honour concluding that one group of experts should be preferred over another was that none of the medico-legal experts were called to give evidence. Justice Gleeson found the primary judge ignored the fact that satisfaction of section 109(3)(b) is based on a preliminary enquiry involving a cursory assessment of the available evidence. This is

required as the section refers to the 'likely' damages a claimant would receive, so the question is whether there is a real (as distinct from remote) chance that the claimant would receive damages above the applicable threshold.

The Court of Appeal has clarified that the approach to be taken by the Court in determining the monetary threshold issue in section 109(3)(b) is by reference to the claimant's medical evidence, taken at its highest.

The decision demonstrates that when a Court considers applications to commence proceedings under section 109(3), they are required to have regard to all evidence relied upon. The conduct of parties other than the claimant, including their solicitors and the insurer will also be examined and may be deemed to be part of the reason for the delay, even if statutory timeframes have been adhered to.

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## Section 62 : A Reminder - A different opinion on causation may not be "additional relevant information"

In the case of *John Hoyn v NRMA Insurance Limited* [2015] NSWSC 814, Justice Adams has determined that the Proper Officer was wrong to consider a medico-legal opinion expressing a different view on causation as "additional relevant information" within the meaning of Section 62 of the *Motor Accidents Compensation Act 1999.*

The claimant was injured in an accident in May 2011. He was assessed at MAS as having a Whole Person Impairment ("WPI") of 10% in relation to his neck, left shoulder and left arm in August 2013. In a further MAS assessment in May 2014 the same injuries were again assessed, together with an injury to the right shoulder alleged to be caused by the accident, at 12% WPI.

The insurer then obtained a report from Dr Pierides that in his view the claimant's right shoulder injury was not caused by the cervical spine injury and there was no evidence on assessment of any restriction of movement in the right shoulder as a result of any cervical spine injury. He was doubtful whether there was in fact any right shoulder injury as the claimant had not complained of the injury until 2 years after the accident.

The Proper Officer decided this report was additional relevant information in the sense that it was not before the MAS Assessor at the time of his assessment. The MAS Assessor had found the claimant's neck injury caused limitation of movement in the right shoulder and was related to the motor accident. However because the MAS Assessor had not seen Dr Pierides' opinion on causation, the Proper Officer determined that Dr Pierides' opinion may be capable of changing the outcome.

The Proper Officer determined that there would be a further assessment. The claimant sought judicial review of the Proper Officer's determination.

The application came before Justice Adams, who agreed that the opinion of Dr Pierides on causation was different to that of the MAS Assessor. However, his Honour pointed out that the two matters that the Proper Officer said were the basis of Dr Pierides' opinion, being the lack of restriction of movement in the right shoulder and the first report of right shoulder injury being made 2 years after the accident, were both considered by the MAS Assessor and addressed in his determination.

Justice Adams re-iterated that a further medical opinion from one expert that differs with an earlier opinion from another expert on the same issue is not "additional relevant information". The fact that Dr Peirides differed from the MAS Assessor as to the degree of significance to be placed the two matters of delay in reporting of symptoms and range of movement on assessment was not additional information in the relevant sense.

The approach taken by Justice Adams was consistent with the approach taken in *Alavanja v NRMA Insurance Ltd [2010] NSWSC.* Justice Davies in that case set out the rationale for the position taken by His Honour, ie that a different opinion on a matter already canvassed by a MAS Assessor was not additional relevant information. To allow otherwise would mean there may never be an end to the assessment process, which would be inconsistent with the aims of the *Motor Accidents Compensation Act,* which include the early resolution of compensation claims.

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## Consecutive Accidents & the Domestic Assistance Threshold

The NSW Court of Appeal recently examined an interesting scenario involving the apportionment of domestic assistance in two motor vehicle accident claims. In *Falco v Aiyaz; Falco v Falzon* (2015) NSWCA 202, it was determined that a global assessment of care at seven hours per week apportioned equally between two accidents meant that the threshold set out in Section 141B of the *Motor*

*Accidents Compensation Act* 1999 has not been met and no damages for gratuitous care were payable.

Section 141B prescribes that in order to succeed in a claim for gratuitous domestic assistance, a claimant must reach a threshold of at least *six hours per week* and the care must be provided for a *continuous period of six months*.

The claimant, Ms Falco, contended that as a consequence of two separate motor vehicle accidents she suffered soft tissue injuries and a psychiatric condition. On the first occasion, the vehicle that struck her vehicle was driven by Mr Mohammed Aiyaz. On the second occasion, the vehicle that struck her vehicle was driven by Mr Victor Falzon. Ms Falco sued Mr Aiyaz and Mr Falzon in separate proceedings in the District Court. Liability was admitted in each case.

Ms Falco made a claim for care on the basis she required full time care for the rest of her life. In particular Ms Falco relied upon gratuitous care being provided by her husband and her daughter. Although there were issues of credit, Bozic DCJ, the trial judge, determined that the first accident was of a minor severity in which Ms Falco suffered a mild adjustment disorder with mixed anxiety with depression. The condition had not stabilised as at the date of the second accident and Ms Falco was predisposed to an increased psychological reaction due to the second accident.

An apportionment for award of damages was made at 50%. The trial judge's award of seven hours per week of gratuitous care was apportioned 50% between the two accidents meant that each responsible driver was liable for three and a half hours per week. The defendants appealed this finding on the basis that Ms Falco was not able to be awarded damages for care pursuant to Section 141B as she did not reach the threshold of six hours per week for a minimum of six months for each accident.

The Court of Appeal agreed with this submission, noting that the trial judge did not make a finding that both insurers were concurrently liable for the same damages sustained by Ms Falco and the principles involving consecutive accidents and apportionment should be applied.

The Court of Appeal noted that in "increased vulnerability" situations when the damage sustained in the second accident is greater because of an aggravation of an earlier injury, only the extra consequences of the second accident can be claimed by the injured party in relation to the second accident. Accordingly, the Court of Appeal allowed the appeal by the defendants and reduced the damages to reflect that there was no entitlement to gratuitous domestic assistance against either defendant as the threshold needed to be achieved in each claim.

Insurers should closely examine the number of hours awarded on a global basis for care when there are consecutive accidents. Providing a determination of concurrent liability is not made, and insurers should be alive to the threshold in Section 141B for each claim.

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