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Asbestos Claims – The tail for insurers just got longer

Long-tail insurance describes insurance covering losses that may not be known until after the period of insurance expires with claims taking a significant time to report, settle and close. This includes most casualty lines including general liability insurance and workers' compensation insurance. These classes of insurance have occurrence based policies that cover liabilities that arise as a consequence of damage sustained in the period of insurance. The insurer's liability for insurance written in a year cannot be closed out until many years after the policy period passes and all claims are finalised.

An example of a long tail claim is a personal injury claim for damages for injuries sustained as a consequence of exposure to asbestos. A person exposed to asbestos may not know they have suffered an injury until symptoms of their injury manifest many years after the exposure to asbestos and it is only then that the person realises they have an injury and brings a claim for damages for the injuries they sustained. Liability and workers compensation insurers have felt the brunt of asbestos claims for many years and the long tail nature of these claims is indisputable.

In asbestos related claims identifying the date of injury presents a conundrum for insurers that do not cover an insured for the entire period that asbestos exposure is attributable to the insured's activities, as well as for insurers that come on risk for an insured many years after the asbestos exposure ends. The date of injury will be the trigger for cover under the insurance.

Determining when an injury is sustained can be difficult. Quite often there is no manifestation of the disease until many years after the exposure. A cause of action does not accrue until there is damage. The question is whether there can be damage before the symptoms of a disease manifest themselves. Is the injury sustained when the symptoms manifest or rather when there is an injury in fact? Is the injury sustained

when there is a change in cells which will ultimately lead to mesothelioma?

It now appears that the tail is about to get even longer as a consequence of the recent High Court judgement in *Alcan Gove Pty Ltd v Zabic [2015] HCA 33* which determined that the injury occurs when there is the change in the cells that will lead to a disease rather than the manifestation of the symptoms of the disease.

Zabic commenced proceedings against his employer Alcan Gove Pty Ltd claiming damages for mesothelioma caused by the inhalation of asbestos fibres in the course of his employment between 1974 and 1977. He sought damages alleging his employer had been negligent. However in the Northern Territory legislation had abolished common law actions in negligence with respect to workplace injuries after 1 January 1987. Common law claims were replaced with limited statutory rights to compensation. If the cause of action accrued on or after 1 January 1987, it would have been statute barred. If the action accrued before 1 January 1987 Zabic had a common law claim.

The judge at first instance (Barr J) held that the cause of action did not accrue until the onset of malignant mesothelioma. According to the evidence, that was probably at a point between one and five years before Zabic first experienced symptoms of mesothelioma in 2013 or 2014. On that basis, the judge held that the cause of action did not accrue until well after 1 January 1987. An appeal followed.

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The Court of Appeal of the Northern Territory (Riley CJ, Southwood and Hiley JJ) reversed the judge's decision. They found that Zabic's mesothelial cells were damaged shortly after inhalation of asbestos fibres between 1974 and 1977 and that damage would "inevitably and inexorably" lead to the eventual onset of the malignant mesothelioma. On that basis, the Court of Appeal concluded that the damage done to the mesothelial cells shortly after inhalation was "non-negligible compensable damage sufficient to found a cause of action and that the subsequently developed malignant mesothelioma was part of the damage arising in that accrued cause of action."

There was then an appeal to the High Court that affirmed the decision of the Court of Appeal.

French CJ, Kiefel, Bell, Keane and Nettle JJ in a joint judgment concluded:

> *"The law is clear that actual damage or injury is an essential element of a cause of action in negligence for personal injury. … What may qualify as actionable damage is, however, a question of fact and degree and ultimately of policy. Kiefel J observed in Tabet v Gett that the "damage necessary to found an action in negligence ... is the injury itself and its foreseeable consequences" As Hayne and Bell JJ said in the same case, damage refers to "some difference to the plaintiff [which] must be detrimental. In similar vein, in Harriton v Stephens, Crennan J, with whom Gleeson CJ, Gummow and Heydon JJ agreed, said:*
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> *"Because damage constitutes the gist of an action in negligence, a plaintiff needs to prove actual damage or loss and a court must be able to apprehend and evaluate the damage, that is the loss, deprivation or detriment caused by the alleged breach of duty. Inherent in that principle is the requirement that a plaintiff is left worse off as a result of the negligence complained about, which can be established by the comparison of a plaintiff's damage or loss caused by the negligent conduct, with the plaintiff's circumstances absent the negligent conduct."*

So when does damage occur in a mesothelioma claim?

The High Court noted the current state of the law in Australia was against the injury in fact approach noting:

> *"So far it has been held in Australia that where there has been an inhalation of asbestos that has led to pleural thickening of the lung at the time of trial, but which has caused no physical discomfort or disability, with only the potential for more serious developments, those physiological changes wrought to that stage could not be said to have amounted to an actionable injury because of the lack of any established harm. The potential for more harmful developments could not alter that situation."*

However the High Court determined it was time to change. The High Court concluded that where initial mesothelial cell changes occurred shortly after the inhalation of asbestos fibres, and that they were bound to and did lead inevitably and inexorably to the malignant mesothelioma from which Zabic suffered, Zabic's cause of action in negligence accrued when those initial mesothelial cell changes occurred and, as the Court of Appeal held, damages for the mesothelial tumour from which he now suffers are recoverable in that cause of action. It was noted by the High Court that "initial mesothelial cell changes do not develop into mesothelioma in the absence of a "trigger".

The conclusion of the High Court is sure to lead to disputes over the date of injury in mesothelioma claims with insurers that come on risk for an insured after asbestos exposure ceases seeking to establish that the injury and accrual of the cause of action occurred before the insurer came on risk.

We are likely to see increased claims frequency for insurers that were on risk for an insured when the asbestos exposure occurred and the High Court does not envisage any limitation problems for those claims as it noted:

"As a final observation, it does not detract from that conclusion(the injury in fact analysis applies) that time may run under statutes of limitation against persons who have been exposed to asbestos fibres but who have not yet contracted mesothelioma or another disease as a result. Their position will be protected by statutes of limitation which, in all States and Territories, either set the limitation periods for personal injury by reference to the time at which a cause of action becomes discoverable or provide for postponement of limitation periods until after the time when the material facts can reasonably be ascertained by the plaintiff.'

No doubt insurers and actuaries are working away on recalculating liabilities as a consequence of this significant shift in the landscape for asbestos related claims in Australia. Chemical and dust exposure claims will face a similar issue with the date of injury becoming an issue in those claims as well.

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Dangerous recreational activities and negligence claims - Quad bike riding

Throughout Australia the rights of individuals to bring personal injury claims and in particular claims by those injured whilst participating in recreational activities have been modified by legislation. The legislation introduced the concepts of risk warnings, waiver agreements and the exclusion of liability for obvious risks of dangerous recreational activity.

However it is not that easy to identify what is a dangerous recreational activity and the obvious risks of that activity as was seen in the recent decision of the NSW Court of Appeal in *Alameddine v Glenworth Valley Horse Riding Pty Limited*. In this case the Court of Appeal was called on to determine whether quad bike riding was a dangerous recreational activity and determine the obvious risks of that activity and the defences available in recreational activity personal injury claims

Alameddine was injured while quad bike riding at a recreational facility at Glenworth Valley in NSW. The operator of the facility was known as Glenworth Valley Outdoor Adventures a trading name of Glenworth Valley Horse Riding Pty Limited and Ocean Planet Kayak Tours Pty Limited.

Alameddine's mother reviewed the operator's website and made a booking for herself and 7 children the following day. The website indicated that participants were required to be 12 years and above.

Alameddine who was two days shy of her 12th birthday had her application form completed by her older sister. The application included a waiver of liability.

There was a warning sign at the facility that stated that quad biking was "an inherently dangerous activity", and that participants were to travel at "a speed which is within your ability and that is suitable for the ground conditions you may experience". The sign also contained a warning to participants' engaging in the activity that participation was "entirely at your own risk".

Alameddine and her fellow participants were provided with a safety briefing by an employee of the operator who provided a warning that there was a risk of being injured. A demonstration of how to ride a quad bike followed and then the participants rode off along the designated riding path at the facility with Stubbs the operator's employee leading the group.

On the return trip, Alameddine was in a group of four being led by Stubbs. As the group ahead was travelling at a greater speed Stubbs accelerated to catch up. Alameddine also increased her speed (to keep up with Stubbs) and lost control of the quad bike and fell off the bike.

Alameddine was injured but did she have a claim against the operators? Was quad biking a dangerous recreational activity and could the risk warnings provided come to the aid of Glenworth Valley Outdoor Adventures?

In NSW section 5L of the *Civil Liability Act 2002 (NSW)* provides that a defendant is not liable in negligence for harm suffered by a plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity in which the plaintiff was engaged.

Further, section 5M of the Act provides that a defendant does not owe a duty of care to another person who engages in an activity where that activity was the subject of a risk warning.

Alameddine (by her mother) commenced proceedings in the NSW District Court against the operators claiming damages for her injuries. The primary judge Armitage DCJ rejected the contention that the accident resulted from "the materialisation of an obvious risk of a dangerous recreational activity" but found that the operators had warned Alameddine that the quad biking activity involved a significant risk of physical harm and that they therefore had a defence to the claim under s 5M of the Civil Liability Act.

Armitage DCJ concluded:

"it is my view that quad bike riding as the plaintiff participated in it was not an activity which involved a significant risk of physical harm, provided that it was

properly supervised by the defendants, as in my opinion, was not entirely the case."

Quad biking was not a dangerous recreational activity.

In relation to the risk warning Armitage DCJ reasoned:

"The terms of the application form quoted above are in my opinion a 'general warning of risks that include the particular risk concerned', and I consider that it 'warns of the general nature of the particular risk', and it provides a warning by reference to the general kind of risk involved, although it is true that there is no precise delineation of each separate obstacle or hazard which may be encountered. I do not think, despite the plaintiff's submission, that the risk warning, in order to be effective within section 5M, had to descend to such particularities as the risk of losing control of a quad bike as a result of riding it at excessive speed, or for that matter even the risk of losing control of it generally, for whatever reason."

Alameddine's claim failed. Even though quad bike riding was not a dangerous recreational activity she had been provided with a risk warning that was a defence to the claim. An appeal followed.

In the appeal Macfarlan JA, with whom Simpson JA and Campbell AJA agreed determined that quad bike riding as structured by Glenworth Valley Outdoor Adventures was not a dangerous recreational activity taking into account the "totality of the circumstances surrounding the activity in which Alameddine was engaged."

Macfarlan JA reasoned:

"I do not consider that the application form's "fine print", asserting in a formal fashion that quad biking and other adventure activities constituted "a dangerous recreational activity", or Mr Stubbs' more limited statement, fairly reflected the activity's nature as it was presented to the appellant's family both in their initial contract with the respondents and in what occurred on the following day. The family was told that the quad bikes were easy to ride and were given instruction, their skills were assessed and they were closely supervised throughout the activity."

A further nail in the coffin for Glenworth Valley Outdoor Adventures was that even if this was a dangerous recreational activity the injury did not materialise from an obvious risk of the activity.

Macfarlan JA concluded:

"Section 5L is also inapplicable because the appellant's injury did not result from "the materialisation of an obvious risk" of the activity which, as the following authorities demonstrate, would require the risk to have been inherent in, or an incident of, that activity."

Macfarlen JA observed:

" it would have been obvious to a reasonable person in the appellant's position (even taking into account her age, ... that significant injury might be suffered if that person, or another participant, were unable to properly control his or her quad bike. These were obvious risks incidental to the activity (albeit, as I have held, that it was not a "dangerous recreational activity"). However, I do not consider that the risk of injury resulting from an instructor riding faster than was safe for inexperienced or young participants and effectively giving such persons no real choice but to also do so in order to keep up with him, was a risk inherent in or incidental to the quad bike riding activity as it was presented to the appellant and her family. To uphold the defence under s 5L in such circumstances would be inconsistent with the evident policy underlying s 5L to preclude a plaintiff suing where (and only where) the plaintiff has been injured as a result of him or her engaging in a recreational activity when the risk that materialised should reasonably have been obvious to them."

The finding that the risk was not an obvious risk of the activity also infected the defence under section 5M as the risk warning defence was only applicable where there was a warning about the risk of the activity. When it came to the risk warning and the section 5M defence Macfarlan JA concluded:

"Both sections (5L and 5M) import the notion that I have referred to in connection with s 5L that, for the section to be applicable, the risk must be inherent in or incidental to the activity. ... the risk that materialised in this case was not of that character. As a result, even if, as the primary judge held, the warnings that the respondents gave extended to the risk that materialised, s 5M does not protect the respondents because that risk is not one "of the activity" in the sense described above. "

As to the waiver agreement the Court of Appeal determined that the application form did not form part of the agreement governing the participation in the activity as the agreement was concluded when the booking was made through the website so the terms of the application were not relevant, The primary contract that was made either the day before the trip or when the tickets were paid for did not contain the terms of the form, nor did it give notice that there were express terms to be incorporated. Essentially the application did not convey that the document was contractual in intent or was to form a variation of an existing contract
In this case the defence under section 5N of the Act was not available. The Court of Appeal also determined that a proper construction of the clause in the application did not exclude liability.

The Court of Appeal's decision in this case acts as a reminder that:

- a recreational activity is not a dangerous recreational activity simply because there is a risk of injury;
- it is necessary to consider the totality of the circumstances surrounding the activity to determine if there is a dangerous recreational activity;
- the section 5L obvious risk defence is only available for risks inherent in, or an incident of, that activity;
- the 5M risk warning defence only has application to risks inherent in, or an incident of, that activity and warnings provided about those risks;
- waiver provisions in application forms are scrutinised closely and where an agreement is concluded before the application is signed(for example at the time of booking) the application may not form part of the agreement governing participation in the activity.

The defences available in claims arising from injuries that result from participation in recreational activities are not as wide as those that provide recreational activities perceive.

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NSW Court of Appeal finds that councils are not liable for actions of malicious third parties

Liability for criminal conduct of others is a difficult concept to grapple with. Why should a person be liable for injuries caused by the criminal activities of another?

The Courts have shown restraint when considering claims for personal injury pursued by persons injured in an assault or by other criminal conduct when those persons look to others than the perpetrator of the crime to recover compensation for their injuries.

The employee/employer relationship is one area where we have seen some traction in claims of this nature. Employers have been held liable for failing to prevent harm that was deliberately caused by fellow employees. Operators of licensed premises have also been held liable for injuries sustained by persons that have been assaulted by intoxicated patrons. The key is the level of control that a person has over the situation. Terminate and remove the dangerous employee, eject the intoxicated patron.

But what about road authorities? Are they liable for the actions of fools that create dangers on the road?

The recent decision of the NSW Court of Appeal in *Rankin v Gosford City Council* provides guidance on these issues.

At approximately 5:30am, Mr Rankin was riding his motorcycle along Woy Woy Road, on his way to a Sunday morning church service. As Mr Rankin approached the suburb of Kariong, he collided with several barriers that were obstructing the northbound lanes of Woy Woy Road.

There were 12 barriers in total which were made of a hard plastic material and had been "chained" together. They had in fact been placed in the roadway by Gosford City Council. It was intended that the barriers would obstruct only one of the two northbound lanes, in accordance with a Traffic Control Plan to close off a section of the Road to facilitate road works. There were also temporary speed controls in place.

At some point during the night prior to Mr Rankin's accident, four of the barriers were moved by an unknown person or persons to block the second northbound lane of Woy Woy Road. Those persons were never located or identified.

After having collided with the barriers, Mr Rankin was catapulted from his motorcycle and suffered severe injuries, predominantly to the right leg. He subsequently sued Gosford City Council, alleging that they had been negligent

The barriers had been delivered to the site location two and a half weeks before the accident. They were designed to be filled with water and couldn't be moved when they were.

Gosford City Council employees confirmed that they had checked most of the barriers on most mornings before they started work to make sure that they were filled with water.

Ms Sehlin, an independent witness who was first on the scene 15 minutes after the accident, gave evidence that she observed that all 12 of the barriers were empty and could be "easily" pushed by leaning on them. The police report suggested that the road surface was wet at the accident scene although Ms Sehlin did not recall seeing any water on the roadway that may have leaked from the barriers. She recalled that several of the barriers were filled with rubbish and one was missing a valve, so that it could not be filled with water in any case.

The Council denied it owed a duty of care and relied on the so-called "statutory immunity" afforded to road authorities pursuant to Section 45 of the *Civil Liability Act* 2002 (NSW), which in part reads as follows:

> *"A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising*

from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm."

Rankin relied on the decision in *RTA v Refrigerated Roadways* [2009] NSWCA 263 where the RTA was held liable in negligence for the death of a truck driver caused by a group of youths throwing a piece of concrete from Glenlee Bridge, which was under the care and control of the RTA at the time.

The primary judge Button J of the Supreme Court concluded the immunity under Section 45 was not available on the basis that there had been a *misfeasance* on the part of the Council rather than a nonfeasance. In essence, the Council had not failed to undertake road works *at all* in accordance with Section 45, rather they had undertaken road works, but had done so negligently.

Button J concluded that on the balance of probabilities the "unknown malefactors" had not been responsible for emptying the barriers.

However, ultimately Button J was not satisfied that there was a duty of care owed to Mr Rankin and the *Refrigerated Roadways* exception did not apply to displace that rule. Unlike the Refrigerated Roadways case where there was evidence that throwing rocks from the bridge here there was no evidence that it was a common occurrence that the barriers were being moved to block the entire roadway,. All evidence pointed to the barriers having been moved to obstruct the whole of the northbound lanes of Woy Woy Road as an isolated incident. It was also noted in *Refrigerated Roadways*, another aspect of the exception was the consideration of the fact that rocks could naturally fall and cause personal injury to passing motorists, and historically such cases would result in a finding of negligence in a Council or roads authority.

Mr Rankin appealed, and the matter proceeded to a hearing before Justices Basten, Macfarlan and Simpson of the NSW Court of Appeal.

The focus of the appeal was the element of "control". Council had the legal authority to control the road works and impose traffic controls. In essence, it was found by their Honours that the Council owed a duty of care to ensure proper signage was in place to *"warn motorists of a temporary hazard, to indicate clearly where the temporary lanes were situated and to impose a speed limit appropriate to the changed conditions"*.

Their Honours were satisfied that proper steps for the discharge of that duty had been taken by the Council by installing the barriers and traffic controls.

On the question of whether there was a breach of the more general duty to take precautions against a risk of harm to motorists such as Mr Rankin, their Honours were careful to note that the reasonably foreseeable "risk of harm" where the crash barriers were held to be ineffective, was not the same "risk of harm" that actually materialised. The "risk of harm" arising from ineffective crash barriers in the sense that they were not adequately filled with water was that a vehicle could enter the work site and cause injury to the worker, and potentially the driver. This was because the purpose of the barriers was to protect the workers from passing motorists.

Therefore, Mr Rankin was required to establish that the Council owed him a duty of care to protect him from the risk that maleficent or irresponsible third parties would unlawfully move the barriers across the roadway.

The Court of Appeal concluded the Council had no knowledge of a risk that the barriers would be moved and any such risk would not have been discovered by taking reasonable steps to inspect where a latent danger might reasonably be suspected.

MacFarlan JA noted there was a lack of evidence that the risk of the barriers being moved was known, or should have been known to the Council prior to the accident. The lack of foreseeability that the risk of harm would arise was a *"strong… and conclusive"* factor, and sufficient for His Honour to make a finding that there was no such duty of care.

His Honour was also concerned about the potential for expansion of such a duty to cover the innocent conduct of third parties. His Honour noted that for example if a motorist left his vehicle on the side of the road with the keys in the ignition, and a wrongdoer subsequently drove that vehicle to the middle of the road and caused a hazard, it would not be proper to construe that the motorist owed a duty of care to any person suffering personal injuries that could occur as a result of the hazard.

The Court of Appeal subsequently dismissed the appeal, holding that Button J had been correct to conclude that no duty should be imposed on the Council to take steps to avoid the creation of a risk by the unlawful acts of third parties.

Councils and other road authorities are unlikely to be held responsible for the antisocial or criminal conduct of third parties, unless the risk is foreseeable and or known to the Council or road authority.

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Principals v contractors- liability for negligent acts

Generally a principal will not be held liable for the negligent acts of its contractors. In fact principals will often seek to escape liability by asserting they have delegated responsibility for a task to a competent contractor. The level of control exercised by the principal over the activities of the contractor and its employees is the primary factor considered in determining the principal's liability for an accident, if it has any liability. However a failure on the part of a contractor to clean up after works have been completed can cause problems for the principal if they do not address the risks created after they take back control over a site.

An example of the Courts approach to this consideration is seen in the recent NSW Court of Appeal decision of *Bitupave v Pillinger*.

Pillinger had been a keen motorcyclist for many decades, often partaking in extended group expeditions all over the country, including several trips between Queensland and New South Wales.

During one such trip and after returning from a lunch with a group of fellow motorcycle enthusiasts, he lost control of his motorcycle on Blue Knob Road, Nimbin.

Pillinger suffered severe injuries as a result of colliding with the road surface. Perhaps unsurprisingly, he had no recollection of how the accident had occurred.

Prior to the accident, road works had taken place on the relevant stretch of Blue Knob Road, supervised by Lismore City Council.

Pillinger sued both the Council and its subcontractors, Bitupave t/as Boral Asphalt for $1.17 million in damages.

At first instance before Button J of the Supreme Court, the evidence confirmed that the Council had commenced the road works shortly before the accident and Bitupave had become involved as a subcontractor. Initially Bitupave used a rotary broom to sweep the road surface and remove loose material. Bitupave had then resurfaced the road with bitumen and a 14mm aggregate, which was compacted with a roller. The final step, conducted by Bitupave, had been to use a rotary broom to again sweep excess aggregate from the road surface.

Just prior to the accident there had been extremely heavy rain in the Lismore area. As at the date of the accident, Blue Knob Road was open to traffic with no delineating lines on the resurfaced section. No warning signs had been placed on the roadway that referenced the road works and the potential for the presence of any loose material.

Significantly, there was a windrow – in essence, a row or line of loose material swept together – on either side of the roadway left behind from the road works. There was evidence that as a result a "swathe" of that material had been washed onto the road which contained road base and/or aggregate.

There was also a portion of other organic and inorganic material which made up the swathe, such as leaves, rubbish, soil, and other detritus in the area which had overflown from a table drain on the side of the road during the heavy rains.

Button J concluded that both the Council and Bitupave had been negligent. In other words, both defendants failed to take reasonable care whilst undertaking the road works. This was on the basis that both parties had failed to take reasonable steps to ensure that a windrow was not left to the eastern side of Blue Knob Road. The windrow posed a reasonably foreseeable risk of being washed or otherwise travelling onto the roadway. This had in fact occurred after the very heavy rains in the days prior to the accident.

In terms of apportionment of liability, Button J considered that the Council should bear 40%, and Bitupave 60% or responsibility.

As a secondary issue, Button J found that Bitupave was liable to indemnify the Council for the whole of its liability. This was due to a breach of Clause 10 of the contract, which required Bitupave to take out a policy of public liability insurance which it had failed to do.

Bitupave appealed. Cross-appeals were also filed by the Council and Mr Pillinger, predominantly on the question of apportionment of negligence and contributory negligence.

Bitupave argued that the risk of harm should have been defined by Button J in respect of the manifestation of three relevant events – not just the sweeping of the aggregate with the rotary broom (which Bitupave had conducted in the course of the road works), but also the storm with heavy rains, together with the pre-existing and severe blockage of the drain on the Eastern side of Blue Knob Road. It was asserted by Bitupave that all three events would have contributed to the slew of material which was carried onto the roadway, and lowered the friction.

The Court of Appeal disagreed. Ward JA (Gleeson JA agreeing) noted that such a formulation of the risk *"impermissibly"* invoked the benefit of hindsight. Ward JA (Gleeson JA agreeing) held:

"…the true source of the potential injury or harm, to someone in Mr Pillinger's position, was the loss of co-efficient friction caused by the presence of a swathe containing roadbase and/or aggregate on the road."

Significantly, Ward JA observed that how the swathe got there in the first place went to foreseeability of the risk rather than whether there had been a breach of the duty of care, which required a different test to be applied – that is, whether it was *"reasonably foreseeable"* that the windrow would be swept onto the road as a result of the actions of both the Council and Bitupave.

On that point, Bitupave pointed to the contract in place between the parties and argued that as the Council had been responsible for sweeping the shoulders of the road using a vacuum broom, they were in turn responsible for first creating the *"feathered windrow"* on Blue Knob Road which ultimately led to Mr Pillinger's accident. Ward JA (Gleeson JA agreeing) again upheld the findings of Button JA, noting that:

"Whether or not [the windrow] was feathered, unless the material was swept into the drain or otherwise physically removed it must have remained on the side of the road (even if in a flattened out form) and it must have been reasonably foreseeable by [Bitupave]… that this would be the case"

Despite the fact that Bitupave had no hand in the construction of the drain which ultimately overflowed in the heavy rains, the Court found that both the Council and Bitupave ought to have reasonably foreseen that:

"the table drains could become blocked if road building material were pushed into them and for that reason a windrow should not be created or pushed into or close to (or left near) such a drain."

Although their Honours accepted that part of the material that constituted the swathe could have come from the detritus in the drain, the occurrence of the water running in a south-westerly direction across the road due to the blockage, and carrying the loose materials left in the windrow to the road surface, was reasonably foreseeable in any case.

The Court of Appeal noted relatively simple action could have been taken by Bitupave to ensure that the material was *"graded and swept to the lower western side of the road"*, rather than simply leaving and contributing to the windrow on the Eastern side of the roadway near the table drain.

The Council's predominant complaint as to the findings by Button J was that the Council could not be said be negligent, as it had only been involved in creating a windrow prior to the spray-sealing of the roadway by Bitupave which went beyond the shoulder of the roadway, and could not have contributed to the swathe on Blue Knob Road.

Ward JA (Gleeson JA agreeing) was content to rely on the expert evidence of a Council employee given at trial who had confirmed that Council practice was to leave a windrow during such road works, and Her Honour held that there was incontrovertible evidence that a windrow had been left by the Council prior to Bitupave's involvement, which could not have *"vanishe[d] into thin air"*. Ultimately, the fact remained that:

"…there was sufficient material left on the side of the road to cause a loss of co-efficient friction on the surface of the road when it was washed across the road during the storm."

It was also contended in the appeal that there was no basis to find that the material from the windrow played a causative role in Mr Pillinger losing control of his motorcycle, particularly in circumstances where other material from the drain had been washed into the roadway. Further, the contribution of passing motorists in dislodging the loose gravel could not be discounted as an essential component of the creation of the swathe.

Their Honours noted that there had been insufficient evidence before Button J to conclude that passing vehicle had contributed in such a way. Further, it was clear from the expert evidence that gravel and aggregate were materials that would commonly result in a loss of friction. Overall, there was a finding that both the Council and Bitupave had misapprehended the fundamental aspect of causation in the accident, that is:

"ultimately it was not the creation of the windrow of itself that caused the problem; rather, it was the failure of [the Council and Bitupave] to remove the windrow in such a way that there did not remain (feathered out) an amount of loose roadbuilding material that was capable of being washed back onto the road during a storm."

Creating and leaving the windrow to the Eastern side of the road, as the Council did, and leaving and contributing to the windrow with aggregate, as Bitupave did, were actions *"but for which the accident would not have occurred"*.

On the issue of contributory negligence, Ward JA (Gleeson JA agreeing) concluded that Button J had erred in making a finding that there was contributory negligence. The Court was willing to give Mr Pillinger the benefit of the doubt, as:

"In the absence of evidence as to what was visible to the southbound group of riders other than their general acceptance of the need to look out for hazards on the road, there was no basis for the conclusion that Mr Pillinger did see, or should, riding prudently, have seen, the swathe on his southbound trip."

Ward JA (Gleeson JA agreeing) found it was unlikely that Mr Pillinger would have been travelling above the speed limit of 80km/h, as he was an experienced motorcyclist with no prior convictions for speeding (other than one conviction for speeding whilst driving a car).

On the issue of apportionment the Court of Appeal declined to intervene as the apportionment by Button J was not thought to be so unreasonable or unjust as to require revisitation.

Interestingly Ward JA considered that a more appropriate finding of apportionment would have been 50/50, as both the Council and Bitupave were responsible for leaving the windrow on the side of the road. Her Honour went further and suggested that there may have been greater degree of culpability in the Council, as its servants and employees had the last opportunity to remove the windrow and control over the road works. However the determination of the trial judge was open on the evidence.

The order for indemnification of the Council's liability by Bitupave was upheld by Ward JA (Gleeson JA agreeing) together with Emmett JA on the basis of breach of Clause 10 of the contract.

The decision of *Bitupave v Pillinger* is instructive for insurers of principals and contractors. The totality of the control of works needs to be considered when considering responsibility for an accident and where a Council has engaged a contractor to carry out roadworks it will not escape liability by asserting the contractor was responsible for all of the works where the actions of the Council play a role in the accident. If a contractor fails to clean up a site after works are completed the principal needs to ensure that no risks remain after the works are complete.

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Successful claim by injured young swimmer overturned on appeal

The NSW Court of Appeal has unanimously overturned a verdict found in favour of a plaintiff who sustained serious injury as a 12 year old when she slipped while attempting to dive into the shallow end of a swimming pool thereby curtailing her promising swimming career.

In *Miller v Lithgow City Council*, his Honour Acting Judge Hulme of the NSW Supreme Court found in favour of Emilie Miller in a separate liability hearing on the basis that her high school was negligent but she failed in her action against the Council which managed the pool.

Ms Miller, who was is now 18, appealed against the decision in favour of the Council. The School appealed against the decision in favour of Ms Miller.

The appeal court comprising Basten, Leeming and Simpson JJA in *Uniting Church in Australia Property Trust (NSW) v Miller; Miller v Lithgow City Council* upheld the appeal by the School and dismissed Ms Miller's claim for damages against it. The Court of Appeal also dismissed Ms Miller's claim for damages against the Council resulting in her being wholly unsuccessful.

His Honour Justice Leeming delivered the leading judgment with which their Honours Justices Basten and Simpson agreed.

The instructive paragraph of his Honour's judgment appears towards the end where he stated:

> *"Ms Miller's tragic accident was entirely blameless on her part, but it does not follow that her injury was caused by a breach of duty owed to her by either the School or the Council. For the foregoing reasons, I have concluded that she failed to establish such a breach by either…"*

The accident occurred on 7 January 2008 during Ms Miller's school holidays. She was a promising swimmer, being age champion at her school and in the District and was a multiple medallist at both Regional and State levels, appearing in the top 10 age rankings at the National level in four events.

At the time of her accident, she was training at Lithgow War Memorial Swimming Pool with two friends. Whilst under the supervision of her friends' father, she slipped while diving into the shallow end colliding with the bottom of the pool and fracturing a cervical vertebra.

She was rescued and flown to Westmead Children's Hospital. She was initially diagnosed with complete C5-6 tetraplegia but her condition improved during the ensuing months resulting in her being able to return to school later that year.

The Council managed the pool in which Ms Miller was injured as trustee for the Lithgow Public Park Reserve Trust.

The School was a corporation constituted by Section 12 of the *Uniting Church in Australia Act 1977* (NSW) which operated Kinross Wolaroi School and was liable for the conduct of its servants and agents.

Miller's swimming coach, employed by the School, had taught her the technique of performing a track-start dive which involved her crouching with one foot behind the other and with both hands down on the edge of the pool. She had learned to perform this dive at other

pools under the tutelage of the swimming coach at both the deep and shallow ends.

Ms Miller gave evidence during the liability hearing that she was never warned of any risks associated with this type of dive.

The primary judge found that Ms Miller had used this dive both in training and during competitions such that she had performed it on many hundreds if not thousands of occasions, without any problems.

On the date of accident, the swimming coach was not present as he was on annual leave. He did, however, provide the parent who supervised Ms Miller with both a dry land and a swimming program for Ms Miller and the other swimmers who were the children of the supervising parent. This program was in the form of a letter printed on the School's letterhead and addressed personally to the parent.

The program included swimming 20 laps and diving from each end, thereby diving 10 times from the deep end and 10 times from the shallow end. Ms Miller's accident occurred on the second of 20 laps. It was the first time that day she had dived into the pool from the shallow end.

It was also near a "NO DIVING" sign.

At the first instance hearing Ms Miller relied upon several standards, guidelines and other forms of literature published by swimming associations and other expert bodies which allegedly set the parameters for safe diving in shallower water.

Leeming JA, in the appeal judgment, summarised the literature as follows:

> *"The essential points emerging from the four articles are: (a) to the extent that the literature distinguishes between types of competitive dives, track-start dives are safer, and (b) none of the literature refers to any risks associated with coping tiles; the focus is the depth of water and the height from which the dive is commenced."*

This evidence was relied on in Ms Miller's case against the Council both at first instance and on appeal. The primary judge held that there was no evidence to demonstrate that the Council should have become aware of any significant increase in danger associated with track-start dives or the importance of a readily grippable coping or any other basis for drawing a distinction between track-start and other dives.

This finding was upheld by the Court of Appeal.

Leeming JA held that the relevant risk of harm in the case against the Council was a risk of harm to a *trained* swimmer like Ms Miller, not an untrained recreational swimmer. All of the literature, his Honour held, made a distinction between trained and untrained swimmers as two distinct classes.

His Honour went onto say:

> *"The risk of harm must be addressed at a level of specificity which distinguishes the trained competitor from the untrained recreational swimmer."*

This, His Honour held, dispensed with the appeal point regarding the warning sign also. To the trained swimmer, the warning sign was irrelevant.

His Honour also held that the Council's lifeguard was not negligent by failing to enquire of the supervising parent whether he was a licensed coach.

Ms Miller's appeal against the Council was therefore dismissed.

In relation to the School's appeal against Ms Miller, Leeming JA observed that Ms Miller's pleadings made no reference to the *Civil Liability Act 2002* (NSW)*("CLA"). Little reference to the CLA was made by the primary judge in his judgment.

Justice Leeming, as he has done in earlier cases, repeated the proposition that each of the seven paragraphs in Section 5B CLA pertaining to breach of duty of care must be considered by a Court before a defendant is found to have been negligent.

Further, his Honour held that each paragraph of Section 5B presupposes a risk of harm against which precautions should have been taken.

His Honour stated that the risk of harm may be different in the case of each defendant.

Further, a plaintiff may be exposed to a range of risks and a range of harms. In respect of a range of harms, his Honour confirmed the long-held position at common law which continues to operate, namely the kind of harm which is foreseeable. This therefore includes all injuries, minor, major or catastrophic or even fatal suffered from a dive which results in the swimmer colliding with the bottom of the pool.

In relation to a range of risks, however, his Honour observed that the CLA points in two directions namely the burden of taking precautions against *similar risks of harm* and the rebuttable presumption of awareness of obvious risks to cases where the person is aware of the *type or kind or risk* even if the person is not aware of the *precise nature, extent or manner of occurrence of the risk.*

His Honour concluded that the point of the exercise is not confined to the precise set of circumstances which are alleged to have occurred, although identifying the

relevant risk of harm must encompass those circumstances.

Further it was emphasised by his Honour that it is unrealistic to expect there to be a single characterisation of the risk of harm.

His Honour proceeded to overturn the findings made by the primary judge that supported the first instance decision in favour of Ms Miller.

The importance of identifying the risk of harm was a failure by Ms Miller's legal team in the present case. It also led the primary judge into error in the first instance judgment.

This common theme still haunts many first instance judgments when Leeming JA and other appeal court judges have emphasised on numerous occasions that the provisions of the CLA must be considered by primary judges.

The result was an unfortunate outcome for Ms Miller but a reinforcement of the consistent approach the NSW Court of Appeal has adopted in cases involving negligence.

Courts must identify the risk of harm. They will be guided to a large extent by the pleadings presented to them by plaintiff lawyers.

Those that fail to identify the risk of harm in a case run the risk of an appeal court overturning a verdict in favour of their client.

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WORKERS COMPENSATION ROUNDUP

Reconsideration Claims for Permanent Impairment - Will it open the Floodgates?

The mechanism for determining a disputed claim for permanent impairment in the Workers Compensation Commission is through the use of an approved medical specialist ("AMS"). An AMS of the appropriate specialty will provide an assessment of whole person impairment ("WPI") after considering the evidence filed by the parties and conducting an examination of an injured worker.

Workers or employers who are aggrieved with the assessment of an AMS have the right to lodge an appeal from the findings of the AMS within 28 days of issue of the Certificate of Determination. Appeals are limited to four criteria:

- deterioration of the worker's condition that results in an increase in the degree of permanent impairment;
- availability of additional relevant information (but only if it was not available before the medical assessment);
- the assessment was made on the basis of incorrect criteria; and
- the Medical Assessment Certificate contains a demonstrable error.

If the Registrar is satisfied that on the face of the Medical Assessment Certificate that one or more of the four criteria are applicable, the claim is then referred to a Medical Appeal Panel (MAP) for determination.

Following a determination by the MAP the rights of appeal are limited to an Administrative Review in the Supreme Court.

In the alternative, and although it is not often used, the Workers Compensation legislation contains a reconsideration provision in Section 350 of the *Workplace Injury Management and Workers Compensation Act 1998* ("WIMWCA"). The provision allows for the Commission to "reconsider" a Certificate of Determination. An important consideration is that there is no specified time limit to make a reconsideration application.

Arbitrator John Harris of the Workers Compensation Commission was called upon to determine the scope of the reconsideration provision in *Jeanette Marie Iredale v State of NSW*.

Ms Iredale was employed by the State of NSW as a high school teacher for 25 years. In 2007 she suffered a number of psychological difficulties at school to the point where her condition deteriorated and she ceased work on 21 May 2009. After unsuccessful attempts at mediation she ultimately ceased teaching with the school in early 2010.

Ms Iredale brought a claim for permanent impairment in the Workers Compensation Commission relying upon a report of Dr Teoh who assessed 17% WPI. We should point out that in order to sustain a claim for permanent impairment in relation to a psychological injury the threshold is 15% WPI.

In February 2012 the employer issued a dispute notice claiming Ms Iredale's condition was not stable for the purposes of assessment. The resulting dispute was determined by an AMS appointed by the Commission who in June 2012 assessed Ms Iredale with 7% WPI.

Noting the assessment did not reach the threshold, Ms Iredale filed an application to appeal against the AMS findings. The MAP dismissed the appeal.

On 16 March 2015 Ms Iredale filed a second application to appeal against the decision of the AMS. In essence the ground of appeal relied upon was that there had been deterioration of Ms Iredale's condition that had resulted in an increase in the degree of permanent impairment. In support of the appeal fresh evidence was filed including reports from the most recent treating psychiatrist, a further statement and a decision of the WorkCover Merit Review Service that determined that Ms Iredale's capacity for employment was nil.

A delegate of the Registrar of the Commission wrote to Ms Iredale's solicitors in April 2015 stating that in the absence of a rescission of the original determination of the Commission, the application to appeal against the decision of the AMS could not proceed. Accordingly, Ms Iredale sought a reconsideration of the original AMS decision to allow for a second appeal application to proceed.

The employer disputed the reconsideration application on the basis it was an unmeritorious application which should be dismissed as being frivolous, vexatious and otherwise misconceived. In particular the employer focused on the fact a period of two and a half years had elapsed since the MAP had rejected the original appeal and Ms Iredale had failed to challenge the MAP in the Supreme Court.

The arbitrator called for submissions in relation to the single claim restriction as contained in Section 66(1A) of the Workers Compensation Act 1987 and recent decision of *Cram Fluid Power Pty Limited v Green (2015)*. The employer did not make any submissions as to whether the one claim restriction as imposed by Cram and Section 66(1A) was applicable. .Arbitrator Harris determined that an application based on deterioration does not challenge the correctness of the original certificate but is focused on what has occurred since that time. The employer's submission that the AMS properly assessed the permanent impairment, that the MAP upheld the Medical Assessment Certificate and that a period of two and a half years had elapsed was "entirely beside the point". The issue was simply whether there had been a deterioration of Ms Iredale's since the assessment by the original AMS.

Arbitrator Harris was satisfied that the evidence filed by Ms Iredale established a significant deterioration in her condition. Arbitrator Harris noted the original evidence in 2011 and 2012 demonstrated Ms Iredale was capable of working two to three days per week in a job that was less demanding and stressful. The evidence now before the Commission established that since mid 2013 Ms Iredale had no capacity for employment. Although Arbitrator Harris conceded the test for employability used for the assessment of permanent impairment was slightly different to the test of "current work capacity" as used in a work capacity decision, the evidence from the claimant's treating psychiatrist and the view of the Workplace Independent Review Officer was that Ms Iredale was unable to work. In light of this evidence Ms Iredale had suffered deterioration in her condition when assessed for the purposes of employability. Ms Iredale had also shown deterioration in her social and recreational activities. Social and recreational activities are another component used by an AMS when assessing permanent impairment in a psychological injury claim.

After Arbitrator Harris had determined there was deterioration, the question then remained as to whether the original AMS findings should be subject to reconsideration. Arbitrator Harris commented that as a reconsideration would allow a MAP to assess impairment in respect to the original proceedings in the original claim, the one claim restriction as imposed by Section 66(1A) was not applicable.

Arbitrator Harris noted that the reconsideration provision discretion was broad. Provided the claimant was relying upon a condition that was previously referred to the AMS, reconsideration could be sought.

1. Arbitrator Harris also addressed an argument by the employer that there should be a "finality of litigation" which would prevent a successful reconsideration application. Arbitrator Harris commented that the "finality of litigation" must be weighed against the interests of justice and the wide discretionary power in Section 350 of WIM Act. The exercise of discretion favoured a reconsideration of the certificate and Ms Iredale's claim was referred to the MAP to properly determine the WPI based on the deterioration.

This decision has significant ramifications for permanent impairment claims in the workers compensation jurisdiction. Prior to the legislative amendments in June 2012 and the recent Cram decision confirming that only one claim for permanent impairment was available; a worker could simply file further applications in the Commission for additional permanent impairment. We are of the view worker's solicitors will now extensively utilise the wide ranging discretion in the reconsideration provisions in order to "sidestep" the one claim restriction. Provided the worker can adduce sufficient evidence to demonstrate there has been a deterioration of their condition, there

appears to be little impediment to a reconsideration of the WPI.

We have little doubt the matter will be subject to appeal and we will be interested to see decision of the Presidential Unit of the Workers Compensation Commission. Nevertheless, the NSW legislature already has sought to redress the retrospectivity of the one claim restriction as determined in Cram. In this regard we note the Labor Party has introduced draft legislation into the NSW parliament on 15 October 2015 seeking to reverse Cram and on 26 October 2015 the NSW Government announced it would introduce a regulation addressing some of the restrictions imposed by Cram. The Regulation, expected to be passed in November 2015, will only apply to workers with a claim for lump sum compensation made prior to 19 June 2012, and allow those workers to make one further claim which should be contrasted with the Labor Party's proposed amendment to allow unlimited further claims for those workers affected by Cram.

Although the Regulation proposed by the NSW Government imposes a restriction to only one more claim, it does not impose a time limit for the further claim and it does not impose a minimum increase in the level of impairment in order to make that further claim. And with the one more claim comes the possibility of a further reconsideration in light of the decision in *Iredale v State of NSW.*

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Surveillance in Work Injury Damages Claims - When is it Admissible?

In New South Wales an employee who claims that they were negligently injured at work can bring a claim for work injury damages against their employer. That claim is governed by the provisions of the *Workers Compensation Act* 1987 and *Workplace Injury Management and Rehabilitation Act* 1998. That legislation sets out a number of pre-requisites that must be satisfied including an assessment of 15% whole person impairment in the claim for lump sum compensation, service of a notice of intention to bring a claim for work injury damages and then subsequently service of a Pre Filing Statement.

The Pre Filing Statement must attach the evidence on which the employee proposes to rely. A Pre Filing Defence is served by the employer in response to the Pre Filing Statement within 28 days. Generally claims will then proceed to mediation in the Workers Compensation Commission. If the claim does not resolve at mediation then a Certificate of Mediation Outcome will be issued and the employee can then commence Court proceedings.

The system is "front end loaded" and was designed with the intention of matters resolving prior to proceeding to Court. The intention is that all evidence will be available at the time that the matter proceeds to mediation.

The legislation in fact provides that parties are limited to the Pre Filing Statement and Defence (Section 318 of the *Workplace Injury Management and Workers Compensation Act 1998*). That section provides that a party to the proceedings is not entitled to have any report or other evidence admitted in the proceedings on the party's behalf if the report or other evidence was not disclosed by the party in the Pre Filing Statement or Defence, except with leave of the Court. Section 318(2) provides that leave should not be granted by the Court unless the Court is satisfied the material was not reasonably available to the party when the Pre Filing Statement or Defence was served and the failure to grant leave would substantially prejudice the party's case.

What happens however when surveillance is undertaken after service of the Pre Filing Defence?

The NSW Court of Appeal in *Kubovic v HMS Management Pty Limited* (2015) has recently considered that section of the Act and how it applies where surveillance has been obtained of the injured person subsequent to service of the Pre Filing Defence.

Marion Kubovic was injured whilst working for his employer and commenced proceedings in the District Court. The matter proceeded to trial in the District Court and the trial judge awarded damages of $107,951 after a deduction of 20% for contributory negligence.

Kubovic appealed.

A significant issue on the appeal was whether or not the trial judge had erred in granting leave to the defendant to rely upon and admit surveillance evidence that had not been previously disclosed in or served with the Pre Filing Defence and whether Kubovic was denied procedural fairness in the manner in which the trial judge used the surveillance evidence in assessing damages. The surveillance evidence that was used in the case depicted Kubovic at a gym on 22 October 2013. The issue was whether or not the material was "reasonably available" to the defendant at the time of service of the Pre Filing Defence. The trial judge found that the surveillance was not readily available in 2012 and therefore permitted use of the

surveillance and admission of the surveillance into evidence.

Kubovic in his appeal contended that this was an error by the trial judge.

The Court of Appeal however disagreed.

In relation to this issue Justice McColl stated:

"While I accept that the scheme of the pre-filing regime is intended to reduce costs and favour out of court settlements, the availability of adducing further material albeit subject to a grant of leave, demonstrates that the legislature recognises that despite that, purpose, reports or other evidence not disclosed may be relevant to the ultimate outcome. Not all elements of the forensic battleground have been abandoned. However, clearly a trial judge will be careful about testing the issues posed by an application for s 318 leave conscious of the purpose of the legislative scheme but, too, recognising the necessity to consider what is necessary to serve the interests of justice.

In my view the appellant has not demonstrated that the primary judge erred in concluding the surveillance evidence was not reasonably available to the respondent when the pre-filing defence was served. The inquiry is, as I have said, essentially factual. In this case it is apparent that his Honour regarded the surveillance evidence as providing more specific information relevant to the true extent of the appellant's disabilities than was available at the completion of the pre-filing process. Having regard to the appellant's realistic concession that the respondent would suffer prejudice if s 318(2)(a) was satisfied, it was in the interests of justice to permit it to adduce that evidence."

Employers will therefore be able to continue to use surveillance as a forensic tool in the defence of work injury damages cases and surveillance undertaken after service of the Pre Filing Defence will be able to be used in cross examination and relied on in Court proceedings.

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Does "constitutional pathology" mean "pre-existing condition"?

When workers are assessed by an Approved Medical Specialist ("AMS") in the Workers Compensation Commission it is not uncommon for the AMS to apply a deduction for any previous injury or pre-existing condition in accordance with Section 323 of the Workplace Injury Management and Workers Compensation Act 1998 ("WIM Act").

Such deductions are often the point of appeal by both workers and insurers especially now that the entitlement to various benefits hinges on the assessment of permanent impairment.

In *Cullen v Woodbrae Holdings Pty Ltd*, the Supreme Court has recently set aside a decision of the Medical Appeal Panel after finding that the panel incorrectly treated a "constitutional pathology" as a pre-existing condition without identifying when the worker may have first developed the condition.

Kevin Wayne Cullen commenced employment with Woodbrae in 1978 when he was only 18 years old. From around 2000 to 2002 Cullen began to experience pain in both hips. In 2004 Cullen ceased work at around the time Woodrae ceased trading. In 2008 Cullen had a right hip replacement followed by a left hip replacement in 2010.

Cullen made a claim for lump sum compensation alleging his employment as a slaughterman with Woodbrae was a substantial contributing factor to the development of a disease of gradual process in the hips. In the alternative, Cullen alleged his employment was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease in the hips.

Liability for the injuries claimed to both hips was accepted and the matter was referred to an AMS to determine the degree of whole person impairment.

The AMS assessed 36% WPI for both hips but applied a 75% deduction, bringing the assessment down to 10% WPI. The AMS provided the following reasons for the deduction:

"This is because the aetiology is predominantly constitutional, with some impact from 'work injury'. The work injury did not cause the osteoarthritis, but aggravated and probably accelerated the arthritis to the point where total hip replacement was probably conducted a little earlier than [it] would have been otherwise."

Cullen appealed, arguing there was no evidence of a pre-existing condition. Cullen argued that for a deduction to apply the osteoarthritis had to pre-date his employment and there was no evidence to support such a finding.

The Medical Appeal Panel ("MAP") upheld the AMS's findings. While the MAP acknowledged there was no evidence of symptoms prior to 2002 and no imaging studies before 2008, the MAP confirmed the evidence indicated a "predominantly constitutional pathology".

Cullen sought judicial review of the MAP's decision in the Supreme Court.

First, Cullen argued Section 323 of the WIM Act could not be applied on the basis of degenerative changes occurring contemporaneously with the claimed injury. Secondly, as the injury had been accepted, Cullen argued the only basis upon which the MAP could have applied the deduction was if it found there was previous injury or pre-existing condition that pre-dated his employment with Woodbrae and there was certainly no evidence Cullen suffered osteoarthritis in his teens.

Woodbrea maintained that the Panel found Cullen had a condition that predated his employment and there was some evidence to support that finding based on the radiology which showed advanced "severe bone-on-bone arthritis".

His Honour Justice Beech-Jones found that the Panel was required to identify a condition that existed at some point which had to pre-date Cullen's employment with Woodbrae given the accepted injury was as a disease or aggravation of a disease arising from the nature and conditions of employment.

Essentially, Justice Beech-Jones found the Panel's approach in treating a pre-existing condition as a condition that existed outside the course of employment was incorrect. The WIM Act specifically refers to previous injury or pre-existing condition. The Panel failed to make a finding that Cullen was afflicted by a condition that existed prior to the commencement of his employment with Woodbrae where he worked from age 18. It only found that there was evidence of osteoarthritis, which was a "primarily degenerative condition" but did not explain whether Cullen always had that condition or always only had a susceptibility or predisposition.

Therefore, the MAP's decision contained an error of law on the face of the record irrespective of whether the condition had to pre-date the commencement of Cullen's employment or not.

Justice Beech-Jones confirmed that in order to establish a pre-existing condition for the purposes of a deduction under Section 323 of the Workplace Injury Management and Workers Compensation Act 1998, there must, at the relevant date, be an actual condition although it may be asymptomatic. A mere predisposition or even susceptibility is not sufficient to constitute a "condition".

The decision of the MAP was therefore set aside.

As the degree of pre-existing impairment is often a contentious issue between workers and insurers this decision highlights that it is not enough to simply rely upon evidence of a "constitutional pathology" but there must be evidence that the condition existed prior to the injury or, where the injury is a disease due to the nature and conditions of employment, the relevant employment.

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Future Medical Treatment Disputes – Changes in Procedures

From 16 October 2015 the Commission will refer all disputes concerning proposed treatment or services to an arbitrator for determination according to the law.

The *Workers Compensation Amendment Act 2015* amended Section 60(5) by replacing the clause "must be referred by the Registrar for assessment under Part 7 of Chapter 7 of the 1998 Act unless the regulations otherwise provide" from Section 60(5) with "may be referred by the Registrar for assessment under Part 7 of Chapter 7 of the 1998 Act".

The amendment effectively reverses the effect of the Court of Appeal decision in *Zanardo* which mandated referral of all disputes relating to proposed treatment to an approved medical specialist for a non binding opinion as to the reasonable necessity of the proposed treatment prior to determination of any liability issues by an arbitrator.

The Governor of New South Wales has appointed 16 October 2015 as the day on which the amendment commences.

The President of the Workers Compensation Commission, Judge Keating, has advised from 16 October 2015 the Commission will refer all disputes concerning proposed treatment or services to an arbitrator for determination according to the law. There is still an option to refer disputes to approved medical specialists, however it is expected that this will only be utilised in limited circumstances.

As a consequence of this change in procedure, delays and additional costs occasioned by the need to refer such claims for approved medical specialist assessment prior to determination of liability issues will be avoided in most cases where there are claims for proposed treatment.

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CTP ROUNDUP

Judicial Review and the Intricacies of the Lifetime Care and Support Scheme

In the recent decision of *Insurance Australia v Milton* [2015] NSWSC 1392, the NSW Supreme Court has dismissed an application by an insurer seeking judicial review of a decision of the Lifetime Care and Support ("LTCS") Authority Review Panel that Mr Milton was not eligible to be included in the scheme.

By way of background, Mr Milton suffered severe injuries in a motor vehicle accident in 2011, including a severed right lower leg which was ultimately amputated, injuries to his right arm and a traumatic brain injury. Prior to the accident, Mr Milton had been a keen cyclist, surfer and snow boarder. After recovery, Mr Milton went on to become an elite para-snow boarder, being a member of the Australian Paralympic team at the last winter Olympics.

Mr Milton was admitted into the LTCS as an interim participant, but subsequently the LTCS determined he did not satisfy the criterion for permanent participation.

The details of the steps and underlying process leading to the decision of the Review Panel not to accept Mr Milton into the scheme are complex.

Mr Milton was strenuously opposed to inclusion in the scheme.

The insurer disputed the decision of the LTCS to exclude Milton from the scheme, and the dispute was initially referred to an Assessment Panel under section 14(1) of the *Motor Accident (Lifetime Care and Support Act)* 2006 ("LTCS Act").

As Mr Milton's potential inclusion in the scheme hinged on an assessment of his brain injury, in line with both the LTCS Act and the *Lifetime Care and Support Guidelines,* part of the panel's deliberations involved undertaking a Functional Independence Measurement ("FIM") assessment.

The assessors did not find Mr Milton had the requisite scores to place him in the category required for entry into the program, despite evidence to the contrary from Dr Bowers, a medical expert qualified by the insurer, who had found Mr Milton had the requisite scores in the areas of bladder and bowel control.

The insurer applied for a review of the decision of the Assessment Panel under LTCS Act Section 15(1), relying on a new report from Dr Bowers expressing uncertainty about the appropriate scores for Mr Milton. However the Review Panel, comprising two rehabilitation experts and a urologist, completed a further FIM assessment and again concluded that although he suffered a brain injury caused by the subject accident, as well as experiencing significant Post-Traumatic Amnesia (the first two of three criteria) he did not score low enough (the third criteria) to qualify for entry into the scheme.

The review panel could not find a medical basis for the improvement in FIM scores between Dr Bowers' assessments. The review panel also noted Mr Milton was familiar with the FIM assessment tool and self reported that he could have tailored his responses to achieve a maximum impression of independence.

Importantly however the review panel found Mr Milton lived a complicated lifestyle, spending half of each year in Australia, and the other half in Europe training. Although Mr Milton's brain injury had not assisted his coping abilities, it was not the sole or main cause of the problems he experienced in day-to-day life.

The insurer applied for judicial review of the Review Panel's decision. The first ground argued by the insurer before Justice Beech-Jones contended the Review Panel fell into error when they addressed causation. In particular, the insurer argued that by enquiring whether his brain injury was the sole or main cause of Mr Milton's incapacity the Review Panel had applied a test that was too strict.

Ultimately however, Justice Beech-Jones dismissed this ground of review on the basis that as the Review Panel had found Mr Milton had not reached the threshold scores for inclusion in the scheme, it became redundant to determine whether the correct test had been applied to considering the issue of causation. His Honour noted that a decision is not liable to be set aside for error unless it is material to the outcome.

The point will no doubt be ventilated in an appropriate case in the future, as the insurer sought to argue that the correct causation test to be applied was effectively the common law test. The insurer argued the common law test would have been satisfied in Mr Milton's case if his brain injury was "a contributing cause, which is more than negligible".

The second ground of review argued by the insurer was that the Review Panel failed to comply with Clause 17 of the Guidelines, which requires the inclusion of "written reasons" for a decision. It was contended by the insurer that the Panel failed to deal with inconsistent histories given by Mr Milton to medical experts, failed to explain an arguably dramatic

improvement of Mr Milton's bowel and bladder functions between FIM assessments, did not make an assessment of Mr Milton's credibility and failed to explain why it gave such overwhelming weight to Mr Milton's own account in circumstances where he clearly did not want to be a participant in the scheme.

Essentially it was argued that the Review Panel had not engaged in any critical evaluation of what the insurer considered to be significant inconsistencies in the evidence and histories available.

Justice Beech-Jones rejected this argument, finding on the basis of the High Court's decision in Wingfoot Australia Pty Ltd v Kocak (2013) 252 CLR 480 that the function of the Review Panel is to form and give its own opinion on the medical question referred to it. It is not the role of the Panel to choose between competing arguments or to adjudicate between different medical opinions. His Honour noted this also applies to MAS Review Panels.

In this case, Justice Beech-Jones found the Review Panel had acknowledged and understood that there were differing medical opinions regarding Mr Milton's functioning, especially his bowel and bladder function. The panel undertook their own assessment of Mr Milton's functioning, and in doing so acknowledged his unwillingness to participate in the scheme, as well as his knowledge of the workings of the FIM assessment process.

With regard to Mr Milton's cognitive functioning, the Review Panel set out lengthy deliberations on areas such as "social interaction" and "problem solving". His Honour considered the Panel had used the FIM assessment as an opportunity to make detailed observations of Mr Milton's cognitive functioning.

In relation to the insurer's list of alleged failures on the part of the Review Panel, Justice Beech Jones considered the Panel had resolved any inconsistent histories by reviewing and observing Mr Milton and forming their own professional opinion. Ultimately, to resolve the question of Mr Milton's credibility the panel placed particular emphasis on Mr Milton's ability to live a complicated independent lifestyle and their own observations of his intellectual capacity.

This decision is a confirmation that although obtaining medico-legal evidence is important, as is pointing out inconsistent histories and issues of credibility, ultimately medical assessors of the MAS and LTCS Authorities are required to reach their own conclusions based on their professional judgment.

The other point to note is that once again an argument based on insufficient reasons being given by the decision maker has not been accepted by a Supreme Court Judge on Judicial Review. If the decision maker's path of reasoning can be followed and no error demonstrated, then the Court will support the decision without the need for detailed analysis of each piece of contradictory evidence being set out in the decision.

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Judicial Review and the value of the Calderbank letter

In October this year Justice Beech-Jones delivered a short but useful judgment in a judicial review case on the issue of indemnity costs in *Insurance Australia Limited v O'Shannessy (No.2) [2015] NSWSC 1328*. The issue was the effect of a "Calderbank" offer sent by the solicitors for the claimant to the insurer following an application by the insurer for judicial review of an assessment of damages under Section 94 of the Motor Accidents Compensation Act.

The insurer's judicial review application did not succeed. The claimant sought indemnity costs based on his Calderbank offer of settlement of a verdict for the claimant with no order for costs. The insurer had rejected the Calderbank offer within 24 hours of receiving the offer, and in turn made a counter offer to settle the claim under the MACA for $550,000.00 plus regulated costs.

The insurer argued against an award of indemnity costs on the basis that the offer was not a genuine offer. It simply involved the insurer discontinuing its application, and it was not unreasonable for the insurer to reject such an offer.

His Honour acknowledged that an offer involving discontinuance may often not represent a genuine compromise, but not in this case. As this was a judicial review decision with only two possible outcomes (ie dismissal of the insurer's application or the application succeeding and the assessment being set aside and re-determined), to offer one of the two outcomes was a genuine offer.

However, His Honour decided the insurer's refusal of the offer was not unreasonable in the circumstances.

Relevantly, the insurer was seeking to challenge a substantial award of damages and had reasonable grounds to do so even though it did not succeed on its application. The claimant's costs incurred at the time the offer was made were minor in comparison, as the claimant had only filed a Reply and had not yet embarked on submissions. It was not unreasonable for the insurer to refuse the offer to avoid the risk of a

modest costs exposure as to do otherwise would be to lose the chance to challenge the substantial award of damages.

In essence, the decision turns on the discrepancy between the relative amounts of the size of the risk and reward in the context of the judicial review.

As a result, CTP insurers may yet find it a useful decision when faced with a judicial review application where the potential award of damages is not so substantial as it was in the case of O'Shannessy. In those circumstances, an insurer's Calderbank offer to a claimant to discontinue an application for a review of damages with no order as to costs ought to have prospects of being found both a genuine offer and one unreasonable for the claimant not to accept.

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