GD NEWS / OCTOBER 2015

IN THIS EDITION

Editors:


David Newey


Amanda Bond

GILLIS DELANEY LAWYERS
LEVEL 40, ANZ TOWER
161 CASTLEREAGH STREET
SYDNEY NSW 2000
AUSTRALIA
T: + 61 2 9394 1144
F: + 61 2 9394 1100
www.gdlaw.com.au

Obvious risk - No Liability for Council where no knowledge of that risk

It is not always easy to determine whether a risk is obvious for the purpose of the *Civil Liability Act 2002* or whether a duty of care extends beyond a duty to warn.

The *Civil Liability Act 2002* provides there is no duty to warn a person about an obvious risk. However the risk is only obvious if it would be obvious to a reasonable person in that person's position.

If there is no duty to warn about the risk it is still necessary to determine what would be a reasonable response to that risk. If precautions other than warnings would have been taken by a reasonable person liability can still attach to a defendant that fails to take those precautions even though the risk was obvious.

However when it comes to road works, even if a reasonable person would have taken precautions against a risk of harm, road authorities are not liable in negligence for failing to carry out road works unless at the time of the alleged failure the road authority had actual knowledge of the particular risk the materialisation of which resulted in the harm. Interestingly a risk may be obvious but the road authority can only be liable for carrying out road works where it had actual knowledge of the risk. A road authority may not owe a duty to warn about a risk as it is obvious and even though it is an obvious risk the road authority does not need to take precautions against the risk unless it had actual knowledge of that risk.

This interesting conundrum was recently considered by the NSW Court of Appeal in *Collins v Clarence Valley Council*.

Ann Collins was injured when she fell over the railings of the Bluff Bridge which straddles the Orara River at Lanitza in New South Wales. The front wheel of her

bicycle became stuck in a gap between wooden planks of the bridge. Clarence Valley Council had care, control and management of the bridge. The deck of the bridge had longitudinal wooden planks that had been spray sealed with bitumen however there were gaps of varying sizes between the longitudinal planks. In addition, some of the planks were degraded and had holes in them.

At the time of her accident Collins was participating in the Sydney to Surfers Paradise bicycle ride, an annual charity ride organised by the Engadine Rotary Club to raise money for Father Chris Riley's "Youth Off the Streets" organisation. It was the tenth consecutive year she had taken part. Collins had been a regular cyclist for about 15 years, during which time she cycled for about 100 to 120 kilometres on a weekly basis in the Sydney metropolitan area.

Collins knew the Bluff Bridge had wooden planks with gaps and to avoid getting her wheels caught or jammed in the gaps she decided to ride over them at an angle.

As Collins approached the end of the bridge, at a time when she was looking ahead instead of down, her front wheel became caught in a gap between the planks. The bicycle stopped suddenly and she fell over the guard rails of the bridge into a rocky ravine with the bicycle still attached to her feet. She was seriously injured.

Collins sued the Council for negligence, claiming it had breached its duty of care in failing to eliminate or minimise the risks the bridge posed to cyclists by repairing the bridge, erecting a sign warning cyclists of the dangers inherent in the state of the bridge, and undertaking an adequate inspection or installing higher guard rails.

In the Supreme Court, Beech-Jones J found for the Council, holding that the risk of injury to a cyclist if their wheels became stuck in the gaps between the planks and the holes in degraded planks on the bridge was an "obvious risk" within the meaning of s 5F of the Civil Liability Act 2002 (NSW) ("CLA"), and that the Council did not owe Collins a duty of care to warn of that risk by the erection of a warning sign.

Beech-Jones J also found that a reasonable person in the Council's position would not have undertaken remedial work to the bridge, and that section 45 of the Civil Liability Act was a defence to this claim and shields a roads authority from civil liability for harm arising from a failure to carry out road work unless it had actual knowledge of the particular risk that materialised.

Collins appealed but found no joy in the appeal with the Court of Appeal finding that the findings of Beech-Jones J were available on the evidence.

The Court of Appeal detailed the process that one must embark on when considering whether a risk of harm is obvious.

The first step in the determination is to identify the risk of harm.

The Court of Appeal confirmed that this is done prospectively rather that retrospectively. A retrospective analysis looks at an obligation to avoid the particular act or omission said to have caused loss, or to avert the particular harm that in fact eventuated and obscures the proper inquiry as to breach.

It is necessary to identify what risk a reasonable person in the defendant's position would foresee and evaluate to determine what, if any, precautions ought to be taken.

Beech-Jones J was correct in identifying the risk of harm as "injury being caused" by the defective condition of the bridge as the true source of potential injury stemmed from the defective condition of the bridge which led to the risk of injury to a cyclist whose wheel became stuck in one of the gaps between the wooden planks.

The risk of harm identified is relevant both for the purposes of s 5F of the Civil Liability Act (obvious risk) and to foreseeability in relation to questions of duty, breach and causation.

The Court of Appeal then turned to consider whether the risk of harm was obvious and whether the Council owed a duty to warn of that risk.

McColl JA noted:

> *"The question of obvious risk in CLA, s 5F involves the determination of whether the plaintiff was exposed to a risk of harm which would have been obvious to a reasonable person in his or her position. The focus of the enquiry is not upon the putative tortfeasor but upon the person who has been injured or, more accurately, a reasonable person in his or her position. The test is an objective one and must take account of the objective circumstances of the person whose conduct is being assessed. In that inquiry "the plaintiff's state of mind is [not] determinative, but [rather] what a reasonable person in his or her position would regard as obvious."*
>
> *"Risk" in s 5F(1) "refers to the chance or possibility of an occurrence which results in 'harm', which is defined in s 5 to include 'personal injury or death'." Whether or not a risk is "obvious" may depend upon the extent to which the probability of its occurrence is*

or is not readily apparent to a reasonable person in the position of the plaintiff.

"Obvious" means that both "the factual scenario facing the plaintiff" and "the risk are apparent to and would be recognised by a reasonable [person], in the position of the [plaintiff] exercising ordinary perception, intelligence and judgment." That means the Court will take into account, for example, the age and level of experience of the plaintiff. Whether or not a risk is "obvious" may well depend upon the extent to which the probability of its occurrence is or is not readily apparent to the reasonable person in the position of the plaintiff. A risk may be "obvious" even though it has a low probability of occurring and is not prominent, conspicuous or physically observable.

As I have said, prima facie, the plaintiff's actual knowledge of matters which constitute the risk of harm is irrelevant, except to the extent that how any such knowledge was acquired may be relevant to the forward looking inquiry as to whether the risk would have been obvious to a reasonable person in his or her position. However, as the "obvious risk" inquiry is into the knowledge that a reasonable person in the appellant's position should be taken to have had, it may be relevant to know the extent to which he or she was actually aware of the risk in whole or in part. That "would be a circumstance to be taken into account when considering what would have been obvious to a reasonable person in the position of the respondent."

McColl JA(with whom MacFarlan JA and Emmett JA agreed) concluded that having regard to the ubiquity of the gaps between the planks, the possibility of a wheel being jammed when the bicycle was near the railing, leading to the rider falling over the low guardrails, was obvious.

There was no duty to warn about the risk that a cyclist's progress may be suddenly arrested by a gap in the bridge's planking and cause the rider to fall over and suffer injury.

As there was no duty to warn the precautions other than the warning sign which Collins argued should have been implemented only became relevant in the event Collins succeeded in establishing the Council had actual knowledge of the particular risk as a consequence of the Section 45 defence. Section 45 of the Civil Liability Act provides that a roads authority is not liable in proceedings for civil liability 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.

Here Mr Madden was the Council officer with relevant authority to carry out the necessary roadwork to eliminate the relevant risk or to consider carrying out such roadwork. However, the primary judge held, Collins had to establish that Mr Madden had "actual knowledge of the particular risk the materialisation of which resulted in her injuries. Madden did not give evidence. The primary judge concluded that there was "no evidence to support any inference that Mr Madden had knowledge that there were gaps in the planks of the Bluff Bridge and that they posed a risk to cyclists or anyone else crossing the bridge." This was because the highest point on the evidence of Mr Madden's state of knowledge was that Mr Bailey said he "drove down the Orara Way from time to time and as the Council's bridge engineer he was responsible for the maintenance of its bridges". However, "there was no evidence as to how often he drove on the road and, more importantly, whether he ever inspected the Bluff Bridge when he did so or otherwise receive any report on its condition.

McColl JA noted:

"Because "actual knowledge" is required, reliance on imputed or constructive knowledge is precluded. However, as the primary judge held, a finding of actual knowledge can be made by inference and, if the inference is fairly available and the roads authority calls no evidence to rebut it, the Court can more comfortably find actual knowledge. "

The primary judge held there was no basis in the evidence for inferring Mr Madden had actual knowledge of the particular risk the materialisation of which resulted in the harm. Mr Barry drew attention to entries in the Council's records which he submitted could found an inference of the relevant knowledge on Mr Madden's part. One related to a proposal to replace the bridge with a concrete one. Nothing in that document indicated the state of repair of the bridge, let alone the "particular risk the materialisation of which resulted in the harm" was the, or a, reason for the proposal. Rather, the project was described as "increas[ing] the width of the bridge … in accordance with the Austroads Bridge Design".

The only other document relied on concerned the replacement of a running plank on the bridge. He submitted Mr Bailey had said that was "the kind of entry a bridge engineer would make" and that bridge engineer was Mr Madden. Mr Madden was not identified as either the author of the particular entry or entries of that type.

In those circumstances the primary judge was not satisfied actual knowledge had been made out. The Court of Appeal found that this finding was open to the trial judge on the evidence.

As a consequence in the absence of actual knowledge of the risk of harm the Council was not liable for failing

to carry out road works. The defence under section 45 was available.

Collins failed in the claim as the risk was obvious and the Council owed no duty to warn and it was not liable for any failure to carry out road works as it had no actual knowledge of the obvious risk.

Interestingly McColl JA also found that Collins' knowledge of the risk was relevant to contributory negligence if there had been a finding that the Council was liable. Collins accepted that she knew before the accident that the way to avoid the risks posed by longitudinal gaps was to "stop and avoid them" or to keep riding across them at an angle. Collins' actions of riding the bicycle with the wheel facing parallel to the gaps in the surface of the bridge at about the time it became jammed whilst not looking at the bridge surface contributed to the accident and McColl J determined that had Collins succeeded in the claim Collins would be guilty of at least 50 per cent contributory negligence.

At the end of the day personal responsibility remains alive and well however it is interesting that a road authority can escape liability for failing to carry out road works where there is an obvious risk of harm provided It has no actual knowledge of that risk.

David Newey
dtn@gdlaw.com.au

Fall from train- deciding the correct hypothesis when there is no direct evidence

The onus of establishing the facts to prove a negligence claim rests on the person who was injured and where there are two alternative scenarios of equal probability a person will fail in their claim if one scenario demonstrates negligence and the other does not. The injured person will not have established on the balance of probabilities that there was negligence. However if there are two scenarios and an injured person can demonstrate that one scenario is more probable than the other and the more probable scenario demonstrates negligence the injured person will succeed as was seen when the High Court unanimously allowed an appeal from the Court of Appeal of the Supreme Court of New South Wales and restored the primary judge's award of damages *Corey Fuller-Lyons by his tutor Nita Lyons v State of NSW*.

Corey was eight years of age when he suffered severe injuries when he fell from a train about two minutes after it departed from Morisset Station. He was travelling with his 2 brothers. He brought proceedings in the Supreme Court of New South Wales, claiming damages in negligence against the State of New South Wales, the legal entity operating the rail network.

There was no direct evidence of how Corey fell from the train. It was common ground that Corey must have fallen through the front doors of the carriage in which he was travelling. The doors were fitted with electro-pneumatic locking motors which were centrally operated by the guard on the train. When the doors were locked, they could not be prised open. The adoption of the locking door system was intended to eliminate the known risk of passengers falling from the train. Locking the doors was a controversial policy since, in the event of a loss of power or an accident, passengers remained locked in the cars until rescued.

It was the State's case that Corey had deliberately interfered with the doors before they were closed and that he had been assisted in this endeavour by his older brothers.

The doors could not have been locked, despite the guard having engaged the locking system before the train left Morisset Station if Corey fell out of the doors. The primary judge found that the only realistic means by which Corey could have generated sufficient force against the pneumatic power of the locking motors to open the doors far enough to fall out was if he had his back to one door and he pushed with his arms or a leg against the other. The primary judge considered the most likely explanation for how this occurred was that Corey had been caught between the doors as they closed at Morisset Station, leaving part of his torso and at least one of his arms and legs outside the train. The primary judge held the State liable for the negligent failure of a railway employee to keep a proper lookout before signalling for the train to depart. The guard ought to have seen Corey caught in the doors. Corey was awarded $1,536,954.55 in damages.

The State successfully appealed to the NSW Court of Appeal. The Court of Appeal identified alternative hypotheses that did not entail negligence on the part of railway staff and concluded the alternative hypotheses were of equal or greater probability than the hypothesis upon which the primary judge based his conclusion of negligence. The first hypothesis was that Corey might have used a backpack or other bag, a shoe placed lengthways, or a ball such as a basketball or soccer ball, to prevent the doors from closing. A gap of this magnitude, it was said, would have permitted Corey to insert his shoulder into it and to enlarge it by pushing one of the doors with both hands whilst obtaining leverage by leaning part of his back against the other door. A second hypothesis was that was that the wedge that initially kept the doors from closing was Corey's shoulder, arm and leg and Corey would have had the strength to make the gap larger by using his arms, back and perhaps his leg. Their Honours considered that Corey could have accomplished this

manoeuvre within a matter of seconds. Therefore Corey failed to prove his case on the balance of probabilities.

Corey was granted special leave to appeal to the High Court and the Court unanimously allowed the appeal, finding that the Court of Appeal erred in overturning the primary judge's ultimate factual finding. The High Court determined that in light of the Court of Appeal's acceptance that Corey had his back to one door and that he was able to force back the opposing door with his arms before his fall, the further finding that he came to be in this position as a result of the doors closing on him at Morisset Station was the most likely inference "by a large measure". The alternative hypotheses were not of equal probability.

The primary judge's findings and award were correct and Corey was entitled to damages.

The absence of direct evidence as to the cause of an accident will result in the need for inferences to be drawn on how an accident occurred. Where there are two or more hypotheses as to how an accident occurred and the hypotheses that supports a finding of negligence is not more likely than the others the claimant will fail in their claim in negligence as they will fail to demonstrate negligence on the balance of probabilities. Inferences of equal probability will not be enough, however convince the Court that one inference is more probable than another and that hypothesis will be the hypothesis applied to determine the claim.

Amanda Bond
asb@gdlaw.com.au

Fire in a brothel – Non disclosure of association with bikie gang leads to rejection of insurance claim

An insured's duty of disclosure extends to matters other than those raised in a proposal form and can extend to associations that directors and others involved in a business have with bikie gangs as was seen in the recent case of Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited, which concerned a claim for damage under an insurance policy following a fire in a brothel in the ACT.

Stealth Enterprises Australia Pty Ltd owned and operated a brothel in the ACT, which traded as The Gentlemen's Club. The brothel's premises were insured by Calliden Insurance for fire and business interruption under a policy which had been renewed in September 2011. A fire damaged the Gentlemens Club on 1 January 2012 which resulted in the brothel ceasing to trade.

Stealth Enterprises made a claim on its insurer However Calliden denied liability under the policy. Calliden's denial was based on an alleged non disclosure of 2 critical facts. The first complaint was an alleged failure to disclose the association between Mr Baris Tukel, Stealth Enterprises sole director, a shareholder and its guiding mind and Mr Fidel Tukel, his brother and the brothel's manager, with the Comancheros bikie gang. Secondly, that while the brothel was registered under the Prostitution Act 1992 (ACT), when the policy was first issued in 2010, it was no longer registered when the policy was renewed in 2011.

Proceedings were brought by Stealth Enterprises against Calliden challenging the denial and Calliden defended these proceedings on the basis that Stealth Enterprises failed to comply with disclosure obligations imposed upon it by the Insurance Contracts Act 1984 (Cth) and that this failure entitled it to reduce its liability under the policy to nil. Calliden claimed that if there had been proper disclosure of relevant matters, the policy would not have been issued in 2010 or renewed in 2011.

In the proceedings Stealth Enterprises ultimately did not deny either the connection between Mr Baris Tukel, Mr Fidel Tukel and the Comancheros, or that at the relevant time the brothel was no longer registered under the Prostitution Act.

An insured's obligations to disclose facts is set out in section 21 of the *Insurance Contracts Act 1984* and the remedies available where there is a non disclosure are governed by section 28 of that Act.

Those sections provide:

> *"21 The insured's duty of disclosure*
>
> *(1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:*
>
> *(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or*
>
> *(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.*
>
> *(2) The duty of disclosure does not require the disclosure of a matter:*
>
> *(a) that diminishes the risk;*
>
> *(b) that is of common knowledge;*
>
> *(c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or*

(d) as to which compliance with the duty of disclosure is waived by the insurer.

(3) Where a person:

(a) failed to answer; or

(b) gave an obviously incomplete or irrelevant answer to;

a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter.

28 General insurance

(1) This section applies where the person who became the insured under a contract of general insurance upon the contract being entered into:

(a) failed to comply with the duty of disclosure; or

(b) made a misrepresentation to the insurer before the contract was entered into;

but does not apply where the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into.

(2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.

(3) If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under subsection (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made."

The Court noted in this case, in resolving the issues it was relevant that in the ACT, brothels may operate legally in accordance with the regulatory scheme established by the Prostitution Act. There is no doubt persons involved in the operation of such businesses, who have backgrounds which would not oblige them to make any disclosures to an insurer under section 21 because they raised no relevant risks. Others will fall into a different category.

Calliden argued that matters other than those raised in questions in the proposal needed to be disclosed by Stealth Enterprises and if they had been disclosed Calliden would not have insured Stealth Enterprises.

An example given by Calliden as to a matter about which no specific question was asked in its proposal form, but which would have to be disclosed by an applicant for insurance, was undetected arson. Its case was that similarly, while it asked no specific questions about membership of an outlaw bikie gang, s 21 obliged an applicant such as Stealth Enterprises to disclose that membership.

Schmidt J noted:

"The duty imposed by s 21 fell on Stealth Enterprises, a corporate applicant who could only act through its officers and employees.

The need for disclosure by a corporate applicant for insurance, about the private activities of its officers, depends on the nature of the activities in question and the impact which they might have on the risk which an insurer is being asked to accept. That is because an insurance contract is a contract requiring the utmost good faith of both parties (see s 13 and CGU Insurance Ltd v Porthouse [2008] HCA 30; (2008) 235 CLR 103 at [49]).

It follows that, if, for example, Mr Baris Tukel, had received threats from another bikie gang that the brothel was going to be firebombed, that is a matter which Stealth Enterprises would undoubtedly be bound to disclose in its application, given the obligation imposed upon it by s 21. That is because, unquestionably, it would know that such a threat would have an impact on Calliden's decision as to whether to accept the risk of insuring its brothel.

It was argued, nevertheless, for Stealth Enterprises that a case under neither s 21(1)(a) nor (b) could be established, because even the objective test under s 21(1)(b) turned on a question of fact, to be determined in a context where the reasonable person would apprehend that the insurer had not asked a question about membership of a bikie gang, even though it was insurance of a brothel which was being sought and where information was required to be given about criminal convictions in the preceding five years, as well as information about employment of illegal immigrants, but no general question was posed about any other relevant matters.

The reasonable person would also have in mind, it was argued, that it was not seeking to insure the Comancheros' clubhouse, but a perfectly legitimate business, conducted under the laws of the ACT and not for the benefit of the Comancheros. Such a person would also take into account the absence of a relevant question."

Schmidt J concluded membership of the Comancheros was relevant to the decision to insure. Schmidt J noted the decision in *CGU Insurance Limited v Porthouse* it was observed that:

"A test of disclosure, which operates by reference to both the insured's actual knowledge and the knowledge of a reasonable person in the same circumstances, is calculated to balance the insured's duty to disclose and the insurer's right to information. The insurer is protected against claims where the

insured's disclosure is inadequate because the insured is unreasonable, idiosyncratic or obtuse and the insured is protected from exclusion from cover, provided he or she does not fall below the standard of a reasonable person in the same position."

Calliden offered insurance to those in the adult industry, including those who operated brothels. It was possible that members of bikie gangs might be involved in the conduct of such businesses.

Underwriters for Calliden gave evidence that membership of the Comancheros gave rise to risks relevant to Calliden's decision to insure.

Calliden's Underwriting Guidelines did not address the concept of membership of bikie gangs and Calliden could have addressed this issue specifically in its Guidelines.

Further, Calliden could have required information to be provided by applicants in a proposal form including questions about possible associations of the intending insured and its directors with outlaw bikie gangs but they did not. However that was not an answer to the issue.

Schmidt J was satisfied that the evidence established that a reasonable person would be expected to know that their membership of the Comancheros was relevant to the decision to insure and whilst that knowledge must have regard to what was asked in Calliden's written application form, the form included a declaration that all relevant information had been disclosed. Schmidt J noted if a relevant question about membership had been asked and answered the questions raised by s 21 could have easily been answered. If the answer given had been incorrect, the breach of the duty to disclose would have been clear. If the answer given had been incomplete or irrelevant and still a policy had been issued, s 21(3) would have resulted in Calliden having been deemed to have waived the disclosure duty.

However Schmidt J noted "disclosure of relevant things which are not known to the insurer and about which questions are not asked in an application form, is where the duty imposed by s 21 on an insured bites."

Schmidt J was satisfied that "given not only what was known to Stealth Enterprises directly about Comancheros' membership of its director and manager, but also from what was, by 2010, a matter of common knowledge about the activities of the Comancheros and its members, that a reasonable person could be expected to know that membership of the Comancheros was relevant to Calliden's decision to accept the risk of insuring the brothel which Stealth Enterprises owned and operated."

Whilst the "Calliden Business Pack Adult Industry Insurance Policy" was the basis of a scheme tailored for the adult industry, including brothels, which could operate legally in the ACT Schmidt J accepted the evidence of the Underwriters that the policy would not have been written if the director's membership of the Comancheros had been disclosed.

The business had been registered as a brothel but the registration had lapsed. Whether lapse of the registration was the result of oversight, a deliberate decision, or as the result of some other difficulty was not determined. The Court noted that was irrelevant to the question of whether the evidence established that Stealth Enterprises knew that registration was relevant to Calliden's decision to insure.

Schmidt J concluded a reasonable person would have known that maintaining the brothel's registration was relevant to Calliden's decision to renew the policy. The Court accepted the evidence of the Underwriters that they would not have renewed the insurance in the event that it had been disclosed the brothel was not registered.

Schmidt J concluded that Calliden was entitled to reduce its liability for the claim to nil. Schmidt J concluded:

"There was no issue that under s 28(3), in an appropriate case, an insurer can reduce its liability under a policy to nil. I am satisfied, for the reasons given, that this is such a case. I am also satisfied that if the necessary disclosures had been made, the policy would not have been issued in 2010 or renewed in 2011.

Even if the case Stealth Enterprise advanced in relation to membership of the Comancheros had succeeded, the case advanced in relation to the failure to disclose the lapse of registration in 2011 could not, with the result that judgment would still have to be given for Calliden.

In the result, Stealth Enterprises' claim must fail."

As can be seen the insured duty of disclosure extends to matters that a reasonable person in the insureds position would have known as relevant to the decision to insure and associations with a bikie gang was one of those matters. Lapsing of registration of a brothel is another of those matters that should be disclosed. Where an insurer would not have insured a risk if a disclosure of a material fact had been made it can reduce its liability for a claim to nil where there has been a non-disclosure.

Businesses who have directors or employees with associations with bikie gangs or criminals need to carefully consider their duty of disclosure and what needs to be disclosed to an insurer about moral risks as those moral risks may be relevant to a decision to insure and a failure to disclose material facts can

impact on entitlements under any insurance policy as was seen in this case.

David Newey
dtn@gdlaw.com.au

Theft Claims and Fraud

Fraud is a dishonest act or omission with an intention to deceive so as to obtain a material benefit or advantage.

Where an insurer asserts fraud the onus shifts to the insurer to prove that the insured was involved in or knew of the fraudulent event or activity.

The test to be applied in determining whether an insurer has discharged its onus of proof was set down by the High Court in *Neat Holding Pty Limited v. Karajan Holdings Pty Limited*. In that case it was noted:

> *"The ordinary standard of proof required of a party who bears this onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what is sought to prove. … clear or cogent or strict proof is necessary where so serious a matter as fraud is to be found. Statements to that effect should not, however, be understood as directed at the standard of proof. Rather they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a Court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."*

Fraud in the claim involves establishing that the insured has attempted to deceive the insurer in the way in which it has pursued the claim, for example, in making false statements to the insurer or generally providing false information.

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

Section 56 of the ICA provides that the insurer may not avoid the contract of insurance but may refuse to pay the claim where there has been fraud.

However fraud is one matter and proving a claim is another. It is incumbent on an insured to establish the facts that support the claim and if those facts are not made out the claim will fail even where there is no fraud.

If an insured alleges his property was stolen and fails to prove on the balance of probabilities it was stolen the claim will fail.

There will often be interplay between allegations of fraud and an alternative argument that the evidence does not establish the facts that are necessary to trigger a claim as was seen in the recent decision of the NSW Court of Appeal in *Sgro v Australian Associated Motors Insurers Ltd*.

Sgro owned a Ferrari. AAMI insured his vehicle. Sgro gave alleged that he had parked the vehicle in Eurella Street, Burwood at about 8pm, eaten at a restaurant in Burwood and then seen a movie at the Burwood Westfield Complex. When he returned to Eurella Street at about 12.50am the vehicle was not there. He made a claim on his insurer AAMI for the theft of the vehicle.

AAMI denied the claim as it alleged that the vehicle had been stolen. It put in issue whether the vehicle had been taken away or removed from Sgro's possession without his consent. AAMI also alleged that Sgro had made false statements in support of his claim and, for that reason, that it was entitled to refuse payment under s 56(1) of the Insurance Contracts Act 1984 (Cth). The statements alleged to have been false did not include Sgro's contention that the vehicle had been stolen.

Sgro's case was that on the afternoon of 17 December 2011, he had left work at 2 pm and driven straight home, where he stayed until he went out for the evening at about 7:30 pm, having made arrangements for dinner at Burwood at 8:30 pm with his brother, sister-in-law and two friends. The arrangements included going to a movie at the Burwood Cinema complex after dinner. The dinner and movie arrangements were corroborated and were not in dispute.

Sgro's parents gave evidence that Sgro had left home around 7.30pm corroborating the timing of events relied on by Sgro.

AAMI called evidence from Mr Sacco who lived in Eurella Street, opposite where the vehicle had in fact been parked on the day of the alleged theft. Mr Sacco, by chance, had a deep interest in Ferrari motor vehicles. He identified the model of the vehicle he saw parked opposite his house, as a 360 Modena, being the model of Sgro's vehicle. Based on Mr Sacco's evidence, the primary judge found:

"… that the car was there between 5.00pm and 5.50pm and was driven away at approximately 6.30pm. It follows, therefore, that I find that [Sgro] was not truthful about his whereabouts and that of the car during those times."

Addressing Sgro's claim that the vehicle was stolen from Eurella Street at some time between 8pm and 12.50am, the primary judge was not satisfied that it had been parked in that street at any time during that period: The primary judge did, however, find that the vehicle was parked in Eurella Street (and opposite the Sacco family residence) at some time after 5pm and until it was driven away at approximately 6.30pm:

This was not consistent with Sgro's evidence that he had first driven the vehicle from his home, where he lived with his parents, at about 7.30pm. Having regard to these and other inconsistencies concerning the circumstances surrounding the disappearance of the vehicle, the primary judge was not prepared to accept his uncorroborated evidence which would have meant that the vehicle had been parked in Eurella Street twice in the same evening.

The primary judge also held that AAMI was entitled to refuse the claim pursuant to s 56 of the ICA, as Sgro was not honest and candid in the answers he gave to AAMI about his whereabouts on the afternoon of the day the vehicle disappeared. However the primary judge made no specific finding of fraud and in fact declined to go that far.

Sgro appealed however found no joy a second time around.

The Court of Appeal dismissed the appeal finding it was open to the primary judge to make the finding that she did concerning the circumstances of the claim and that Sgro had not established on the balance of probabilities that the vehicle was stolen.

Beazley P noted:

"In order for a plaintiff to succeed, it must satisfy the court, on the whole of the evidence, of the facts necessary to establish the cause of action. In coming to its determination, a court is not required to accept the whole of the evidence adduced by one or other of the parties. Nor is it required to accept the whole of the evidence of a particular witness. It may find itself satisfied in respect of some facts, not satisfied in respect of other facts, and not satisfied one way or the other in respect of other matters. If, on the whole of the evidence, the court is satisfied that the facts necessary to sustain the cause of action have been proved on the balance of probabilities, the plaintiff will succeed. In the present case, that required the appellant to satisfy the court that an insurable event had occurred. The relevant insurable event was the theft of the vehicle. As I have said, her Honour specifically found that she was "not satisfied to the requisite standard" that the vehicle had been stolen. Accordingly, the appellant's claim failed.

In a case where, on the whole of the evidence, the probabilities are equal, a plaintiff will fail, having not satisfied the court on the balance of probabilities of the necessary facts to establish the cause of action. If in a case such as the present, the court had found that the probability that the vehicle was stolen was equal to the probability that it was not stolen, the appellant would not have succeeded on his claim"

Meagher JA who agreed with Beazley P noted:

"The primary judge made clear that her finding was not a finding of fraud: Nor was her Honour's conclusion necessarily equivalent to a finding of fraud because, in a case where the only reasonable alternative was that Sgro had participated in the vehicle's disappearance, it was open to her Honour to find that she was not satisfied the vehicle had been stolen where the probability that it had been stolen was equal to the probability that it had not."

As Sgro had not established the theft the claim failed and AAMI were entitled to reject the claim. However the findings of Olsson DCJ on the section 56 ICA defence were a different matter.

Olsson DCJ found that "for whatever reason" Sgro was not honest or candid in the answers that he gave about his whereabouts on the afternoon of the theft and she was satisfied on that basis AAMI was entitled to refuse the claim pursuant to s 56 of the Insurance Contracts Act."

The Court of Appeal held that finding was not enough to validate denial of the claim under section 56 of the ICA.

Beazley P noted:

"The seriousness of a finding of fraud, including statutory fraud, does not permit of other than a specific finding that the fraud, or the contravening conduct, has in fact occurred. This was well explained by Dixon J in Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336, albeit in the context of the requisite standard of proof. His Honour stated, at 362-363:

"It is often said that such an issue as fraud must be proved 'clearly', 'unequivocally', 'strictly' or 'with certainty' … This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained [that the fraud has been committed]."

Olsson DCJ did not make a finding of fraud. As Bealzey P noted:

> *"A finding of fraud, including fraud for the purposes of s 56, involves a finding that a person has been untruthful and deliberately so, with the intent of obtaining a financial gain. It is a finding of seriously wrong conduct. Although it was not suggested that criminal consequences are likely to flow from the finding in this case, the appellant submitted that there may be serious implications for his future insurance needs. But even without that concern, it cannot be gainsaid that, if a finding of fraud is to be made, it should be made clearly and the reasons for the finding articulated. A statement that "for whatever reason" the respondent's entitlement to have the claim refused under s 56 does not satisfy this fundamental requirement."*

Meagher JA was also of the view that to be entitled to rely on a defence under s 56(1), the insurer had to plead and prove that any false statement was knowingly made by the appellant for the purpose of inducing it to pay his claim. The primary judge's findings did not include a finding of fraud and a denial based on fraud was not supported by the findings.

At the end of the day AAMI were entitled to refuse the claim as the evidence to establish the theft did not stack up.

However fraud was another issue and it is interesting that AAMI did not suggest that the statement that there was a theft was a false statement that amounted to fraud. The statements that AAMI argued were false were not found to be statements knowingly made by an insured for the purpose of inducing it to pay his claim.

Proving facts and establishing fraud often run side by side in a theft claim. The onus of establishing the facts rests on the insured whilst the onus of establishing fraud rests on the insurer. An insured can and will come unstuck if they cannot establish that a vehicle was stolen and an insurer can come unstuck in an allegation of fraud if it cannot establish that there was a false statement knowingly made for the purpose of inducing an insurer to pay a claim.

The case also serves as a reminder that fraud is a serious allegation and must be properly pleaded in proceedings, The case that is alleged must be clearly articulated in the pleading so that the alleged perpetrator understands the case that is alleged.

As Beazley P noted:

> *"The seriousness of raising a question of fraud underlies the express pleading requirement that fraud be clearly pleaded and properly particularised: Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 14.14. The pleading must allege the acts involved and that they were done in a manner that involves fraud: ...*
>
> *In Ghazal v Government Insurance Office (NSW) (1992) 29 NSWLR 336 at 344, Kirby P observed, in the context of the manner in which a case was run at trial, that it is necessary to fairly confront a person with the suggestion that a case is false or fraudulent. His Honour pointed out that this was once considered a question of fairness but was now accepted to be a basic obligation of procedural justice: .."*

The simple fact is that fraud must be specifically pleaded and the acts or omissions relied on in support of an allegation of fraud must be included in the pleadings.

David Newey
dtn@gdlaw.com.au

Is diving a dangerous recreational activity and do risk warnings protect those responsible for those activities?

In the recent decision of *Sharp v Parramatta City Council [2015] NSWCA 260*, the NSW Court of Appeal considered whether the operator of a pool owed a duty of care to supervise and instruct individuals using a 10 metre diving platform and whether a warning sign placed on a ladder leading to the diving platform would absolve the Council that operated the pool from any responsibility for injury to those that used the diving platform.

In particular the Court of Appeal considered the provisions of *Civil Liability Act (NSW) 2002* ("CLA") relating to risk warnings and whether the injuries were suffered as a result of materialisation of an obvious risk of a dangerous recreational activity within Section 5L of the CLA.

On 25 January 2009 Erin Sharp attended Parramatta War Memorial Swimming Centre with her partner and two friends. The Centre was occupied and operated by Parramatta City Council. Sharp and her friend walked to the 10 metre diving tower and ascended the stairs with the intention of diving from the tower. When they reached the top of the tower Sharp changed her mind. She gave evidence that she was nervous and no longer wanted to jump however having sought instructions from the lifeguard she proceeded to jump. The lifeguard advised her to fall vertically, feet first into the pool below. Although she fell feet first, she entered the water with her buttocks making the first contact with the surface, resulting in a compression fracture of the T11 vertebral body.

Sharp sued the Council in the District Court at NSW.

At first instance, Curtis DCJ dismissed Sharp's claim for damages on the basis there was a warning sign at the base of the stairs to the diving tower that read "... PERSONS USING THE PLATFORMS AND SPRINGBOARDS DO SO AT THEIR OWN RISK" and this provided a defence to Ms Sharp's claim under Section 5M of the CLA.

Section 5M relevantly provides:

> *"(1) A person (the defendant) does not owe a duty of care to another person who engages in a recreational activity (the plaintiff) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff…*
>
> *(3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.*
>
> *(4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).*
>
> *(5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk) …*
>
> *(8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person."*

Further, his Honour observed that Council was entitled to rely on Section 5L of the CLA. Section 5L provides:

> *"A person (the defendant) is not liable in negligence for harm suffered by another person (the plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff."*

Sharp appealed, arguing that Curtis DCJ had incorrectly applied section 5L and section 5M of the CLA.

In a unanimous decision Meagher JA, Ward and Gleeson JJA dismissed Sharp's claim on appeal.

The Court of Appeal held that the warning sign sufficiently identified the general nature of the risk of injury in undertaking the activity of jumping into the pool from the 10 metre platform. It was accepted that the instructions given by the lifeguard did not contradict the warning given by the sign.

Further, the Court of Appeal accepted Council's submissions that the risk of harm in jumping from the 10 metre platform was an "obvious risk" and was a "dangerous recreational activity".

Section 5F of the CLA defines obvious risk as:

> *"an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person".*

Whilst Sharp accepted that in jumping from the platform she was engaged in a recreational activity, she disputed that she was engaged in a "dangerous recreational activity".

In their judgment the Court of Appeal noted:

> *"Here the obvious risk which materialised and caused the appellant's injuries was also, viewed prospectively, the significant risk of harm which made the activity of jumping from the platform relevantly "dangerous". Accordingly, s 5L(1) was satisfied with the result that the respondent was not liable in negligence for that harm..."*

The Court of Appeal held that the risk of injury with the water surface from such a height was obvious. The activity was a dangerous recreational activity and therefore Council was entitled to rely upon Section 5L of the CLA.

The Council also provided a risk warning and was entitled to rely on section 5M.

The decision is a reminder that the statutory defences in the CLA are not toothless tigers and with the right facts and circumstances the defences can succeed.

Kristine Gorgievski
kkg@gdlaw.com.au

EMPLOYMENT ROUNDUP

Can a Redundancy be an Unfair Dismissal?

The interaction of the unfair dismissal provisions of the *Fair Work Act 2009* (the Act) and terminations of employment by reason of redundancy continues to bedevil employers, workers and the Fair Work Commission (FWC).

The starting point for a clear understanding of how these issues relate is the definition of "Unfair Dismissal". Section 385 of the Act defines an unfair dismissal as follows:

"385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy."

There are therefore 4 requirements. They are cumulative requirements; that is, if one is not satisfied, there can be no unfair dismissal.

Procedurally, section 396 of the Act dictates that the FWC must decide certain matters before considering the merits of an application. Those matters include whether the dismissal was consistent with the Small Business Fair Dismissal Code; and whether the dismissal was a case of genuine redundancy.

Not a Genuine Redundancy

This is one of the s385 integers necessary for there to have been an unfair dismissal. If the termination is a case of genuine redundancy, there can be, by definition, no unfair dismissal.

What is a genuine redundancy? The Act sets out the definition as follows:

"389 Meaning of genuine redundancy

(1) A person's dismissal was a case of genuine redundancy if:

(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer.

For a redundancy to be genuine, therefore, both requirements of s389(1)(a) and (b) need to be satisfied, and the exception in s389(2) negatived. If those are all present, the redundancy is genuine, and termination of employment by reason of that redundancy can never be an unfair dismissal.

The Explanatory Memorandum to the Act gives some examples of when an employer no longer requires a job to be performed for the purposes of s389(1)(a):

1548 The following are possible examples of a change in the operational requirements of an enterprise:

a machine is now available to do the job performed by the employee;

the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task or duty instead of five; or

the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exist.

1549 It is intended that a dismissal will be a case of genuine redundancy even if the changes in the employer's operational requirements relate only to a part of the employer's enterprise, as this will still constitute a change to the employer's enterprise.

There is a consistent theme in decided cases about redundancy that it is the employer's prerogative to rearrange the structure of its business by breaking up the functions, duties and responsibilities of a single position and distributing them among the holders of other positions, including newly created ones, as it sees fit.

The consultation requirements found in s389(1)(b) must be fulfilled. The word 'consult' means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response.

Some of the ordinary incidents of a requirement to consult are:

- to provide information about the change; and
- to provide an opportunity for affected employees to give their views about the impact of the change; and
- to consider any views about the impact of the change that are given by the employees.

The final integer in genuine redundancy is redeployment. For the purposes of s.389(2) the FWC must find, on the balance of probabilities, that there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employee. There must also be an appropriate evidentiary basis for such a finding.

The question is whether redeployment within the employer's enterprise or the enterprise of an associated entity would have been reasonable at the time of dismissal. In answering that question a number of matters are capable of being relevant. They include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered. What is 'reasonable' will accordingly vary from case to case.

So, from an employer's perspective, a termination by reason of genuine redundancy means that no unfair dismissal claim can be brought by the employee. But to establish a genuine redundancy requires the employer to show that the job no longer needs to be done, that it has complied with any obligation to consult, and that redeployment was not reasonable.

David Collinge
dec@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Amendments to Journey Claims Prevail Again

The amendments to the journey provisions of Section 10 of the 1987 Act provide that compensation is only payable for injuries received on periodic journeys if there was a "real and substantial connection" between the employment and the accident or incident out of which the personal injury arose.

In only a handful of cases since the amendments became effective have injured workers been able to successfully argue there was a real and substantial connection with their employment.

The journey provisions were again construed in favour of the employer in the recent Presidential determination of Alexander and Alexander as legal personal representatives of the Estate of Hugh Alexander v Secretary, Department of Education and Communities [2015] NSWWCCPD 41. The decision also considered the journey provisions that apply to work related journeys to educational institutions.

Mr Alexander died from injuries he received in a motor vehicle accident whilst driving from his place of employment in Swan Hill, Victoria to either his agreed place of abode that evening being his parents' residence at Lithgow or to an educational institution in Bathurst, where he was to attend his graduation ceremony the following day. His parents claimed compensation for lump sum death benefits and funeral expenses on the basis the deceased's injury occurred on either a periodic journey between his place of abode and place of employment or between his place of abode or place of employment and an educational institution which he was required by the terms of his employment or "was expected" by his employer to attend.

In relation to the first of the scenarios, namely whether the deceased was on a journey from his place of employment to his place of abode, the arbitrator at first instance concluded there was insufficient evidence that employment factors caused or had a connection with the cause of the motor vehicle accident to satisfy him that the accident's connection with the deceased's employment was real and substantial.

Dealing with the alternative scenario that the deceased was on a periodic journey from his place of employment to an educational institution, the arbitrator was satisfied the deceased was on such a journey, however he was not satisfied it was a "daily or periodic journey". The Arbitrator determined that the purpose of travel was a one off for the purpose of attending his graduation and thus it lacked any degree of regularity or periodicity to be characterised as a periodic journey. The Arbitrator was not satisfied the journey was a journey expected by his employer to attend the educational institution in the manner contemplated by the section noting the qualification in respect of which the graduation ceremony related would have been conferred on the deceased whether or not he attended. Furthermore, the graduation ceremony related to studies the deceased had carried out and completed at a time prior to starting work with the Department and was completely independent of his employment.

The deceased's parents appealed the arbitrator's findings and determination. Deputy President Roche upheld the arbitrator's findings. He rejected the parents' submission that the Department's approval for the deceased's attendance at the educational institution constituted an understanding or "expectation" that the deceased would attend the educational institution for the purpose of accepting his degree. The Deputy President agreed with the Arbitrator's findings there was no evidence of any attendances by the deceased at the University while

he worked for the Department. Attendance at a graduation ceremony was plainly not a step in the completion of the degree process and was not a pre-requisite for completion of the course. Consequently, the arbitrator's conclusion the relevant journey was a "one off" was clearly correct.

The Deputy President also agreed with the arbitrator that there was a failure to establish a real and substantial connection between the employment and the accident out of which the personal injury arose. He agreed that the authorities establish that Section 10(3A) may, but do not necessarily require a causal connection between the employment and the accident. "Connection" involved a wider concept than causation. What the section required was a real and substantial connection between the employment and the accident. The Deputy President noted that whilst Mr Alexander suggested the Principal directed the deceased to attend the graduation ceremony, her evidence suggested she only enquired if he would be attending but at no time insisted he do so as it was a personal choice if he wished to attend. Notwithstanding the Department's approval, support or encouragement in respect of the deceased's travel to Bathurst to attend the graduation ceremony, such conduct, attitude or assistance on the part of the employer was not sufficient to ground a finding that amounted to a real and substantial connection with the accident.

The Deputy President observed that the test in Section 10(3A) is always "fact sensitive". On the evidence tendered the arbitrator was not satisfied that such a connection had been established and the Deputy President indicated the arbitrator's conclusion disclosed no error.

The limited number of occasions in which workers have successfully invoked the journey provisions since the 2012 amendments demonstrate that unless a worker can provide clear evidence of a real and substantial connection between the employment and the accident or incident out of which the injury arose, it will be difficult for a worker to succeed in journey claims.

Belinda Brown
bjb@gdlaw.com.au

Workers Compensation Liability - Contractor v Deemed Worker

The Workers Compensation Commission has recently determined two appeals concerning the status of a contractor and a licensee as "deemed worker" or "worker" under the workers compensation legislation. In both appeals the decision of the arbitrator was confirmed.

In NSW a person who is not an employee of a company can be deemed to be a worker under the legislation if they meet a number of criteria. A deemed worker is entitled to the same compensation benefits as an employee.

In *McLean v Shoalhaven City Council [2015] NSWWCCPD 52* (2 September 2015), McLean was unsuccessful in arguing that he was a deemed worker under cl 2 of Sch 1 to the Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act).

In seeking compensation from the Council, McLean argued that he worked "on an almost exclusive basis" for the Council under a Services Agreement. McLean had supplied a tip truck and driver to Shoalhaven City Council from the mid 1980s until his injury in 2013. There was no dispute that McLean was a contractor, or that the contract exceeded $10 in value as required by the "deemed worker" provisions in the legislation. The Arbitrator however concluded that the contract between McLean and the Council was not a contract to perform work but was a contract to "provide a particular truck with a driver", noting that the payments made by the Council were for the "supply of the vehicle and driver". Further, the work McLean was doing when he was injured, namely, driving the truck, was clearly an incident of that business. The Arbitrator did not accept that McLean was a deemed worker.

McLean appealed.

McLean argued that the Arbitrator erred in determining that he was performing work for the Council as a contractor. Further, the Arbitrator did not have any regard to the longevity and permanency of the arrangement between the parties, in circumstances where the legislation is clearly intended to protect workers such as Mr McLean. McLean submitted that the work he did for the Council was not incidental to a 'business' but was in fact 'the business. It was argued that although McLean would carry out trade or business for other parties from time to time, this work was "always done outside of [the Council's] normal operating hours" or where "no work was available". Except in limited circumstances, McLean did not employ workers.

Deputy President Roche determined that the longevity or permanency of McLean's arrangement with the Council did not necessarily bring him within the operation of cl 2 of Sch 1, the section of the legislation relating to deemed workers. The Deputy President was of the view that the Arbitrator correctly applied the criteria in *Scerri v Cahill (1995) 14 NSWCCR 389*. To

satisfy the deemed worker provisions, an applicant must establish (amongst other things):

- he (or she) was a party to a contract with the respondent to perform work;
- the work exceeded $10 in value;
- the work is not work incidental to a trade or business regularly carried on by the applicant in his (or her) own name or under a business or firm name, and
- the applicant has neither sublet the contract nor employed workers in the performance of it.

Firstly, the contract between McLean and the Council was not a contract to perform work, but was a contract to provide a truck with a driver and, second, the work carried out under the contract was incidental to a business regularly carried on by McLean for the hire of his truck and the provision of a suitable driver.

The Deputy President rejected McLean's submission that the arrangement was exclusively with the Council noting McLean regularly contracted with other entities and billed those entities on the same business invoices, and in the same manner, that he billed the Council. McLean's tax returns revealed that for the year ending 30 June 2013 his contract receipts were more than $102,000, while his receipts from the Council were less than two thirds of that sum.

It was not relevant that McLean did his other work "outside of normal Council work hours" as the evidence was that during the period of the agreement with the Council McLean regularly conducted a business of hiring his truck with a driver. The submission that McLean did not employ workers "except in limited circumstances" was similarly ineffective in establishing he would be classified as a "deemed worker" for the purposes of workers compensation. The Deputy President confirmed the Arbitrator correctly found McLean carried on a business of hiring his truck with a suitably qualified driver. Usually, but not always, that driver was McLean. The work that McLean was doing when he was injured, namely driving the truck, was clearly an incident of that business. It followed that cl 2 of Sch 1 did not apply and McLean was not a deemed worker.

In the second decision, *Amalgamated Pest Control Pty Ltd v Chaaya [2015] NSWWCCPD 53* (3 September 2015), the appellant pest control business failed to establish that the claimant was an "entrepreneur running his own business" when it was clearly evident the appellant employer exercised a level of control and commanded a benefit from the work being performed pursuant to the licence agreement that was analogous to that of an employer/employee relationship.

Amalgamated conducted its business by issuing licences to licensees wishing to carry on a pest control business in accordance with what it described as "the System and the Image" which dictated procedures and controls on nearly all aspects of the licensees' work.

Chaaya was injured at work and sought compensation from Amalgamated. Amalgamated denied that it was liable to pay Chaaya compensation and so Chaaya brought proceedings in the Worker's Compensation Commission.

The Arbitrator found that Chaaya was a worker within the meaning of Section 4 of the 1998 Act. Looking at the level of control exercised by Amalgamated the arbitrator was not satisfied that Mr Chaaya was "in his own business rather than the respondents business that was receiving the benefit of his work".

The Arbitrator considered it was necessary to have regard to not only the indicia of an employment relationship identified in the relevant authorities (control, hours of work, taxation arrangements, delegation of work, the right to dismiss, mode of remuneration and maintenance of equipment, etc) but the totality of the relationship. The Arbitrator referred to the 'entrepreneur test':

Is the person performing the work an entrepreneur who owns and operates a business; and,

In performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?

If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.

Amalgamated challenged that finding.

Deputy President Roche agreed with the Arbitrator's finding that Chaaya was under a great deal of control within the Agreement with Amalgamated. Whilst Chaaya was permitted to "solicit new business", the new customers he secured would, under the Agreement, become customers of Amalgamated, not customers of Chaaya.

The Deputy President confirmed that the fact that Chaaya provided his own vehicle was not determinative. Amalgamated exercised significant control of the use and maintenance of equipment and whilst there was no express prohibition on Chaaya using his vehicle outside of his duties for Amalgamated, there were tight controls on how the vehicle was to be "constructed, painted, signed, equipped and outfitted". In a practical sense, Chaaya could not really have used his vehicle other than in the performance of the Amalgamated's business.

On appeal, Amalgamated argued that the "Minimum Performance Criteria" imposed by the licence agreement was merely a quality control mechanism and the fact that Chaaya had the right to terminate the agreement on one month's written notice indicated a contract of services rather than an employee/employer relationship. The Deputy President rejected this submission. Given the consequences if Chaaya did not meet the Minimum Performance Criteria, Amalgamated's right to terminate the contract was, as the Arbitrator found, analogous to an employer's power to terminate an employee. Similarly, Amalgamated's powers were similar to an employer's power to performance manage an employee. The Deputy President noted an independent contractor would not be subject to such controls.

Amalgamated also argued that the agreement was designed for corporate independent contractors because it envisaged Chaaya could employ other workers. This argument was rejected. The Deputy President found that the agreement significantly controlled the power of delegation to the extent that employees had to be trained in the "Amalgamated systems" and had to wear uniforms with the company's name and logo on it. Chaaya was not free to hire friends or family. Chaaya in fact gave evidence that if he had a "very big job" Amalgamated would supply two of its own technicians. This evidence was not challenged.

Deputy President Roche accepted that Amalgamated did not pay Chaaya a wage, however the method of remuneration where all money received for work done by Chaaya was credited to an account run by Amalgamated called the "Open Account", and after making numerous deductions, Amalgamated would return about 48 per cent of the gross takings, was more consistent with a person working as a pest control officer as a representative of the Amalgamated rather than Chaaya being an "entrepreneur who owns and operates" his own business. Further, Chaaya was prevented from selling his business above the sum of $1000. There were no "business" assets that Chaaya could expect to sell at a profit and the agreement required any intellectual property developed by Chaaya during the operation of the Licensed Business to be assigned to Amalgamated. Therefore, Chaaya could not realistically build goodwill in the "business" that would have any saleable value.

The Deputy President also dealt with the other indicia including control of work practices and price, holiday/sick leave, insurance and hours of work etc. Although the Arbitrator did not expressly deal with some of the indicia, the Deputy President was satisfied that, having regard to the totality of the relationship and applying the relevant authorities, Chaaya did not conduct a business and was a worker employed by Amalgamated under a contract of service.

For completeness, if the Arbitrator erred in finding Mr Chaaya to be a worker, the Deputy President was satisfied that he would be a deemed worker under cl 2 of Sch 1 and entitled to the benefits under the legislation. Amalgamated argued Chaaya could not be a deemed worker because the work he performed was incidental to a trade or business regularly carried on by him in his own name and he had the right to employ workers. The Deputy President noted Chaaya had no customers or independent business in his name outside of the work he did for Amalgamated, therefore the case was not 'work incidental' and Chaaya never actually "sublet the contract" or "employed any worker" therefore the deemed worker provisions would apply.

Both cases are a reminder to workers and insurers alike that the Workers Compensation Commission will not only look to the individual indicia but to the totality and reality of the relationship between the applicant and respondent in determining whether an employment, or deemed employment relationship exists.

Karmen Cindric
kxc@gdlaw.com.au

CTP ROUNDUP

Knowledge of intoxication of driver - Contributory negligence?

In the December 2014 edition of GD News we examined the Supreme Court decision of Solomons v Pallier that addressed whether there should be a finding of contributory negligence in circumstances where the evidence established that a passenger in a vehicle who had been severely injured should have been aware that the driver's ability to control the motor vehicle was impaired by alcohol.

Pallier suffered serious injuries when he was a passenger in the back seat of a motor vehicle driven by Solomons. Pallier had just turned 16 at the time of the collision and suffered significant brain injuries in the accident. There were five people in the car at the time of the accident.

Solomons asserted that Pallier contributed to his injuries by choosing to travel with Solomons in circumstances where he knew or ought to have known that Solomons' driving would have been impaired by his intoxication from the consumption of alcohol. Pallier argued that he was not aware of Solomons' intoxication and the evidence would not lead to a

conclusion that a reasonable person in Pallier's position ought to have been so aware.

Pallier also alleged that Solomons deliberately drove his vehicle partway off the road. Pallier further alleged that shortly prior to the accident Solomons told one of the front seat passenger that he would drive the car off the road to scare the other passengers as they kept asking him whether he was alright to drive. Pallier argued that the deliberate action by Solomons was not foreseeable. Pallier also argued that prior to getting into the car he had not actually seen Solomons drinking alcohol and as he had not met Solomons prior to the night of the accident, he did not know whether Solomons was affected by alcohol or not on the basis he did not know what Solomons was like when he had not been drinking.

A joint opinion expert provided that the most likely blood alcohol level at the time of the accident would have been .07 and at that level it was unlikely there would be any obvious signs of intoxication such as slurred speech and impaired balance.

In the Supreme Court proceedings His Honour Justice Hammill found on the balance of probabilities, a reasonable person in Pallier's position ought to have known Solomons was intoxicated to the extent that his driving would be impaired. Pallier knew that Solomons took the least direct route and remained on the back streets to avoid detection by the Police. Also, as at least one of the passengers asked Solomons if he was alright to drive it showed that at least one person in the car was worried about his sobriety.

Nevertheless, even though Pallier knew or ought to have known that Solomons' driving may have been impaired, Pallier had very little knowledge of the extent of that impairment. Justice Hammill found that Solomons deliberately drove the car off the road to strike a guide post to scare the passengers in the back of the car and Pallier had no warning that Solomons would deliberately drive off the road. This was not a foreseeable risk and it was not unreasonable for Pallier to have not taken the precaution of refusing the lift. Justice Hammill determined that there should be no deduction for contributory negligence.

Solomons appealed.

In the Court of Appeal, Meagher JA delivered the leading judgment and MacFarlan and Simpson JJA agreed. Meagher JA noted that Pallier had just turned 16 and was eligible to apply for a Learner's licence. He was or should have been aware that Solomons' driving capacity was impaired and that as a P Plate driver Solomons was not allowed to drink and drive.

By travelling in the car Pallier was running the risk of serious injury or worse due to the driver's impaired capacity. The probability of that occurring was unknown but not negligible. It was not reduced from Solomons' assurances that he was "OK to drive". On the contrary, the questioning of Solomons by other passengers should have enlivened Pallier's awareness of the problem. In the circumstances the hypothetical ordinary reasonable 16 year old recognising there was a real risk of serious injury would not have travelled in the car. It was not necessary for Pallier to accept Solomons' offer of a lift and in not rejecting the offer he failed to take reasonable care for his own safety.

When examining the appropriate reduction for contributory negligence, Meagher JA determined the exercise of apportionment directs attention to the culpability or degree of departure of each party from the appropriate standard of care and the relative importance of their respective careless acts in causing the damage suffered. By accepting Solomons' offer of a ride Pallier failed to take reasonable care for his own safety.

When assessing Pallier's culpability Meagher JA noted the following relevant factual considerations:

- he was only 16 years of age and was the youngest of the three passengers;
- he was confronted with the decision of whether to accept Solomons' offer of a ride without much warning when in the circumstances it otherwise would have been difficult for him to get home;
- Solomons told his passengers that he did not think he was over the .05 limit applicable to fully licensed drivers and that he was fine to drive;
- Pallier's actual constructive knowledge to the extent of Solomons' impairment was or would have been that it was mild;
- there was nothing in the evidence either as to Solomons' character or to his conduct on the evening in question which indicated he was someone who might engage in reckless or irresponsible conduct when driving.

Solomons' conduct on the other hand was completely irresponsible and showed a total disregard for his own safety and that of the four passengers to whom he owed a duty of care. In contrast, Pallier's careless act in accepting the ride did not causally contribute to the happening of the accident in which he was injured. On balance there should be some reduction in Pallier's damage to reflect this lack of care and the primary judge erred in concluding otherwise. The reduction must reflect the significant difference in the respective culpabilities of the parties and a just and equitable reduction was 10%.

The ultimate finding of 10% contributory negligence appears appropriate in the unique factual circumstances of this case. We have little doubt that if Pallier was older and a fully licensed driver and the accident had not been caused by a deliberate reckless

act of Solomons, then the finding of contributory negligence would have been higher.

Stephen Hodges
sbh@gdlaw.com.au