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Liability Claims - Is Change in the Air?

In 2001 the NSW Court of Appeal handed down the decision in *Makita v Sprowles* which resulted in a change in the landscape in NSW liability claims. The effect of *Makita v Sprowles* was in essence that more scrutiny would be applied to expert evidence and the expert's methodology, and practical evidence such as the number of pedestrians that had traversed an area would be relevant in the determination of the proceedings.

However, the landscape has changed again as a consequence of the Court of Appeal decision in *Schultz v McCormack (October 2015).*

Scheran Schultz was injured when she slipped on the tiled top step of the verandah of Norman and Cathryn McCormack as she was leaving their house following a social visit. Schultz and the McCormacks were friends and she had been to their house many times. The incident occurred at about midnight when the verandah surface was wet as a consequence of rain that had fallen earlier in the evening. Schultz was turning to walk down the stairs when she fell. As a consequence of the fall she fractured her right ankle in addition to sustaining soft tissue injuries to her left shoulder, left hip and lower back. The front porch had been tiled in 2004 and 2005 and the McCormack's had not noticed that the area was slippery. Schultz had not known the area to be slippery before her fall. There had not been any previous accidents. There was no handrail on the stairs nor were there any anti-slip strips or nosings on the stairs. There was an overhanging roof on the verandah however this did not cover the stairs. Schultz was wearing rubber thongs at the time of the incident.

Schultz commenced proceedings against the McCormacks in the District Court at Sydney. Those proceedings were heard before His Honour Judge Levy.

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After the incident McCormack painted a non slip coating on the top of the porch and the stairs. McCormack's evidence was however to the effect that did not make any real difference as to whether or not the stairs were slippery when wet.

Schultz relied on an expert's report of Neil Adams, ergonomic consultant, who had prepared a report according to which the stairs had a coefficient of friction of 0.29 which was not adequately slip resistant.

The McCormacks did not rely on any expert evidence rather, relied on the fact that there had been no previous incidents and they had not identified the tiles as slippery.

The matter proceeded to hearing in the District Court before His Honour Judge Levy who found in favour of the McCormack's. His Honour concluded that the McCormack's did not owe a duty of care to warn Schultz of the risks associated with stepping onto the wet stairs as such a risk ought to have been obvious to her at the time. His Honour also determined that if Schultz had been successful in her claim then he would have reduced any judgment by 50% for contributory negligence.

His Honour however determined that if Schultz was successful in establishing liability he would have assessed damages totalling $782,415.65.

Schultz appealed.

Her Honour Justice McColl delivered the leading judgment.

Her Honour Justice McColl stated:

> *"The weight the Court should attach to the fact the respondents said there had never been an accident on the steps before "involves a question of fact to be determined in the light of all the relevant circumstances". However, even accepting the respondents' evidence that there had never been an accident on the steps and/or verandah before does not necessarily answer the appellant's case, that they ought to have known the tiles were dangerously slippery when wet. Mr Sheldon SC submitted that in making that finding, the primary judge failed to pay proper, or any, regard to paragraph 3.1.5 of Mr Adams' report, to the effect that slip resistance values he obtained conducting wet pendulum tests at the respondents' premises on the tiles, demonstrated that those tiles would "generally be experienced as slippery when wet". That, in my view, was evidence from which a reasonable inference could be drawn that the respondents' either knew or ought to have known that fact."*

Justice McColl continued:

> *"It is not apparent how his Honour reached the conclusion that knowledge of the slipperiness of the tiles as opined by Mr Adams could not be imputed to the respondents. His Honour made similar findings elsewhere in his reasons but, again, did not in my view identify any basis for his rejection of the proposition that the respondents ought to have known of the excessive slipperiness of the tiles on their porch and front stairs.*
>
> *In my view, Mr Adams' unchallenged evidence did provide support for the proposition that the occupants of the house with tiled surfaces with that degree of slipperiness ought to have realised that that was the case bearing in mind that the tiles had been in place for five or six years". ... in those circumstances ... it is consistent with that explanation by Mr Adams that the respondents did not actually experience the tiles as extremely slippery because they were aware of its conditions and had adjusted to it. However Mr Adams' evidence supported the finding, in my view, that they "ought to have known" of the high risk of slipperiness the tiles posed when wet.*
>
> *As the primary judge accepted, the risk of harm in such a context was foreseeable and was not significant.*
>
> *In those circumstances, in my view, His Honour ought to have found that a reasonable in the respondents' position ought to have taken precautions against the risk of harm, the most obvious of which was to warn the appellant that the porch could have become wet if the rain had been windblown and, if it had, that it would have been abnormally slippery. They could also have used mats on the veranda to provide a non slip surface."*

Her Honour Justice McColl therefore found in favour of Schultz and Schultz in fact received a unanimous judgment in her favour from the Court of Appeal.

So the end result was that Schultz was successful.

The case presents a warning to homeowners and insurers and defendants to personal injury claims generally. The fact that there are no prior accidents or incidents is not in itself enough for a defendant to escape liability. If there is expert evidence from a claimant that an area is slippery and that issue is seriously in dispute then expert evidence should be obtained to combat the claim.

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Claims against Insurers where an insured is insolvent are not available to third party beneficiaries

The remedy available in NSW court proceedings for a party to join an insurer directly arises in circumstances that usually involve the absence of a defendant who is able to meet a verdict found in favour of a plaintiff.

Commonly, this will entail the death of an individual or a person having no assets or being declared bankrupt.

If that person held a policy of insurance at the relevant time which responds to the claim, a NSW Court may grant leave in NSW court proceedings, pursuant to Section 6(4) *Law Reform (Miscellaneous Provisions) Act 1946* ("LRMPA") for the plaintiff to join the insurer to the proceedings so that the action becomes one for relief against the insurer directly, not the dead or impecunious insured.

Recent amendments to the Insurance Contracts Act 1984 (Cth) broadened the scope of the indemnity available to persons under a policy of insurance who may not be expressly named as insureds but who are considered third party beneficiaries entitled to indemnity if they are defined within the policy wording to be persons within a class or category of persons to whom the policy applies.

However, as was recently highlighted by Justice Beech-Jones of the NSW Supreme Court in *Robinson v Vogelsang (No 1)*, in a NSW court proceeding where an aggrieved plaintiff seeks relief directly against the insurer of a deceased or impecunious defendant, who was a third party beneficiary at the relevant time and entitled to indemnity under a policy of insurance, the law of NSW precludes a grant of leave under Section 6(4) LRMPA in favour of the plaintiff, if that defendant did not enter into the contract of insurance with the insurer.

Fiona Robinson sustained serious physical injuries in a horse riding accident on farming property owned by Peter Vogelsang. Vogelsang and his de facto partner, Catherine Martin, owned the horse.

Robinson sued Vogelsang and Martin claiming damages for her injuries based on their alleged negligence.

An issue arose during the proceedings in the NSW Supreme Court when Allianz, the insurer of Vogelsang and Martin, declined indemnity. Vogelsang and Martin cross-claimed against Allianz but at the start of the trial, they sought to represent themselves. As his Honour stated, they had buckled under the weight of paying for legal representation.

In anticipation of the financial difficulties experienced by Vogelsang and Martin, Robinson filed a motion seeking leave under Section 6 LRMPA to join Allianz to the proceedings.

That application failed.

His Honour referred to the express wording in Section 6(1) LRMPA which states:

> *"If any person ... has, whether before or after the commencement of this Act, entered into a contract of insurance by which the person is indemnified against liability to pay any damages or compensation, the amount of the person's liability shall on the happening of the event giving rise to the claim ... be a charge on all insurance moneys that are or may become payable in respect of that liability."*

Senior counsel for Allianz contended that the wording highlighted above meant that only Vogelsang's liability could be considered in the application not Martin's because she did not enter into the contract of insurance with Allianz. Vogelsang was the named insured with whom Allianz contracted.

Justice Beech-Jones accepted this submission. His Honour highlighted the following factors that give rise to an entitlement for leave under Section 6(4) LRMPA:

- There must be an arguable case demonstrated against both the insured and the insurer.
- The purpose of a grant of leave under Section 6(4) LRMPA is to enforce the statutory charge created by Section 6(1).
- That charge only relates to insurance moneys that are payable in respect of "... that liability."
- It is only a liability of a person who "...entered into a contract of insurance" that must be considered.

If this decision is followed by appellate courts, it suggests that while the federal parliament seeks to protect the rights of third party beneficiaries who are entitled to indemnity under a policy of insurance, the benefit is not passed onto aggrieved plaintiffs who seek to rely upon that person's entitlement to indemnity and claim a charge on insurance moneys unless that person is a named insured who entered into the contract of insurance.

The decision is plainly consistent with the wording of Section 6(1) LRMPA but the ramifications are significant for plaintiffs who find themselves in these circumstances.

For insurers, it is a get out of gaol card which remains available if an application to join them directly to proceedings is brought by a third party beneficiary that did not take out the contract of insurance.

When considering such an application, the first question thus becomes "Was the person, who is said to be an insured under the policy, a person who entered into the contract of insurance?"

If the answer is no, it is inevitable that the application will not succeed.

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The importance of formal documentation – even amongst friends and family

The recent surge in property prices and the demand for more housing in New South Wales has encouraged many people to try to capitalise on the economic climate and enter into their own development deals.

However it is vitally important to properly document those deals. The precise terms and legal relationship between all the parties to the deal should be clearly set out in writing - even if those parties are very good friends or even members of the same family.

The failure to clarify and record in writing these vital aspects of the deal can lead to arguments down the track, with different memories and interpretations of events and expectations, and of course considerable legal costs in asking a judge to decide the matter.

Recently, the NSW Court of Appeal needed to address this very issue. In *EPS Constructions Pty Limited v Mass Holdings Pty Limited*, a group of friends and family members had combined in a form of joint venture to sell to Housing NSW land in south western Sydney that they had previously acquired, with the intention that one of the partners to the deal (who owned a construction company) would build units on that site for Housing NSW.

During the course of the project, a dispute arose between the partners to the joint venture and the building company about the distribution of profits after the costs of construction.

The deal between the partners to the joint venture had been verbally negotiated primarily in locations such as coffee shops and restaurants, with little or no notes kept of the discussions. Also, the one piece of paper that may have recorded some vital aspects of the deal had long since been lost.

In the absence of any contemporaneous documentary evidence, the only way for the court to ascertain what the precise terms of the deal had been was by in depth examination of the witnesses' different accounts of events. Since the deal had been negotiated and completed five years earlier, it was only natural that the witness' recollections were markedly different.

At the substantive trial of the dispute, the primary judge had assessed this evidence and made a ruling that the construction company was liable to pay certain amounts of moneys to the partners. The construction company had appealed this decision.

After a lengthy examination of the evidence the Court of Appeal noted that the trial judge had had a difficult task of assessing the witnesses' relative credibility and reconciling the diverse memories of key events and timelines. The Court of Appeal held that, in the circumstances, the trial judge was entitled to come to the conclusions that he did in relation to the deal, based on his careful analysis of the evidence and his determination of the credibility of each of the witnesses.

The trial judge's task in this case had not been an easy one, and there is no doubt that some of the parties would still disagree with the judge's findings about the true terms of the deal.

This case comes as a salient reminder that even though a deal or transaction is approached with the optimism that it will be profitable and without dispute, it is always worthwhile to properly and comprehensively document the deal to ensure that there are no misunderstandings about each party's obligations and expectations.

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Christmas/New Year deadlines for responses to security of payment claims

The *Building and Construction Industry Security of Payment Act 1999 (NSW)* sets out a process under which persons carrying out construction work can issue claims for progress payments and, if the recipient of the claim does not respond within the time frames specified in the Act, be entitled to full payment of those claims. This is the case even if the owner, developer or head contractor disagrees that the person making the claim is actually entitled to the amount claimed.

As a strategic measure, it is quite common for such claims to be served during the Christmas and New Year break, when many people are away from their desks and may therefore miss responding within the specified time.

Accordingly, it is important to be aware of the deadlines that apply during this period and ensure that systems are in place to address any claims that are received.

The Act provides that once a payment claim is served, if the recipient of a claim does not intend to pay the full amount claimed he or she must issue a payment schedule within ten business days after the day that the claim was served. A business day is defined in the Act to exclude weekends, public holidays, and 27, 28, 29, 30 or 31 December in any year. During this season's break, the public holidays are on 25 December 2015, 28 December 2015, and 1 January 2016.

As a convenient reference, we set out below the timeframes within which a payment schedule must be served during the holiday period:

Date claim was served	Deadline for payment schedule to be served
Monday 7 December 2015	Monday 21 December 2015
Tuesday 8 December 2015	Tuesday 22 December 2015
Wednesday 9 December 2015	Wednesday 23 December 2015
Thursday 10 December 2015	Thursday 24 December 2015
Friday 11 December 2015	Monday 4 January 2016
Monday 14 December 2015	Tuesday 5 January 2016
Tuesday 15 December 2015	Wednesday 6 January 2016
Wednesday 16 December 2015	Thursday 7 January 2016
Thursday 17 December 2015	Friday 8 January 2016
Friday 18 December 2015	Monday 11 January 2016
Monday 21 December 2015	Tuesday 12 January 2016
Tuesday 22 December 2015	Wednesday 13 January 2016
Wednesday 23 December 2015	Thursday 14 January 2016
Thursday 24 December 2015	Friday 15 January 2016
Tuesday 29 December 2015	Monday 18 January 2016
Wednesday 30 December 2015	Monday 18 January 2016
Thursday 31 December 2015	Monday 18 January 2016
Monday 4 January 2016	Monday 18 January 2016
Tuesday 5 January 2016	Tuesday 19 January 2016

The Act also provides for a process for the adjudication of payment claims. Once an application for adjudication has been served, the recipient has a timeframe of five business days after service of the application or two days after appointment of the adjudicator (whichever is the later) within which to serve a formal response. Often, these two dates are the same. The adjudicator is not permitted to consider any response or further material submitted after the deadline. The timeframes that apply during the holiday period (assuming a five business day period within which to respond) are as follows:

Date adjudication application was served	Deadline for adjudication response to be served
Monday 7 December 2015	Monday 14 December 2015
Tuesday 8 December 2015	Tuesday 15 December 2015
Wednesday 9 December 2015	Wednesday 16 December 2015
Thursday 10 December 2015	Thursday 17 December 2015
Friday 11 December 2015	Friday 18 December 2015
Monday 14 December 2015	Monday 21 December 2015
Tuesday 15 December 2015	Tuesday 22 December 2015
Wednesday 16 December 2015	Wednesday 23 December 2015
Thursday 17 December 2015	Thursday 24 December 2015
Friday 18 December 2015	Monday 4 January 2016
Monday 21 December 2015	Tuesday 5 January 2016
Tuesday 22 December 2015	Wednesday 6 January 2016
Wednesday 23 December 2015	Thursday 7 January 2016
Thursday 24 December 2015	Friday 8 January 2016
Tuesday 29 December 2015	Monday 11 January 2016
Wednesday 30 December 2015	Monday 11 January 2016
Thursday 31 December 2015	Monday 11 January 2016
Monday 4 January 2016	Monday 11 January 2016
Tuesday 5 January 2016	Tuesday 12 January 2016

The date that a claim or adjudication application is deemed to have been served depends on the method of service and the particular circumstances of how the claim was served. Therefore, we recommend that recipients of a claim or adjudication application seek legal advice as quickly as possible to determine the applicable time frame within which to provide a response.

We are able to provide assistance to both claimants and recipients in preparing and responding to security of payment claims and applications.

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Security of payment v litigation in construction claims – the tug of war

The ongoing tug of war between the statutory rights of contractors to receive progress payments on non-residential construction projects and the claims made by principals under the contract or through the Courts is still going strong, despite the relevant legislation having now been in force for over 15 years. When there are competing claims on a project, the winner of this battle can often achieve a strategic advantage that can help them win the war.

The *Building & Construction Industry Security of Payment Act 1999* (NSW) provides a statutory right to

claim and receive progress payments in a timely manner, albeit on an interim basis. The purpose of the Act is to provide a quick and efficient means by which contractors can recover progress payments in order to maintain cashflow to their subcontractors and suppliers, without interfering with the parties' existing rights under the construction contract. Part of this statutory process is the entitlement to obtain and enforce a Court judgment for payment of a progress claim if an adjudicator appointed under the Act has determined the contractor is entitled to payment (at least on an interim basis).

By contrast, the owner or developer may be entitled to liquidated damages for late completion of the work and/or rectification costs for defective work (often as an offset to the contractor's progress payment), but does not have the same entitlement to a quick claim and enforcement process. The preparation of such a claim will almost always be complex and time consuming.

So should a contractor be entitled to a progress payment in the interim even if a principal has made it clear they have incurred damages that should be offset against that payment?

In the recent New South Wales Supreme Court decision of *Samadi Developments Pty Limited v SX Projects Pty Limited*, this conflict arose once again.

Samadi had engaged SX Projects to perform design and construction work at a residential and commercial development in Elizabeth Street, Surry Hills.

On 16 June 2015 SX Projects had obtained a judgment against Samadi of $1,402,419.63 in respect of progress claims under the contract, based on an adjudication determination it had obtained in its favour under the Act.

In a separate Court proceeding, which had been commenced earlier but was still in its early stages, Samadi had sought to litigate the underlying contractual issues. It claimed it was entitled to liquidated damages for delays in completion of the work, damages for defects in the work and damages for the cost of completing the work after the work had been taken out of SX Projects' hands.

SX Projects wished to enforce the judgment it had obtained in its favour by issuing a statutory demand against Samadi in accordance with Section 459E of the *Corporations Act 2001*. The problem was that since proceedings had been commenced against SX Projects in relation to the same facts which formed the basis for SX Projects' adjudication determination, Samadi would have good grounds for having the statutory demand set aside on the basis that it had an offsetting claim.

Accordingly, SX Projects asked that the Court stay the proceedings that had been commenced by Samadi until Samadi had paid SX Projects the amount of the adjudication determination of $1,402,521.22 plus interest. In the alternative, if that application was not successful, SX Projects asked the Court to order that Samadi pay security for SX Projects' likely costs to defend the proceedings that had been commenced by Samadi.

In its submissions to the Court, SX Projects had argued that the intention of the Act to keep the cash flowing on a project would be undermined if it was prevented from being able to enforce the adjudication determination and subsequent Court judgment that it had received.

However Justice Ball disagreed, saying that while SX Projects was precluded from issuing a statutory demand, this did not mean that it was precluded from other means of enforcing the judgment in its favour. If the company against whom the statutory demand is issued were to be wound up before having the opportunity to pursue and have determined its underlying claims under the contract, the result would be to deprive that party of the ability to pursue its contractual rights. Those rights are supposed to be expressly preserved by Section 32(2) of the Act, which provides:

> *"Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by sub-section (3)".*

Further, the Act also requires any Court to take account of any money already paid as a result of an adjudication determination when determining what order to make in a later proceeding. Accordingly, justice would ultimately be served if Samadi were to be given the opportunity to pursue its claims in the Court proceeding.

Justice Ball refused to order a stay of the proceedings but agreed that security for costs would be appropriate in the circumstances. In this case, after an evaluation of the estimates of costs provided by each of the parties, he ordered that Samadi pay security in the amount of $250,000.00.

When claims are made by both parties to a construction contract, it is often the case that the party who holds the cash also holds the balance of power in negotiations to resolve those claims. While the Act does provide a means for progress payments to be made quickly so that subcontractors and suppliers are not starved of their own income, payments made as a consequence of adjudication determinations under the Act can significantly affect this balance of power.

This is a timely reminder that for an owner who does not have a right under the Act to obtain a quick but interim determination of its own claims and who needs time to properly prepare a claim under the contract or in the Court system, an adjudication application by the contractor may easily distract the owner from the preparation of its claims and force it into a defensive and ultimately weaker position.

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EMPLOYMENT ROUNDUP

Injunction to restrain termination?

Traditionally, courts have been reluctant to interfere in employment disputes until the process had played its course – usually resulting in termination.

Increasingly, however, there appears to be a willingness to intervene at an early stage. That involvement (which some might call interference) can derail what an employer might believe is a carefully planned and executed disciplinary process.

A recent case from the health care sector illustrates the point *(Burnett v Eastern Health [2015] FCA 1247).*

A Nurse Unit Manager employed by an Area Health Service was notified that her employer proposed to terminate her employment for serious misconduct (the termination decision). She was suspended from duties, but remained on full pay.

To prevent her dismissal, the employee instituted proceedings in the Federal Court of Australia seeking an injunction restraining the employer from terminating her employment.

The employee relied on two bases to support her claim.

First, she claimed that, in breach of the relevant enterprise agreement, and thus in contravention of s 50 of the Fair Work Act 2009 (Cth) (FW Act), her employer had failed to conduct the investigation into her conduct that led to the termination decision in accordance with the requirements of the disciplinary clause of the EA.

Second, she claimed that the employer had, in making the termination decision, contravened s 340 of the FW Act by taking "adverse action" against her because she exercised the "workplace right" conferred upon her by s 341 of the FW Act to "make a complaint … in relation to … her employment".

These allegations are all very well, but would generally not be matters that would excite a court to intervene and put a stop to an employment process whilst the issues are litigated. After all, if there were some flaw in the termination procedure or outcome, the employee would have remedies for unfair dismissal or breach of contract.

But here, the Court was moved to grant an injunction preventing the employer from proceeding with the termination until the claims by the employee had been adjudicated. What prompted the Court to take such a step?

The original notification to the employee took the form of a letter setting out in 11 bullet points matters that were identified as "serious issues" that had been "brought to [the employer's] attention which necessitate a formal investigation be conducted". The bullet points included the following:

- Clinical changes are implemented without any consultation with medical staff
- You have behaved in ways that does not convey respect for your colleagues, a number of the medical staff have reported feeling intimated, belittled and humiliated by your manner and communication style
- Staff are extremely fearful of being admonished if they follow medical orders which they know you do not agree with
- Your leadership style is being described as inflexible, inconsistent, autocratic, non-collaborative, unpredictable, bullying and is directly contributing to the development of a negative culture
- Preventing your nursing staff from following doctor's orders to start formulae in the first 48 hours
- Concerns from medical staff that babies are being over-treated with CPAP
- Medical staff feel they cannot use their experience and judgement to make treatment decisions which they know you will disagree with
- You have created. an environment. where staff feel too scared to express their views in your presence and junior medical staff feel powerless and uncomfortable to work with you to strive for optimal patient care.
- You have failed to uphold Eastern Health's values

It can be seen at once that these are almost impossible allegations to answer. They are generally

conclusionary in nature, and do not set out the evidentiary basis on which they are made.

Not surprisingly, the employee asked for further information by way of particulars, or the provision of documentation in relation to some of the claims.

What the employer then supplied was a letter setting out the results of the investigation into certain allegations against the employee and the findings in relation to those allegations. As an example:

> *"7. Your leadership style is being described as inflexible, inconsistent, autocratic, non-collaborative, unpredictable, bullying and is directly contributing to the development of a negative culture. Your style of management is autocratic, divisive and dictatorial preventing your nursing staff from following doctor's orders. Inconsistent and conflicting reactions. Staff report that you have "tunnel vision". Staff feel conflicted and caught in the middle on many occasions.*
>
> *Outcome: Substantiated. Evidence provided by Dr. Kat Franklin, Dr. Efrant Harnaen, and the Nursing staff interviewed demonstrated they had either experienced this behaviour or witnessed the behaviour to others."*

Although this provides a little more detail, it suffers from the fundamental flaw that it reaches findings based on evidence which is not provided, and in respect of still unspecified and vague allegations. These findings formed the basis of the decision to terminate.

The employer's investigation process was critically flawed. It appeared to the Court that:

> *"…it is strongly arguable that, to comply with the requirements of clause 11.11, Eastern Health needed to provide Ms Burnett with sufficient particulars of each allegation raised against her to enable her to understand the allegation so that she could have "a reasonable opportunity to answer" it. On the evidence before me, it is strongly arguable that that was not done."*

In light of all that, the Court favoured the maintenance of the status quo, and granted an injunction preventing the employer from proceeding with termination.

All this serves to underline that "process" around discipline needs to be fair in substance, and genuinely give an employee an opportunity to answer specific allegations of misconduct. Where a procedure fails to do that, it might be sufficient for a court to interfere. If so the employer's problem will only get worse.

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WORKERS COMPENSATION ROUNDUP

Regulations introduced permitting two claims for whole person impairment

The Court of Appeal decision in *Cram Fluid Power Pty Limited v Green* made it clear there were no circumstances wherein a worker would be entitled to make additional claims for permanent impairment irrespective of the date of injury or when they first brought a specific claim for lump sum compensation.

As we highlighted in last month's newsletter, the NSW Government has sought to reverse the retrospectivity of the *Cram* decision and introduced regulations on 13 November 2015 allowing additional claims of permanent impairment in certain circumstances.

The *Workers Compensation Amendment (Lump Sum Compensation Claims) Regulation* 2015 effective from 13 November 2015 provides that if a worker had previously made a claim for lump sum compensation pursuant to Section 66 before 19 June 2012, the worker will be entitled to make a further claim for lump sum compensation in respect of any increase in the degree of permanent impairment arising from the same injury.

There is no threshold for the further claim. As such the degree of permanent impairment in respect of the further claim is not required to be greater than 10% as is the case with other claims for permanent impairment. Claims that were made after 19 June 2012 which were withdrawn or dismissed due to the *Cram* decision will not be regarded as the one further claim.

Nevertheless a worker who received lump sum compensation for permanent impairment in respect of a claim made on or after 19 June 2012 is not entitled to a further claim. There will also be no entitlement to lump sum compensation in respect of pain and suffering with respect to the further claim.

Whilst this provides clarity for the majority of pre 2012 claims, it is still not clear as to whether the further claim will apply to pre 2012 injuries which were assessed under the Table of Disabilities rather than whole person impairment.

WIRO who provide funding for workers compensation claims has indicated that funding is now available for claims that fit within the parameters of the regulation. The Workers Compensation Commission has also issued a bulletin indicating workers who previously

withdrew claims after the *Cram* decision can either elect to have proceedings restored or could lodge a fresh application.

Whilst the regulation will be welcomed by thousands of workers in New South Wales affected by *Cram,* workers who have duly made claims for permanent impairment after 19 June 2012 will not be able to make a further claim and are still bound by the one claim rule.

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Limits of the Judicial Review of Medical Assessment Certificates

The workers compensation legislation provides for a judicial review of the findings of Approved Medical Specialists (AMS) appointed by the Workers Compensation Commission to assess permanent impairment disputes. There are however limits to the scope of the review.

These limits are highlighted in the recent Supreme Court decision of *Woolworths Limited v Michelle Howarth* [2015] NSWSC1624. Hamill J in the Supreme Court considered an employer's application for judicial review of a Medical Assessment Certificate on the basis that the AMS fell into jurisdictional error by failing to apply the provisions of the relevant Guidelines, accepting what the worker told him and/or failure to provide adequate reasons for the decision. As a consequence of these failures the employer contended it had been denied procedural fairness.

The worker Michelle Howarth made a claim for whole person impairment (WPI) of the left upper extremity which proceeded for assessment by an AMS. The AMS proceeded on the basis that loss of mobility in the right shoulder was caused by overuse following the left shoulder workplace injury. This approach was contrary to the approach adopted on the employer's behalf by Dr Breit that the restriction in the right shoulder was representative of a "normal" lack of mobility in the joint. Dr Breit assessed Howarth's WPI at 4% whereas the AMS assessed the impairment of the left shoulder at 11%.

An integral part of the employer's argument was that the AMS went beyond the terms of the questions and issues remitted for his consideration by the Registrar. It was submitted that by making an assessment that the loss of movement of the right shoulder was caused by overuse resulting from disability to the left shoulder, the AMS exceeded his jurisdiction.

Hamill J considered that although the referral to the AMS referred only to the left shoulder and cervical spine, given Dr Breit's report which referred to lack of mobility in the right shoulder, the fact the AMS came to a different conclusion did not mean that the AMS made a jurisdictional error or exceeded the terms of the referral. Had the AMS added the loss of mobility in the right shoulder in his calculation of WPI he would have exceeded his jurisdiction. The AMS' reference to the right shoulder was merely to consider the approach by Dr Breit and to determine whether his determination of impairment in the left shoulder should be reduced by reference to a normal contralateral joint in accordance with AMA 5 Guidelines.

Whilst it was accepted new issues arising during the AMS' examination required the party affected to be afforded an opportunity to be heard, the issue surrounding the plaintiff's right shoulder was not new as it was raised by the doctor retained on the employer's behalf. Hamill J found that the employer was not denied procedural fairness by the AMS' failure to put it on notice that he proposed to approach the matter in a different manner to that adopted by Dr Breit.

Hamill J indicated it was not for the Supreme Court to conduct a merit review of the decision taken by the AMS as the Workers Compensation Scheme and the legislative framework under which it operates casts the responsibility of assessing the worker's WPI with the AMS. All that was necessary was for the AMS to give some explanation of his preference for one conclusion over another.

A fair reading of the AMS' report showed that he fulfilled the obligations to provide reasons and that his report was "accurate, comprehensive and fair" as required by the WorkCover Guides. The AMS explained how he took a different approach to Dr Breit and the method used in coming to his conclusions. Whilst a different decision maker may have taken a different approach, the certificate did not demonstrate the AMS misconceived his task or otherwise failed to exercise his jurisdiction in accordance with the law.

Accordingly the Summons was dismissed.

The decision highlights the reluctance of superior Courts to interfere with and over zealously scrutinise reasons of an administrative decision maker to simply cure administrative injustice or error. There was no lack of procedural fairness as the issue regarding the restriction of movement of the right shoulder was raised by the employer's doctor and the AMS was not in error in taking a different approach by assessing the restriction of movement in determining the degree of whole person impairment of the injured left shoulder.

So long as the AMS assesses the body parts referred for assessment, provides reasons for their assessment and the report is comprehensive, accurate and fair there would appear to be no basis on which an application for judicial review of the assessment would succeed.

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CTP ROUNDUP

Allianz v Rutland – Is this the end of the Section 63 Review "on the Papers" ?

One of the requirements of a Medical Review Panel when dealing with a review of a MAS Assessor's determination is to determine whether a re-examination of the claimant is required.

The exercise of this discretion was scrutinised by the NSW Court of Appeal in *Allianz Australia Insurance Ltd v Rutland [2015] NSWCA 328*. The particular assessment under review was Assessor Jager's Whole Person Impairment assessment arising out of Ms Rutland's psychological injury. The assessment determined was 14%. Allianz successfully challenged the determination, having identified in its application for review under Section 63 of the MACA that two of the categories on the Psychiatric Impairment Rating Scales (PIRS) had been classed at Class 3 impairments and ought to have been Class 2 impairments.

Ms Rutland was successful in having the Review Panel's assessment set aside by His Honour Judge Garling on judicial review. His Honour agreed with Ms Rutland's submission that the Review Panel had not undertaken a fresh assessment of her WPI as it was required to do under Section 63, but had instead concentrated on the areas of Assessor Jager's assessment about which Allianz had complained. His Honour also agreed with Ms Rutland that she had been denied procedural fairness as a result of the way the Review Panel chose to assess her in respect of the category of Concentration, Persistence and Pace on the PIRS.

Central to Garling J's decision was the fact that Review Panel was required to look at all aspects of the assessment under review and determine the extent of Ms Rutland's whole person impairment as at the date of the assessment. His Honour reasoned that it was not possible for the Review Panel to make that assessment without seeing the claimant.

In what seems an attempt to avoid the ramifications of this decision for the manner in which future Review Panel assessments are conducted, His Honour was quite careful to state that this decision was not to be taken as a determination that examinations are "practically essential" when an assessment is being undertaken by a Review Panel.

Allianz appealed Justice Garling's decision. The submission made in argument before the Court of Appeal was that the decision "amounted to a mandatory requirement that "almost every Review Panel" undertake such an examination".

Allianz argued it was not necessary for Ms Rutland to be interviewed by the Review Panel, firstly because it is unlikely the impairment changed in the months between the initial assessment by Assessor Jager and the assessment by the Review Panel, as the claimant's condition was said to have stabilised. The second reason was that Ms Rutland's solicitors had been informed that the Review Panel might conduct its assessment without examining the claimant themselves and had the opportunity to object to the assessment proceeding in that manner. Ms Rutland's solicitors declined to do so.

In coming to its decision, the Court of Appeal focused on the fact that there was no transcript or clinical notes available to a Review Panel of the assessment before Assessor Jager. In the joint judgment of McColl and Meagher JJA, with Macfarlan JA agreeing, their Honours found that it would be "surprising and unusual" that the Review Panel seeking to assess a claimant's impairment due to psychological injury would not interview the claimant themselves to ensure they had an accurate history of the claimant's pre-accident life and the extent to which it had changed as a result of the injury.

The Court of Appeal was also critical of the way the Review Panel approached the assessment of Ms Rutland's functional impairment in the category of "Concentration, Persistence and Pace" on the PIRS. Assessor Jager determined that Ms Rutland's complaint of forgetfulness would place her in Class 2.

The Review Panel had noted Ms Rutland was a "technical teacher armament technician" and that if she still had the ability to continue in that role, she could not have suffered a Class 3 impairment. Garling J found that Ms Rutland had been denied procedural fairness because there was nothing in the documents before the original assessor or the Review Panel that set out Ms Rutland's work duties actually being undertaken at the time of the Review Panel assessment. No further documents were provided and

they had chosen not to examine Ms Rutland. As a result, the Review Panel therefore could not know the nature of Ms Rutland's duties. Had the Review Panel chosen to examine her, they could have asked about these matters.

The Court of Appeal agreed with this submission and noted there was conflicting evidence in the medico-legal expert reports before the Review Panel as to whether Ms Rutland was having difficulty performing in her role. As a result, Ms Rutland's current position both as to the work she was doing and whether she was coping in the role was not able to be ascertained by the Review Panel at the time of their assessment. This was a denial of procedural fairness because Ms Rutland should have been given the opportunity to explain the apparent conflict shown on the documentary evidence and to explain what the circumstances of her current work situation.

Despite the protestations of the Court of Appeal to the contrary, this decision has ramifications for Review Panel determinations dealing with psychiatric or psychological injuries. We can also see the argument in respect of procedural fairness being raised in the context of physical assessments where there is conflict in medico-legal assessments before the original assessor as to the extent of the effect of the particular injury on the claimant's ability to manage in the workplace, or in the home, as at the date of the assessment by the Review Panel.

Given the Court of Appeal's emphasis on the Review Panel making an assessment of WPI as "at the time of its assessment", it would seem the "review on the papers" by a Review Panel will be less likely to occur in the future.

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Let's take a closer look at causation in Nominal Defendant claims

It is often argued by insurers that when symptoms are reported only after a significant lapse of time following an accident then it is likely the accident is not the cause of the symptoms. The argument may not be so successful in light of the decision of Justice Rothman, in circumstances where there was no complaint of injury for a period of 15 months.

The plaintiff, Clinton McGiffen, broke his left tibia and fibula after being knocked off his motorbike. There was also a notation in the emergency department admission summary on the day of the accident which referred to some thoracic spine pain.

McGiffen had an extremely slow and painful recovery from his fractures and only began to bear weight on his leg 18 months post-accident. Up until this time there had been no further recurrence of the thoracic spine pain recorded on the day of the accident, but when McGiffen started to weight bear, he experienced some further pain in the thoracic spine.

McGiffen was referred to MAS for assessment of his injuries including the thoracic back injury. Initially, MAS Assessor Schutz found McGiffen's back injury had not yet stabilised but thought it possible the motor vehicle accident which was not obvious immediately after the accident.

Once McGiffen's injuries had stabilised he was assessed again at MAS by Assessor Crane. This assessor did not hold the same view as Assessor Schutz and made a finding of nil whole person impairment on the basis that McGiffen's spinal injury was not related to the accident. McGiffen applied for a review of Assessor Crane's Certificate but the Review Panel upheld Assessor Crane's findings. In making their determination they noted that:

> *"There was no evidence of an injury to the thoracic spine at the time of the subject motor vehicle crash. The first symptoms related to the thoracic spine are recorded many months after the crash and this is not consistent with an injury to this spinal region being sustained in the crash".*

McGiffen applied for judicial review of the Review Panel's determination on the basis that the Review Panel had asked the wrong question and applied the wrong test as to causation and the process of fact finding, the Review Panel's findings were not supported by probative evidence and were irrational.

Justice Rothman needed to go no further than the causation issues to determine the review application. Both Assessor Crane and the Review Panel relied entirely on the lack of contemporaneous evidence of a spinal injury until 15 months post-accident. Justice Rothman found the Assessor and the Review Panel had both fallen into error as they had not considered the notation in the emergency department admission summary on the day of the accident regarding thoracic spine pain was not considered. The admission summary specifically noted that there was tenderness over McGiffen's lumbar-thoracic spine on examination. Accordingly, his Honour found that the Review Panel's finding of fact for which there was no evidence equated to an error of law.

His Honour also found the Review Panel asked the wrong question when considering causation. The Review Panel was not required to consider whether

the accident was the sole cause of the thoracic spine pain. It can be an indirect cause and it may be a contributing cause, as long as it was a more than negligible cause. His Honour noted that neither Assessor Crane nor the Review Panel turned their minds to this question. Rather, they determined causation solely on the basis of the absence of contemporaneous evidence. By asking the wrong question Justice Rothman noted causation was determined on the wrong basis. This gave rise to both an error of law and an error of jurisdiction.

His Honour went so far as to state the Assessor and the Review Panel acted irrationally and illogically by way of basing their conclusions on the absence of any evidence of a spinal injury.

Justice Rothman considered it unnecessary to explore the other grounds for review. The Certificate of Assessor Crane and the Review Panel Certificate were quashed. McGiffen's claim was remitted back to MAS for assessment and the insurer was ordered to pay McGiffen's costs.

The judgment muddies further the already murky waters of causation of injury. This is not the first time this issue has been agitated and it is established law that the absence of complaint of injury for a period of time is a relevant consideration but not determinative when considering causation of injury. The unusual feature here is that it took such a long time for the thoracic spine symptoms to recur. However, far more often the insurer will be faced with a claim involving an onset of knee, neck or back pain a couple of months after the accident, and it is in those claims that we can see a claimant's lawyer will now seek to point to this decision as a reason why the insurer should accept the claimant's case on causation, given there is now precedent that a delay between injury and recurrence of symptoms.

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